In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00043-CR

MICHAEL C. GREEN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 371st District Court
Tarrant County, Texas
Trial Court No. 1592318D; Honorable Mollee Westfall, Presiding

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March 25, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Appellant, Michael C. Green, appeals from his conviction by jury of the second degree felony offense of robbery causing bodily injury.[1] The jury further found as "True" one of the two enhancement allegations contained in the indictment and assessed a

[1] TEX. PENAL CODE ANN. § 29.02 (West 2019).

sentence of imprisonment for a term of thirty-five years.[2] Appellant challenges his conviction through two issues: (1) the evidence was insufficient to identify Appellant as the robber and (2) the punishment assessed against him was cruel and unusual in violation of the Eighth and Fourteenth Amendments to the United States Constitution.[3] We affirm the judgment as reformed herein.

BACKGROUND

The offense involved in this proceeding began with a man leaving a grocery store with a cart stacked with numerous cases of sodas. A loss prevention officer, John Gomes, noticed the man leaving with those sodas without paying for them. Consequently, Gomes attempted to stop the man and asked him for a receipt. The man showed him a crumpled piece of paper and when Gomes told the man he needed to actually see the receipt, the man grabbed Gomes's hand and held it on the front of the basket. He then "pushed [Gomes] out of the way and started swinging at [him]." The man hit Gomes "several times" in the upper body. The man then grabbed Gomes and "threw [him] against the wall." Gomes testified the man's actions caused him some pain and resulted in bruising.

A copy of the store's video surveillance recording depicting the altercation between Gomes and the man was admitted into evidence and shown to the jury. The video shows the events occurring as testified to by Gomes. Still pictures from the video footage were

[2] TEX. PENAL CODE ANN. § 12.42(d) (West 2019). An offense "punished as" a higher offense raises the level of punishment, not the degree of the offense. *Oliva v. State*, 548 S.W.3d 518, 526-27 (Tex. Crim. App. 2018).

[3] Originally appealed to the Second Court of Appeals, sitting in Fort Worth, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Second Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

admitted into evidence along with the video. Gomes was also shown a photographic line-up and the audio of the conversation held with a detective at the time of the line-up was admitted into evidence. A paper copy of the photographic line-up was also admitted into evidence. Gomes selected the individual depicted as "#5" and wrote he was "real certain" this was the person he saw commit the offense.

A detective with the Fort Worth Police Department also testified at trial. He explained to the jury his investigation of the robbery, how he came to believe Appellant was the person who robbed the store, and how he prepared and showed the photographic line-up to Gomes.

Following presentation of the evidence, the jury found Appellant guilty as charged in the indictment and assessed punishment as noted.

ANALYSIS

ISSUE ONE—SUFFICIENCY OF THE EVIDENCE

By his first issue, Appellant contends the evidence presented at trial was insufficient to prove he was the person who robbed the grocery store. He does not challenge any of the other elements of the offense for which he was convicted.

A person commits the felony offense of robbery if, in the course of committing a theft, and with intent to obtain or to maintain control of the property, he (1) intentionally, knowingly, or recklessly causes bodily injury to another or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. *See* TEX. PENAL CODE ANN. § 29.02 (West 2019).

When reviewing the sufficiency of the evidence, we examine all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). We consider both direct and circumstantial evidence, and all reasonable inferences that may be drawn from the evidence in making our determination. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). When a defendant contests the identity element of the offense, we are mindful that identity may be proven by direct evidence, circumstantial evidence, or even inferences. *Denson v. State*, No. 2-03-360-CR, 2005 Tex. App. LEXIS 3075, at *5 (Tex. App.—Fort Worth Apr. 21, 2005, pet. ref'd) (mem. op., not designated for publication) (citing *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd)). If there is no direct evidence of the perpetrator's identity elicited from trial witnesses, no formalized procedure is required for the State to prove the identity of the accused. *Denson*, 2005 Tex. App. LEXIS 3075, at *5 (citing *Clark v. State*, 47 S.W.3d 211, 214 (Tex. App.—Beaumont 2001, no pet.)). The jury is the exclusive judge of the credibility of witnesses and the weight to be given their testimony and only the jury may resolve conflicts in the evidence. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Appellant was charged by indictment with "intentionally or knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, cause bodily injury, to John Gomes by striking him or pushing him with the defendant's hand."

Appellant contends the evidence is insufficient to establish his identity. He argues that the victim, Gomes, was unable to identify him in court as the person who committed the offense. He asserts also that he was found to be a suspect through a "grainy video from the store and a photo line-up provided by the Fort Worth Police Department." The only description of the robber, Appellant states, was that of a "heavy set black male." This, he contends, is simply not enough to identify him as the person who robbed the store. We disagree, finding the record contains sufficient evidence from which the jury could have determined Appellant was the robber.

Video footage and still images from that footage were admitted into evidence. The man who took the items from the store and injured Gomes can be seen in both. Prior to trial, Gomes was shown a photographic line-up and the audio of the conversation held with a detective at the time of the line-up was admitted into evidence. A paper copy of the photographic line-up was also admitted into evidence. Gomes selected the individual depicted as "#5" and wrote he was "real certain" this was the person he saw commit the offense. While Gomes did not definitively identify Appellant as the robber at the time of trial due to his fading memory, he did testify he was "very certain" that the person in the photograph he selected was the person who robbed the store "five days prior." He reiterated that certainty during additional questioning.

A detective with the Fort Worth Police Department testified he investigated this robbery. He told the jury he reviewed the offense report and saw a license plate had been obtained from Gomes.[4] He researched that plate and determined it was connected with

[4] Gomes testified he saw Appellant get into a vehicle with the stolen sodas. He recorded the license plate for inclusion in the report to police.

a Buick Enclave. The owner of the vehicle was a sixty-two-year-old woman who did not match any of the people observed at the scene of the robbery. However, one of her known associates did match the description of a female Gomes said he saw in that vehicle the night of the robbery. Appellant was subsequently identified as that female's boyfriend. The detective noted Appellant's description was of a man who was six foot one and 290 pounds, consistent with the description of the suspect provided in the offense report.

The detective then contacted Gomes to participate in a photographic line-up. At trial, the detective was asked several questions about the photographic line-up provided to Gomes. The detective testified Gomes selected the individual in "folder number five" and testified that the person in that folder was Appellant. The detective also identified Appellant in the courtroom. The detective was asked whether he was "certain that the person that is in that photograph that was selected is Michael Green, the person you identified in court?" The detective responded, "Yes, the person in this photograph." The detective was then asked, "Are you confident that Michael Green, the person who's been charged with a crime and that you've previously identified in the courtroom -- are you confident that Michael Green committed the offense of robbery on March 28th, 2019?" The detective answered, "Yes."

While Gomes was not able to provide a definitive in-court identification of Appellant as the person who robbed the store because he believed his memory had faded, this does not render the evidence supporting Appellant's conviction insufficient. A "photospread identification, by itself, is sufficient to support a conviction against an attack on the identity element." *Denson*, 2005 Tex. App. LEXIS 3075, at *8 (citing *Oliver v. State*, 613 S.W.2d 270, 274 (Tex. Crim. App. [Panel Op.] 1981) (op. on reh'g); *see Meeks*

v. State, 897 S.W.2d 950, 954-55 (Tex. App.—Fort Worth 1995, no pet.)). Furthermore, there was significant other circumstantial evidence tying Appellant to the robbery. In a jury trial, the jury may accept or reject all, some, or none of any witness's testimony and it is the jury's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson,* 443 U.S. at 326; *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003). We find the testimony and evidence in the record is sufficient to support the jury's determination that Appellant was the person who committed the offense as indicted. Consequently, we resolve his first issue against Appellant.

ISSUE TWO—CRUEL AND UNUSUAL PUNISHMENT

Via his second issue, Appellant argues the punishment levied against him was unconstitutionally excessive because "it makes no measureable contribution to acceptable goals of punishment" or "is grossly out of proportion to [the] severity of [the] crime." Accordingly, he argues, the trial court committed reversible error and he is entitled to a new trial.

PRESERVATION OF ERROR

We first note that at trial, Appellant objected to the range of punishment of imprisonment for a period of twenty-five years to life, arguing article 12.42(d) of the Penal Code is unconstitutional and violates the Eighth and Fourteenth Amendments to the United States Constitution. In that regard, it has long been held that section 12.42(d) does not violate the prohibition against cruel and unusual punishment. *Rodriguez v. State*, 614 S.W.2d 448, 450 (Tex. Crim. App. 1981). Appellant did not object to his

punishment on any other basis. However, on appeal, he urges that the punishment assessed is itself unconstitutionally excessive.

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. *Lemasurier v. State*, 91 S.W.3d 897, 901-02 (Tex. App.—Fort Worth 2002, pet. ref'd) (citing TEX. R. APP. P. 33.1(a)(1); *Mosley v. State,* 983 S.W.2d 249, 265 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070, 119 S. Ct. 1466, 143 L. Ed. 2d 550 (1999)). The trial court must have ruled on the request, objection, or motion, expressly or implicitly, or refused to rule, and the complaining party must have objected to the refusal. *Lemasurier*, 91 S.W.3d at 901-02 (citing TEX. R. APP. P. 33.1(a)(2); *Taylor v. State*, 939 S.W.2d 148, 155 (Tex. Crim. App. 1996)). Furthermore, an objection preserves only the specific ground cited. *Lemasurier*, 91 S.W.3d at 902 (citing TEX. R. APP. P. 33.1(a)(1)(A); *Mosley*, 983 S.W.2d at 265; *Butler v. State*, 872 S.W.2d 227, 237 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1157, 115 S. Ct. 1115, 130 L. Ed. 2d 1079 (1995); *see also Fierro v. State*, 706 S.W.2d 310, 317-18 (Tex. Crim. App. 1986), *cert. denied*, 521 U.S. 1122, 117 S. Ct. 2517, 138 L. Ed. 2d 1019 (1997) (a general objection is not sufficient to apprise trial court of complaint urged and thus preserves nothing for review)). Thus, the complaint made on appeal must comport with the complaint made in the trial court, or the error is waived. *Lemasurier*, 91 S.W.3d at 902 (citing *Butler*, 872 S.W.2d at 236; *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990)). This requirement applies to error of constitutional dimension, including those asserting a

complaint that a sentence is cruel and unusual. *Richardson v. State*, 328 S.W.3d 61, 72 (Tex. App.—Fort Worth 2010, pet. ref'd) (citations omitted).

Because Appellant did not raise his specific complaint that his sentence is cruel and unusual on the basis that "it makes no measureable contribution to acceptable goals of punishment" or "is grossly out of proportion to [the] severity of [the] crime" at the time of punishment or in his motion for new trial, he has not preserved his complaint for our review.

MERITS OF EIGHTH AMENDMENT CLAIM

However, even assuming preservation of Appellant's issue, we cannot agree with his assertion that his thirty-five-year sentence is either cruel or unusual. Generally, punishment that is within the statutory range of punishment for that offense is not excessive, cruel, or unusual under the Eighth Amendment and will not be disturbed on appeal. *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016) (citing *Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006)).

To determine whether a sentence is grossly disproportionate to a particular crime, the court must examine (1) the sentence's severity in light of the harm caused or threatened to the victim, (2) the offender's culpability, and (3) the offender's prior adjudicated and unadjudicated offenses. *Graham v. Florida*, 560 U.S. 48, 60, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825 (2010); *see also McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir.), *cert. denied*, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992); *Simpson*, 488 S.W.3d at 323; *Moore v. State*, 54 S.W.3d 529, 542 (Tex. App.—Fort Worth 2001, pet. ref'd). In those uncommon times when this threshold is met and gross

disproportionality is determined, the court must then compare the defendant's sentence with sentences given to other defendants in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. *Graham*, 560 U.S. at 60; *Simpson*, 488 S.W.3d at 323; *Moore*, 54 S.W.3d at 542.

As noted, Appellant was convicted of a second degree felony, robbery with bodily injury. While a sentence of thirty-five years might initially seem excessive or disproportionate in a situation in which the resulting injuries were minor, "successful challenges to the proportionality of particular sentences have been exceedingly rare" outside the context of capital punishment. *Rummel v. Estelle*, 445 U.S. 263, 272, 100 S. Ct. 1133, 1138, 63 L. Ed. 2d 382 (1980).

Furthermore, an appellant's criminal history certainly plays a part in determining whether a given sentence is grossly disproportionate. *Id.* at 281-84. Here, the indictment included a habitual offender notice setting forth Appellant's previous two felony convictions, one for the offense of harassment by persons in a correctional facility and one for burglary of a habitation. He pleaded "true" to committing the two previous felonies and the jury found those to be "true," thereby enhancing the applicable range of punishment to imprisonment for life or for any term of not more than ninety-nine years or less than twenty-five years. TEX. PENAL CODE ANN. § 12.42(d). During the punishment phase, the State presented a witness and documentary evidence indicating Appellant stipulated to the judgments in each of those matters. The documentary evidence was also admitted without objection.

As stipulated, Appellant was convicted of burglary of a habitation in 1996 and of harassment by persons in a correctional facility in 2004. Also admitted without objection during the punishment phase of trial was evidence of numerous other offenses committed by Appellant, including offenses involving possession of a controlled substance and unauthorized use of a motor vehicle. The State presented evidence of Appellant's punishments for those offenses, placements on and revocations of community supervision, and the often short periods of time between the assessment of punishment and commission of a new offense. The offense involved here occurred in 2019. Thus, the record indicates Appellant's criminal history has spanned nearly twenty-four years.

We note also that while Gomes's injuries here were minor, "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel*, 445 U.S. at 275. Based on the evidence in the record, we do not find the punishment assessed against Appellant offends the acceptable goals of punishment nor do we find it to be grossly disproportionate to any social norm. *Id.; Simpson*, 488 S.W.3d at 323. Accordingly, we overrule Appellant's second issue.

REFORMATION OF JUDGMENT

In our review of Appellant's second issue, we noted a clerical error in the *Judgment of Conviction By Jury*. The record clearly indicates Appellant pleaded "true" to both enhancement offenses contained within the habitual offender notice paragraph of the indictment. The record also reflects that, prior to accepting his plea of "true," the trial court admonished Appellant as to the range of punishment for a double-enhanced second degree felony and it charged the jury as to that range of punishment. Notwithstanding

the fact that the record clearly supports a plea of "true" to two separate prior felony offenses and a jury finding of a habitual offender, the summary portion of the *Judgment of Conviction By Jury* reflects a plea and finding of "true" as to the second enhancement offense only. Because there were two separate enhancement offenses to which Appellant pleaded "true," and because the range of punishment is affected by the jury's finding that Appellant was a habitual offender, it would be appropriate for the judgment to correctly reflect the his plea as well as the jury's finding.

This court has the power to modify a judgment to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Thus, the *Judgment of Conviction by Jury* should be reformed to reflect a plea of "True" to both the "1st Enhancement Paragraph" and the "2nd Enhancement Paragraph," as well as a finding of "True" to both enhancement paragraphs. The trial court is ordered to enter a *Judgment Nunc Pro Tunc* to reflect this reformation and the trial court clerk is directed to provide a copy of that corrected judgment to the Institutional Division of the Texas Department of Criminal Justice and to this court.

CONCLUSION

Having resolved each of Appellant's issues against him, we affirm the judgment as reformed.

Patrick A. Pirtle
Justice

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