AFFIRMED and Opinion Filed June 9, 2020

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00362-CR
No. 05-19-00363-CR

JOSE LOUIS DELUNA JR., Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 219-83536-2018 & 219-83537-2018

MEMORANDUM OPINION

Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Reichek

Jose Louis Deluna, Jr. appeals his convictions for possession of methamphetamine between four and two hundred grams and possession of alprazolam between twenty-eight and two hundred grams. Bringing two issues, appellant contends the State made an improper punishment argument and the trial court erred in failing to consider the full range of punishment. We affirm the trial court's judgments.

In appellate cause number 05-19-00362-CR, appellant pleaded guilty without the benefit of a plea agreement to the second-degree felony offense of possession of

methamphetamine between four and two hundred grams. Appellant pleaded true to the State's enhancement allegation, raising the punishment range for the offense to that of a first-degree felony. In appellate cause number 05-19-00363-CR, appellant was charged with the third-degree felony offense of possession of alprazolam between twenty-eight and two hundred grams. As with the first offense, appellant pleaded guilty without the benefit of a plea agreement and pleaded true to the enhancement allegation. This raised the punishment range for the offense to that of a second-degree felony.

A punishment hearing for both offenses was conducted before the trial court without a jury. The hearing was conducted over several hours and involved multiple witnesses. During closing arguments, defense counsel noted there had been a lot of discussion during the hearing about whether appellant was a drug dealer and, based on the quantity of drugs appellant was carrying at the time he was arrested, whether the drugs were intended for his personal use. The defense then noted that appellant had been charged only with possession, and not with possession with intent to deliver. Counsel went on to argue,

> We can sit here all day long and say, well, it wasn't for personal use. He was intending to sell these drugs, and maybe he was, Judge, maybe he was trying to sell these drugs. Drug addicts often take part of their drugs and sell them in order to continue their drug habit. But what I do know is that we've got somebody in here who was offered a minimum sentence and chose to take a big risk because he says, [“]I need drug treatment.[”]

Counsel concluded with a plea for leniency and requested appellant be put on community supervision probation so that he could obtain treatment through the Cenikor program.

In the State's closing argument, the prosecutor confirmed that appellant was charged only with possession of a controlled substance and not possession with intent to deliver. The prosecutor went on, however, to request that appellant be sentenced to no less than fifteen years in prison because the evidence showed appellant was a gang member and a drug dealer. The prosecutor stated that "if [appellant] in fact was charged with intent to deliver" the minimum sentence applicable to that offense with an enhancement would be fifteen years. Therefore, according to the prosecutor, appellant should be given at least that long a sentence based on his conduct. In addition, the prosecutor argued appellant had shown himself to be manipulative and he could not be trusted to complete the Cenikor program. The trial court ultimately sentenced appellant to fifteen years in prison for each offense with the sentences to be served concurrently.

In his first issue, appellant contends the prosecutor's statements during closing argument were improper and misled the trial court regarding the punishment ranges applicable to his offenses. Appellant contends the statements were sufficiently egregious to require a new punishment hearing. Appellant did not, however, object in the trial court to the statements about which he now complains. As a prerequisite to presenting a complaint regarding improper argument, appellant was required to

make a timely objection. *See Bell v. State*, 566 S.W.3d 398, 404–05 (Tex. App.—Houston [14th Dist.] 2018, pet. denied.). Because appellant did not object, he did not preserve this issue for review. *Id*.

Appellant's second issue is similarly premised on the assertion that the prosecutor's statements during closing argument misled the trial court regarding the range of punishment applicable to his offenses. Appellant argues that, because the prosecutor misled the trial court, the judge failed to consider the full range of punishment available in his case, including community supervision. But, absent a clear showing to the contrary, we must presume the trial court judge knows the law and applied it in a fair and impartial manner. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006); *Colson v. State*, No. 01-14-01020-CR, 2015 WL 7455770, at *2 (Tex. App.—Houston [1st Dist.] Nov. 24, 2015, pet. ref'd) (mem. op., not designated for publication).

In this case, the record shows the trial court correctly admonished appellant at the beginning of the hearing regarding the ranges of punishment applicable to each of his offenses. It is apparent, therefore, that the judge was aware of the proper ranges to be considered when determining appellant's sentences. The court then heard extensive evidence on punishment, including a significant amount of testimony regarding appellant's desire to be placed on community supervision so he could participate in the Cenikor drug treatment program. The prosecutor's closing

arguments specifically addressed why Cenikor was not an appropriate placement for appellant based on the facts of the case.

At no point in his closing argument did the prosecutor contend that community supervision was not an available option. Nor did the prosecutor suggest that the applicable ranges of punishment required a fifteen year minimum sentence, as would be the case for an enhanced offense of possession with intent to deliver. Instead, the prosecutor argued that, despite the fact appellant was only charged with possession, the trial court should exercise its discretion to impose a sentence of at least fifteen years based on evidence showing appellant had dealt drugs in the past. We see nothing in the record to indicate the trial court considered anything less than the full and correct ranges of punishment. The sentences imposed were within the statutory ranges. Accordingly, we resolve appellant's second issue against him. *See Brumit*, 206 S.W.3d at 645.

We affirm the trial court's judgment.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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Court of Appeals
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JUDGMENT

JOSE LOUIS DELUNA JR., Appellant No. 05-19-00362-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 219th Judicial District Court, Collin County, Texas Trial Court Cause No. 219-83536-2018. Opinion delivered by Justice Reichek. Justices Schenck and Osborne participating.

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

Judgment entered June 9, 2020

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No. 05-19-00363-CR V.

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Opinion delivered by Justice Reichek.
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