AFFIRM; and Opinion Filed June 7, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00709-CR
No. 05-17-00710-CR
No. 05-17-00711-CR

WILLIAM LITTLEBIRD, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F16-76360-Q; F17-75131-Q, F17-75132-Q

MEMORANDUM OPINION

Before Justices Lang-Miers, Evans, and Schenck
Opinion by Justice Lang-Miers

Appellant William Littlebird was charged with failure to register as a sex offender.[1] The indictment contained an enhancement paragraph, which operated to raise the available punishment

[1] Cause number F16-76360-Q/05-17-00709-CR.

range from that of a third-degree felony to a second-degree felony.[2] Appellant pled guilty to this charge and true to the enhancement paragraph. Pursuant to a plea-bargain agreement, the trial court deferred a finding of guilt and placed appellant on five years' unadjudicated community supervision.

While he was on community supervision, appellant was charged with two new offenses of injury to an elderly person.[3] Injury to an elderly person is generally a third degree felony, but the State's allegations included an enhancement paragraph[4] which operated to raise the available punishment range from that of a third-degree felony to a second-degree felony.[5]

The State filed a motion to proceed to an adjudication of guilt on the failure to register as a sex offender case alleging that appellant violated the terms and conditions of his community supervision by possessing marijuana, being intoxicated in public, failing to pay court costs and fines, failing to pay community supervision fees, failing to complete community service hours, failing to pay a urinalysis fee, and consuming alcohol. Appellant entered an open plea of true to those allegations. At this same hearing, appellant also entered open pleas of guilty to the injury to an elderly person charges and pleas of true to the enhancement paragraph in both causes.

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[2] The punishment range for a third-degree felony is imprisonment for a term of not more than ten years or less than two years with an optional fine not to exceed $10,000.00. TEX. PENAL CODE § 12.34. A third-degree felony offense may be enhanced to a second-degree felony by proof of one prior felony conviction. TEX. PENAL CODE §12.42(a). The punishment range for a second-degree felony is imprisonment for a term of not more than twenty years or less than two years with an optional fine not to exceed $10,000.00. TEX. PENAL CODE § 12.33.

[3] Cause numbers F17-75131-Q/05-17-00710-CR and F17-75132-Q/05-17-00711-CR.

[4] The indictments originally contained two enhancement paragraphs, but the trial court granted the State's motion to strike one of those paragraphs.

[5] *See* fn. 2, *supra*.

Evidence before the Trial Court

The trial court heard evidence that, on January 16, 2017, appellant was living with his elderly mother and stepfather in Dallas following his release from a halfway house in Houston. He attacked his stepfather by hitting him. Appellant was trying to get his stepfather to fight him. The stepfather believed this incident was brought on by appellant's drug problem. When appellant's mother attempted to come between the two, appellant became physical with her. This went "on and off" for about two and a half hours. At some point, appellant settled down, apologized for his actions, and left the home. Both appellant's stepfather and mother had bruises that lasted for a period of time, but suffered no permanent damage. They did not call the police immediately, but waited several days before reporting the incident.

Appellant's mother testified that her son, who was fifty-two years old, had spent half of his life in prison. He suffered from mental health issues, including hallucinations and hearing voices. While in prison, he was given some medication, which seemed to help, and was required to go to AA meetings.[6] His mother told the trial judge that she would like to see her son go into a treatment facility. However, she did not want him to live with her. Appellant's stepfather testified that he had no recommendation to make to the trial judge concerning punishment.

Prior to sentencing, appellant's counsel argued that appellant was "someone who has been in need of psychiatric care since probably the age of 12 or 13," had never received proper psychiatric care, and his drug usage was likely self-medication. Defense counsel acknowledged that appellant had been in prison before, and may have attended AA, but "the underlying problem

[6] Alcoholics Anonymous.

was not corrected." Defense counsel asked the trial court to place appellant in SAFPF[7] or, in the alternative, to imprison appellant for a number of years less than the twenty year maximum. As defense counsel argued: "I think he's got, you know, documented mental illness, and I just personally don't feel it's right, you know, extracting such a large punishment on someone who clearly is in need of psychiatric care as well as alcohol and/or drug treatment."

The State responded that appellant was not a good candidate for community supervision, primarily because of his criminal history and recidivism. The State did not recommend a specific term of years to the trial court. The State also requested that, if the trial court placed appellant on community supervision, that the court issue a protective order to help insure that his mother and stepfather were safe.

At the conclusion of the hearing, the trial court adjudicated appellant's guilt in the failure to register as a sex offender case and sentenced him to ten years' imprisonment. The trial court found appellant guilty on the injury to an elderly person cases and sentenced him to two concurrent terms of twenty years' imprisonment, to be served consecutive to the ten-year term.

Appellant's Allegations

In a single issue, appellant claims that the trial court abused its discretion by sentencing him to an "aggregate term" of thirty years. Appellant's claim is not an attack on the propriety of the trial court's "stacking" order, but on the trial court's decision to sentence him to terms of years in the penitentiary as opposed to community supervision.

Appellant claims that the trial court failed to consider his mental health challenges and that his sentences focus on punishment rather than rehabilitation, in violation of the objectives of the

[7] SAFPF is an abbreviation for Substance Abuse Felony Punishment Facility.

Texas Penal Code. The Penal Code provides that the trial court should insure the public's safety by prescribing such punishment as may be necessary to prevent likely recurrence of criminal behavior and by prescribing penalties that are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitative possibilities among individual offenders; the Code lists "rehabilitation of those convicted" as one objective for the trial court. TEX. PENAL CODE § 1.02 (1) (B) & (C), (3). The Penal Code also lists deterrence and prevention of the likely recurrence of criminal behavior as objectives. *See* TEX. PENAL CODE § 1.02(1)(A), (C).

The State responds that appellant has not preserved this issue for appellate review because he failed to object to the trial court's sentences at the time punishment was assessed. Alternatively, the State argues that appellant's sentences are within the applicable range of punishment for each offense and are appropriate under the facts and circumstances of this case.

Preservation

Generally, to preserve error, an appellant must make a timely request, objection, or motion in the trial court. *See* TEX. R. APP. P. 33.1(a)(1); *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.). As appellant acknowledges, he did not complain about the sentences at the time punishment was imposed. While appellant filed a motion for new trial alleging that "the verdict is contrary to the law and the evidence," he did not specifically complain about the length of the sentences. TEX. R. APP. P. 21.3.

Appellant argues, however, that no specific objection was necessary because his objections to the assessment of the maximum possible sentences are apparent from the context of his arguments to the trial court. *See* TEX. R. EVID. 103(a)(1)(B) (requiring an objection "stating the specific ground of objection, if the specific ground was not apparent from the context"). Appellant

points to the record where he requested community supervision and argued against a maximum sentence.

Appellant cites the following authority to support his argument that a specific objection was unnecessary because his complaint was apparent from the context of the case: *Montgomery v. State*, 99 S.W.3d 257, 259–60 (Tex. App.—Fort Worth 2003, pet. struck) (withdrawal of guilty plea); *Edwards v. State*, 21 S.W.3d 625, 626–27 (Tex. App.—Waco 2000, no pet.) (deadly weapon finding); *Johnson v. State*, 970 S.W.2d 716, 719 (Tex. App.—Beaumont 1998, no pet.) (authentication objection); and *Garza v. State*, 841 S.W.2d 19, 23 (Tex. App.—Dallas 1992, no pet.) (amount of restitution). We find these cases are unpersuasive as none of them involve a complaint that the punishment assessed violated the rehabilitation objectives of the penal code. Nor do those cases explain how a complaint that the punishment assessed violated the objectives of the penal code would be apparent from context and not require a trial objection.

Appellant also quotes language from *Bedolla v. State*, 442 S.W.3d 313, 316 (Tex. Crim. App. 2014) to support his arguments:

> To avoid forfeiture of a complaint on appeal, all a party has to do is let the trial judge know what he wants and why he thinks he is entitled to it and do so clearly enough for the judge to understand the request at a time when the trial court is in a proper position to do something about it.

But *Bedolla* is distinguishable as it concerned whether the defendant in that case preserved a complaint about the exclusion of a self-defense jury instruction and whether his request for that instruction was specific enough. *Id.* at 315–17. In this case, the issue is not whether a complaint was sufficiently specific because appellant made no complaint to the trial court that his punishment violated the rehabilitation objectives of the Penal Code.

We conclude that appellant has not preserved this issue for appellate review. *See Castaneda*, 135 S.W.3d at 723; *Thornton v. State*, No. 05-16-00565-CR, 2017 WL 1908629, at *4 (Tex. App.—Dallas May 9, 2017, pet. ref'd) (not designated for publication).

No Abuse of Discretion

Even if appellant had preserved his complaint for our review, we would resolve it against him because we find no abuse of discretion in the sentences assessed.

An appellate court reviews a trial court's sentence for an abuse of discretion. *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). A trial court abuses its discretion only when "the decision lies outside the zone of reasonable disagreement." *McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008).

Generally, punishment that is assessed within the statutory range for an offense will not be disturbed on appeal. *Jackson*, 680 S.W.2d at 814; *Carpenter v. State*, 783 S.W.2d 232, 232–33 (Tex. App.—Dallas 1989, no pet.) (punishment that was assessed within the range of punishment did not fail to comport with objectives of Texas Penal Code, *i.e.*, deterrence, rehabilitation, and prevention). While there are exceptions to this general rule, they are limited and concern issues that appellant has not raised.[8]

Appellant concedes that his sentences are within the prescribed range of punishment. Both offenses were properly enhanced from third-degree to second-degree felonies and carried maximum punishments of twenty years' imprisonment.

[8] *See, for example*, *Harmelin v. Michigan*, 501 U.S. 957, 995 & 1006 (1991) (Scalia, J., announcing judgment of the Court; Kennedy, J., concurring) (gross-disproportionality under the Eighth Amendment of the U.S. Constitution); *Grado v. State*, 445 S.W.3d 736, 743 (Tex. Crim. App. 2014) (trial court's refusal to consider the full range of punishment).

The trial court made no comments when it adjudicated appellant's guilt on the failure to register as a sex offender case and sentenced him to ten years imprisonment. However, in finding appellant guilty on the injury to elderly person case, the trial court said as follows:

> THE COURT: Now, these 2017 cases are disturbing, and these exhibits that the State have provided to the Court are shocking, and I understand that your parents love you and want the very best for you, but I also have serious concern about their safety. There's no provocation that either of them stated for this offense, and your mother was trying to protect your father.

The trial court also found the enhancement paragraph true and sentenced appellant to twenty years' imprisonment in both cases.

The trial court had before it evidence that appellant was a recidivist. The indictment charging him with failure to register as a sex offender contained an enhancement paragraph that appellant had been convicted previously of aggravated robbery with a deadly weapon. The indictments charging him with injury to an elderly person contained an enhancement paragraph that appellant had been convicted previously of aggravated sexual assault with a deadly weapon. Appellant entered pleas of true to both of these allegations.

The trial court knew that the State was unwilling to recommend community supervision for appellant, both on grounds of appellant's criminal history and concerns about the safety of appellant's family members. The trial court also expressed concerns about the safety of appellant's family members.

The trial court could have reasonably concluded that placing appellant back on community supervision would not fulfill the Penal Code's stated objectives of deterrence and punishment as necessary to prevent the likely recurrence of criminal behavior. *See* TEX. PENAL CODE § 1.02(1)(A), (C). There is nothing in the record to indicate that the trial court failed to consider

appellant's mental health issues or his need for drug treatment in assessing these sentences. Further, the trial court had discretion to "stack" these sentences. TEX. CODE CRIM. PROC. art. 42.08.

Based on appellant's criminal history and the nature of the offense, we could not conclude that appellant's sentence violated the rehabilitation objectives of the penal code.

Conclusion

We overrule appellant's sole issue and affirm.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WILLIAM LITTLEBIRD, Appellant	On Appeal from the 204th Judicial District Court, Dallas County, Texas
No. 05-17-00709-CR V.	Trial Court Cause No. F-1676360-Q.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 7th day of June, 2018.

Court of Appeals
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JUDGMENT

WILLIAM LITTLEBIRD, Appellant	On Appeal from the 204th Judicial District Court, Dallas County, Texas
No. 05-17-00710-CR V.	Trial Court Cause No. F-1676360-Q.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

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JUDGMENT

WILLIAM LITTLEBIRD, Appellant	On Appeal from the 204th Judicial District Court, Dallas County, Texas
No. 05-17-00711-CR V.	Trial Court Cause No. F-1676360-Q.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Evans and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 7th day of June, 2018.