COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00387-CR

DONALD RAY SHIVERS JR. APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 89TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 55,034-C

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Donald Ray Shivers Jr. entered open pleas of guilty to three counts of aggravated sexual assault of a child, waived his right to a jury, and elected to have the trial court assess his punishment. *See* Tex. Penal Code Ann. § 22.021 (West Supp. 2016). The State sought to enhance Shivers's punishment

[1]*See* Tex. R. App. P. 47.4.

based on his prior felony convictions, and it sought to cumulate his sentences. After a punishment hearing, the trial court found the enhancements true, sentenced Shivers to three life sentences, and ordered the sentences to run consecutively. In three points, Shivers argues that the trial court abused its discretion by admitting certain victim-impact evidence during the punishment hearing and by assessing a punishment that violated due process and due course of law and constituted cruel and unusual punishment. We will affirm.

II. Factual and Procedural Background

Shivers dated Megan[2] off and on for thirteen years. Together they had a child, Vanessa. When Vanessa was seven, she told Megan that Shivers had made her perform oral sex on him. Megan confronted Shivers, and although he initially denied the abuse, he eventually admitted it to her.

Megan took Vanessa to Patsy's House Children's Advocacy Center where Vanessa made a detailed outcry to Shannon May, a forensic interviewer.[3] Vanessa told May that the abuse started when she was "four or five." Vanessa described several instances in which Shivers had her perform oral sex on him, and she described another instance in which Shivers's penis "touched her butt and [was] in her butt crack."

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[2]To protect the anonymity of the victim in this case, we will use aliases to refer to some of the individuals named herein. *See* Tex. R. App. P. 9.8 cmt., 9.10(a)(3); *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

[3]Vanessa was eight years old when May interviewed her.

Todd Henderson, a police officer assigned to Patsy's House, was notified of the reported abuse. Officer Henderson conducted a noncustodial interview of Shivers, and Shivers admitted to sexually assaulting Vanessa. Shivers claimed that Vanessa initiated the contact when she "started fondling" him as he was reading her a book before bed. Shivers stated that "he didn't stop her from doing it" and that "as time went on, [he] thought [he] would take it a little further." He admitted that he had Vanessa perform oral sex on him on three separate occasions, including one occasion during which he offered her a popsicle if she performed oral sex on him. Shivers claimed that on another occasion, Vanessa tried "to sit" on his penis and that it "might have went up her butt, butt hole." He also admitted to performing oral sex on Vanessa on two occasions after she had taken her bath. Shivers was later arrested and charged with three counts of aggravated sexual assault of a child.

III. SHIVERS'S OBJECTION TO VICTIM-IMPACT EVIDENCE

In his first point, Shivers argues that the trial court erred by admitting victim-impact evidence from two sex-abuse counselors—Susan Cardwell's testimony regarding the effects of Shivers's abuse on Vanessa and Jennifer Edwards's testimony regarding the typical effects of sexual abuse on a child victim—over his objections.[4]

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[4]Prior to Cardwell's testimony, the trial court granted Shivers's request for a running objection to any victim-impact evidence gleaned from Cardwell. Shivers later asked for that same objection to apply to Edwards's testimony, yet he made this request after Edwards had already testified regarding the typical

A. Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010), *cert. denied*, 563 U.S. 1037 (2011). Although there is no bright-line standard for determining when victim-impact and character evidence is admissible, we must respect the legislature's express intent to leave such decisions within the trial judge's sound discretion; we will not disturb such a ruling on appeal unless it falls outside the zone of reasonable disagreement. *Hayden v. State*, 296 S.W.3d 549, 553 (Tex. Crim. App. 2009).

B. The Law

During the punishment phase of a trial, a trial court may admit any matter it deems relevant to sentencing. Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (West Supp. 2016); *Lindsay v. State*, 102 S.W.3d 223, 227 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). The circumstances of the offense are relevant to sentencing and may be considered by the trier of fact in determining the

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effects of sexual abuse on a child victim. Thus, it appears that Shivers has not preserved his objection to the victim-impact evidence gleaned from Edwards's testimony. *See* Tex. R. App. P. 33.1(a)(1) (requiring a timely objection in order to preserve complaint on appeal); *Warner v. State*, No. 02-07-00464-CR, 2009 WL 2356861, at *3 (Tex. App.—Fort Worth July 30, 2009, pet. ref'd) (mem. op., not designated for publication) ("Appellant did not ask for his running objection to Officer Gonzales's testimony to apply to all witnesses. . . . And Appellant failed to object when Daniel Rhodes testified about Appellant's statements in the home. Thus, he failed to preserve his complaint as to that testimony."). Out of an abundance of caution, however, we will consider Shivers's running objection to Edwards's testimony as if it had been timely made.

punishment to be assessed. *Jagaroo v. State*, 180 S.W.3d 793, 798 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). This includes victim-impact evidence.[5] Outside of the context of homicide cases, victim-impact evidence is evidence regarding "the physical or psychological effect of the crime on the victims themselves." *Martin v. State*, 176 S.W.3d 887, 903 (Tex. App.—Fort Worth 2005, no pet.) (quoting *Lane v. State*, 822 S.W.2d 35, 41 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 920 (1992)).

Victim-impact evidence, including evidence that the defendant should have foreseen or anticipated the particular effects of the offense on the victim, is relevant during the punishment phase "if the factfinder may rationally attribute [such] evidence to the accused's 'personal responsibility and moral culpability'" or blameworthiness. *Hayden*, 296 S.W.3d at 552 (quoting *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002)); *Jackson v. State*, 33 S.W.3d 828, 833 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 1068 (2001); *Miller-El v. State*, 782 S.W.2d 892, 896 (Tex. Crim. App. 1990); *Boone v. State*, 60 S.W.3d 231, 238 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd), *cert. denied*, 537 U.S. 1006 (2002).

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[5]Shivers addresses victim-impact evidence; he acknowledges that "[i]n this case[,] the evidence primarily dealt with victim[-]impact issues." Although he sometimes mentions victim-character evidence along with victim-impact evidence, he does not separately brief any contention concerning victim-character evidence. Consequently, to the extent Shivers raises any complaint regarding victim-character evidence, we consider it as he briefed it—that is, as subsumed within the victim-impact argument and analysis.

Even when relevant, victim-impact evidence may not be admissible if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403. When considering the admissibility of victim-impact evidence, courts consider the following factors: (1) the probative value of the evidence; (2) the potential of the evidence to impress the trier of fact in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence. *Salazar*, 90 S.W.3d at 336.

C. The Trial Court Did Not Abuse Its Discretion by Admitting the Victim-Impact Evidence

During the punishment hearing, the State called two sex-abuse counselors as witnesses, Susan Cardwell and Jennifer Edwards.

Cardwell testified that she treated Vanessa after the abuse and observed symptoms consistent with those of a child who had been sexually abused. Cardwell noted that Vanessa showed signs of embarrassment regarding the abuse, that she often dissociated by daydreaming, and that she was "hypervigilant" and "avoidant." Cardwell relayed that Vanessa masturbated excessively and that she was not on track socially. Cardwell noted that she had diagnosed Vanessa with post-traumatic stress disorder.

Edwards testified about the common characteristics of sexual offenders and the process of grooming a child victim. She also testified about the potential effects that sexual abuse has on a child victim, including confusion, shame,

depression, anxiety, guilt, excessive masturbation, dissociation, and post-traumatic stress.

In determining whether here the trial court as the factfinder could have rationally viewed the victim-impact testimony of Cardwell and Edwards as bearing on Shivers's personal responsibility and moral culpability for the offenses and whether Shivers should have foreseen or anticipated the particular effect on Vanessa, we note that Shivers was Vanessa's father. He naturally had a position of trust and authority over Vanessa. Shivers took advantage of that position of trust and authority—the abuse started when he was putting her to bed, took place on other occasions after she had taken her bath, and took place after Shivers had offered her a popsicle to perform oral sex on him. We hold that Shivers, as Vanessa's father, should have anticipated that his sexual assaults, and the accompanying betrayal of his position of trust and authority, would have negative effects on Vanessa. *See, e.g.*, *Stavinoha v. State*, 808 S.W.2d 76, 79 (Tex. Crim. App. 1991) (holding victim-impact evidence was admissible because priest "could easily have anticipated the impact his betrayal of trust" would have on parishioner he had sexually assaulted). Because Shivers should have anticipated that his sexual assaults on Vanessa could have negative effects on her, Cardwell's and Edwards's testimony regarding those negative effects was relevant; their testimony went directly to Shivers's personal responsibility and moral culpability for the offense. *See Hayden*, 296 S.W.3d at 552; *Jackson*, 33 S.W.3d at 833; *Boone*, 60 S.W.3d at 238.

As to the admissibility of Cardwell's and Edwards's testimony, we note that the evidence had significant probative value in that it underscored Shivers's personal responsibility and moral culpability. We also note that the evidence had only a slight potential to impress the factfinder—which was a trial judge in this case, rather than a jury—in some irrational way. Cardwell's testimony regarding the effect the sexual abuse had on Vanessa spans only a handful of pages, while Edwards's testimony regarding the typical effects sexual abuse has on a child victim spans only three pages. The State needed this evidence to demonstrate the negative effects of Shivers's sexual abuse because Vanessa did not testify in this case due to an agreement between the parties. We hold that the trial court did not abuse its discretion by admitting Cardwell's and Edwards's testimony. *See Martinez*, 327 S.W.3d at 736; *Salazar*, 90 S.W.3d at 336.

We overrule Shivers's first point.

IV. SHIVERS'S PUNISHMENT DID NOT VIOLATE DUE PROCESS OR DUE COURSE OF LAW

In his second point, Shivers argues that his punishment exceeded the maximum permitted by due process and due course of law. Pointing to section 12.32(a) of the penal code,[6] Shivers argues that "*as applied to him*, the cumulation of his sentences amount[s] to life without parole, and thus, violate[s] a

[6]Section 12.32(a) provides that "[a]n individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years." Tex. Penal Code Ann. § 12.32(a) (West 2011).

state-created right limiting first[-]degree sentences to life imprisonment." The State counters that Shivers has not applied the proper framework in analyzing the due process and due course of law concerns of his sentences. The State argues that the correct framework is to review each individual sentence as it corresponds to an offense, rather than to look at the cumulative total of the sentences as it corresponds to an offense. We agree.

In *Barrow v. State*, Barrow was charged with two counts of sexual assault of a child, and the jury assessed his punishment at fifteen years' confinement for the first count and at twenty years' confinement for the second count. 207 S.W.3d 377, 378 (Tex. Crim. App. 2006). The trial court ordered Barrow's sentences to run consecutively. *Id.* On appeal, Barrow argued that the trial court's decision to cumulate his sentences violated due process. *Id.* at 379–80. In evaluating his due-process complaint, the court of criminal appeals looked at the sentence for each offense, rather than the cumulative total of the sentences. *Id.* at 379. The court noted that "[a] valid sentence within the statutorily prescribed range was imposed as to each conviction. . . . [And] [t]he decision to cumulate the two sentences did not raise the 'statutory maximum' punishment for either offense." *Id.*

Shivers pleaded guilty to three counts of aggravated sexual assault of a child, each of which was a first-degree felony. *See* Tex. Penal Code Ann. § 22.021. The punishment range for such an offense is life or not more than ninety-nine years or less than five years. *Id.* § 12.32(a). Each of Shivers's life

sentences was thus “within the statutorily prescribed range” for each conviction, and the trial court’s decision to cumulate Shivers’s sentences “did not raise the statutory maximum punishment for [any of the three] offense[s].” *Barrow*, 207 S.W.3d at 379 (internal quotation omitted); *see* Tex. Penal Code Ann. § 3.03(b) (West Supp. 2016) (giving trial judges the ability to cumulate sentences under certain circumstances).

We overrule Shivers’s second point.

V. SHIVERS’S PUNISHMENT DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

In his third point, Shivers argues that the cumulation of his sentences constitutes cruel and unusual punishment because it is disproportionate to the crimes he committed. We will not disturb a trial court’s punishment decision “absent a showing of abuse of discretion and harm.” *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). Generally, a sentence is not cruel, unusual, or excessive if it falls within the range of punishment authorized by a statute. *Hammer v. State*, 461 S.W.3d 301, 303–04 (Tex. App.—Fort Worth 2015, no pet.) (citing *Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973)). Even if a sentence falls within the statutory range for that crime, however, it must be proportional to the crime. *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009 (1983). “Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been

exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272, 100 S. Ct. 1133, 1138 (1980).

In addressing a disproportionality complaint, courts first compare the gravity of the offense against the severity of the sentence. *Moore v. State*, 54 S.W.3d 529, 542 (Tex. App.—Fort Worth 2001, pet. ref'd). If a court determines that the sentence is grossly disproportionate to the offense, it then looks at the evidence concerning sentences imposed on other criminals in the same jurisdiction and sentences imposed for commission of the same crime in other jurisdictions. *Id*. at 541–42.

Comparing the gravity of Shivers's offenses against the severity of his sentences, we conclude that, given the nature of the offenses and the punishment ranges, coupled with Shivers's prior felony convictions,[7] Shivers's punishment of three consecutive life sentences was not unconstitutionally disproportionate for the offenses for which he was convicted. *See id*. at 542–43; *see also Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984) (holding cumulation of sentences did not constitute cruel and unusual punishment).

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[7]In determining whether a sentence is grossly disproportionate, the reviewing court may consider the defendant's prior adjudicated and unadjudicated offenses. *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016). Here, Shivers had previously been convicted of possession of a controlled substance, a second–degree felony. *See* Tex. Health & Safety Code Ann. § 481.115 (West 2017). He had also been previously convicted of three counts of burglary of a vehicle, each a third-degree felony. *See* Tex. Penal Code Ann. § 30.04 (West 2011). Shivers also had been previously convicted of criminal nonsupport, a state-jail felony. *See id.* § 25.05 (West 2011).

Further, even if we had determined that a disproportionality existed between the gravity of Shivers's offenses and the punishments assessed, there is no evidence in the record comparing this result with others in the same jurisdiction for this situation or with those imposed on defendants in other jurisdictions who committed a series of similar offenses. Shivers has thus not shown that the trial court abused its discretion by ordering his sentences to run consecutively. *See Williamson v. State*, 175 S.W.3d 522, 525 (Tex. App.—Texarkana 2005, no pet.) (holding defendant's punishment of three consecutive life sentences for three counts of aggravated sexual assault of a child was not cruel and unusual punishment).

We overrule Shivers's third point.

VI. Conclusion

Having overruled Shivers's three points, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: SUDDERTH, C.J.; WALKER and KERR, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 19, 2017