AFFIRMED and Opinion Filed July 31, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01165-CR
No. 05-19-01166-CR
No. 05-19-01167-CR
No. 05-19-01168-CR

DAVID JASON GARCIA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause Nos. F18-39433-H, F19-00494-H,
F17-39675-H, and F17-39676-H

MEMORANDUM OPINION

Before Justices Schenck[1], Pedersen, III, and Evans
Opinion by Justice Evans

Appellant David Jason Garcia pled guilty to the offenses of unlawful possession of a firearm by a felon, possession with intent to deliver a controlled substance in an amount of 4 grams or more but less than 200 grams, and two counts of aggravated assault with a deadly weapon. The jury assessed punishment as

[1] The Honorable David L. Bridges, Justice, participated in the submission of this case, however, he did not participate in the issuance of this opinion due to his death on July 25, 2020.

follows: forty-five years' imprisonment for possession with intent to deliver a controlled substance, twenty years' imprisonment for unlawful possession of a firearm by a felon, and forty years' imprisonment for each offense of aggravated assault with a deadly weapon. Appellant asserts that the case should be remanded to the trial court for a new punishment hearing because (1) the trial court erred in granting the State's motion to photograph appellant's gang tattoos, and (2) his sentence of forty-five years' imprisonment for possession with intent to deliver a controlled substance violates the Eighth Amendment's prohibition against cruel and unusual punishment. We affirm.

BACKGROUND

At the pretrial conference, appellant advised the court that he wanted to enter a guilty plea for each of the four offenses with punishment set by the jury. The trial court advised appellant of the charges, the punishment ranges, and the enhancement paragraphs. Regarding the offense of possession with intent to deliver a controlled substance, the trial court specifically advised appellant as follows:

> The Court: Now, in the cause number ending in 33, that is the manufacture and delivery of a controlled substance, methamphetamine, that is a first degree felony. The state, when they originally indicted that case, it had two enhancement paragraphs. They have given me a motion to strike both of them. That means that the original underlying offense, the manufacture and delivery of a controlled substance, is a first degree felony. It stays a first degree felony with those two enhancement paragraphs struck. That means that the range of punishment on those go from five to 99 years or life in the penitentiary

with an optional fine not to exceed $10,000. Do you understand what has happened on that case?[2]

[Appellant]: Yes, Your Honor.

The Court: The charges and the range of punishment?

[Appellant]: Yes, Your Honor.

Appellant then pled guilty to the four offenses: (1) unlawful possession of a firearm by a felon (F18-39432); (2) possession with intent to deliver a controlled substance (F18-39433); and (3) two counts of aggravated assault with a deadly weapon (F17-39675 and F17-39676). The trial court accepted appellant's plea of guilty, found that he was mentally competent to enter his plea, and that his plea was entered into freely and voluntarily. Appellant also pled true to an enhancement paragraph for each the two aggravated assault offenses as well as the unlawful possession of a firearm by a felon offense. During the pretrial conference, the State also moved to have appellant photographed regarding his "tattoos, markings, drawings that appear on his body." The trial court granted the motion over the appellant's objection.

The case then proceeded to the jury on the issue of punishment. Joaquin Romero testified he attended a birthday party on December 23, 2017 and a woman said a man had a gun outside. Romero went outside to find a man waiving a gun and walked up to him. As Romero approached the man, he saw a "flash" and the

[2] The indictment defines the offense in Case No. 18-39433 as "possess with intent to deliver, a controlled substance, to wit: METHAMPHETAMINE, in an amount of 4 grams or more but less than 200 grams, including adulterants or dilutants." The trial court used the term "manufacture and delivery" during the pretrial conference. However, appellant pled guilty to the language stated in the indictment.

"spark" and then just a "burning, stinging feeling" in his left thigh. Romero pulled the bullet out as he walked back to the venue. Gabriel Wallace testified that there was an argument at the party and he grabbed one of the guys and took him outside. Wallace was shot in the ankle.

Both DeSoto and Lancaster police officers arrived at the scene. Preston Hammel, an officer with the DeSoto police department, testified that he and other officers located appellant, who matched the description of the shooter, walking away from the party on a road. Appellant was taken into custody but he did not have a weapon on his person. Cody Laws, an officer with the DeSoto police department, testified that he searched the area where appellant was found and located the weapon, a "meth pipe," and a "bag that typically holds narcotics" approximately 200 yards from the party venue in a bush. Jason Rohack, a detective with the Lancaster police department, testified that he sent the bag with the suspected methamphetamine off for testing. The substance in the bag tested positive for methamphetamines and weighed 27.89 grams. Rohack testified that he found additional bags of methamphetamine inside appellant's car.

Steve Lair, a gang investigator with the Carrollton police department, testified that the Texas Department of Criminal Justice identified appellant as a member of the "Pure Tango Blast" or "Tango Blast" gang in 2012 and 2016. Lair noted Tango Blast is the largest prison gang in Texas but members could also join outside of prison. Lair testified appellant self-identified as a member of Tango Blast. He

further testified about appellant's tattoos, including his "PTB" tattoo, the "D-Town" tattoo, and the D-Town Tango blast star, which indicated appellant had an association with the gang. Lair noted that Tango Blast is a violent gang involved in a "myriad of different crimes, from murder to aggravated assault, aggravated robbery, assault, robbery, drug trafficking, theft, [and] home invasion." Lair testified he believed appellant to be a member of Tango Blast "based on [his] training and experience as well as the documentation provided by another law enforcement agency as well as the tattooing on his person."

At the punishment hearing, the State published a number of appellant's prior convictions including convictions for aggravated assault, unlawful possession of a controlled substance, terroristic threat, driving while intoxicated, violation of a protective order, driving with a suspended license, and failure to identify.

Appellant testified that he attempted to leave the party venue but the persons involved in the fight confused him with someone else and attacked him. He testified that he was previously associated with "PTB" the first time he went to prison but he is not associated with them anymore and had not been "for years." The trial court then sentenced appellant in accordance with the jury's assessment of punishment.

ANALYSIS

A. Admission of Evidence

In his first issue, appellant asserts the trial court erred in admitting the photograph of his tattoos because it was not relevant to any issue and its probative value was substantially outweighed by the danger of unfair prejudice.

1. Standard of review and applicable law

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion only when its decision falls outside the zone of reasonable disagreement. *Id*. at 83.

Code of Criminal Procedure article 37.07, section 3(a) governs the admissibility of evidence during the punishment phase of a non-capital trial. *See* TEX. CODE CRIM. PROC. 37.07 §3(a), *Erazo v. State*, 144 S.W.3d 487, 491 (Tex. Crim. App. 2004). At the punishment phase of a criminal trial, evidence, including evidence of appellant's character, may be offered as to any matter the court deems relevant to sentencing. *See* TEX. CODE CRIM. PROC. 37.07 §3(a)(1).[3] The Court of

[3] Code of Criminal Procedure article 37.07, section 3(a)(1) provides as follows:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant *as to any matter the court deems relevant to sentencing, including but not limited to* the prior criminal record of the defendant, his general reputation, his character, the circumstances of the offense for which he is being tried . . . *any other evidence of an extraneous crime or bad act* . . . .

(emphasis added).

Criminal Appeals has stated that the relevance of evidence cannot be determined by a deductive process but is rather a function of policy. *Erazo*, 144 S.W.3d at 491. For example, one policy reason for admitting evidence involves providing complete information to the jury to allow it to tailor an appropriate sentence. *Id.* Thus, the Court of Criminal Appeals has said that evidence is relevant to sentencing within the meaning of statute if it is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case. *Beham v. State*, 559 S.W.3d 474, 479 (Tex. Crim. App. 2018).

2. Analysis

During the punishment hearing, the State introduced photographic evidence of appellant's tattoos and testimony that the tattoos indicated appellant's membership in the Tango Blast gang. Appellant first argues that the photographs were not relevant because there was no evidence that appellant was in a gang at the time the offenses occurred.

As stated above, evidence is relevant to sentencing within the meaning of statute if it is helpful to the jury in determining the appropriate sentence. *Id.* The Texas Court of Criminal Appeals notes that evidence the defendant is an active member of a gang that regularly engages in criminal activities is almost always relevant for sentencing purposes. *Id.* at 481-84; *see also Beasley v. State,* 902 S.W.2d 452, 456 (Tex. Crim. App. 1995) (regarding admissibility of testimony about appellant wearing distinctive gang clothing and reputation for being member of

gang, "The evidence concerning appellant's gang membership is relevant because it relates to his character."); *Phillips v. State*, 534 S.W.3d 644, 657 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (regarding admissibility of tattoos with distinctive meaning related to particular gang, "In general, evidence of a defendant's gang membership is relevant and admissible during the punishment phase of a trial because the evidence relates to the defendant's character."). Further, the Beasley court previously held that "it is not necessary to link the accused to the bad acts or misconduct generally engaged in by gang members, so long as the jury is 1) provided with evidence of the defendant's gang membership, 2) provided with evidence of character and reputation of the gang, 3) not required to determine if the defendant committed the bad acts or misconduct and 4) only asked to consider reputation or character of the accused." 902 S.W.2d at 457.

Here, Lair provided testimony that he believed appellant to be a member of the Tango Blast gang which routinely engages in criminal activities such as murder, aggravated assault, aggravated robbery, assault, robbery, drug trafficking, theft, and home invasion. Further, appellant admitted his affiliation with Tango Blast and the TCDJ identified appellant as a member of Tango Blast in 2012 and 2016. There was evidence that appellant is a member of a gang which routinely engages in criminal activity. Further, the jury was not asked to determine if appellant committed the bad

acts or misconduct, but was only asked to consider appellant's reputation or character.

We reject appellant's argument that photographs were not relevant because there was no evidence that he was in a gang at the time the offenses occurred. At the punishment hearing, appellant testified that he was previously associated with "PTB" but he is not associated with them anymore and had not been "for years." As stated above, however, Lair testified that he believed appellant to be a gang member. However, even if appellant was no longer a gang member at the time of his offenses, evidence of his prior gang membership is still relevant because it relates to his character. *See* TEX. CODE CRIM. PROC. 37.07 §3(a)(1); *Ho v. State*, 171 S.W.3d 295, 305 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("Even if appellant was no longer affiliated with the gang at the time of the shooting, evidence that he was a gang member is relevant—and thus admissible at punishment—because it relates to his character.").

Having determined that the evidence was relevant, we are still left to determine whether its probative value outweighed its prejudicial effect. As an initial matter, "[t]he Texas Court of Criminal Appeals has deemed the disputed testimony relevant; therefore, Rule 403 favors its admission, as there is a presumption that relevant evidence will be more probative than prejudicial." *See Beham v. State*, No. 06-16-00094-CR, 2018 WL 6625890, at *2 (Tex. App.—Texarkana Dec. 19, 2018, no pet.) (mem. op., not designated for publication). The term "unfair prejudice"

refers to a tendency suggest decision on an improper basis such as an emotional one. *See Green v. State*, No. 05-14–1264-CR, 2015 WL 6690216, at *5 (Tex. App.—Dallas 2015, no pet.) (mem. op., not designated for publication). However, it is only where a clear disparity exists between the degree of unfair prejudice of the offered evidence and its probative value that Rule 403 is applicable. *Id.*

Here, we conclude that the evidence, although prejudicial, was not unfairly prejudicial. Lair testified appellant was a gang member and described his tattoos as evidenced by photographs. As stated above, the evidence was relevant to character and did not take a long time to develop. Further, appellant was sentenced to forty-five years' imprisonment for the offense of possession with intent to deliver a controlled substance and forty years' imprisonment for each offense of aggravated assault with a deadly weapon. As each of these three causes had a sentencing range of five to ninety-nine years' imprisonment, appellant received a mid-range sentence. In regard to the fourth charge, unlawful possession of a firearm by a felon, appellant received a sentence of twenty years from a range of two to twenty years. However, reviewing the record as a whole, the photographic evidence was not so unfairly prejudicial that there was a clear disparity between the degree of the prejudice and its probative value. For all these reasons, we conclude the trial court did not abuse its discretion in admitting the photographs and we overrule appellant's first issue.

B. Cruel and Unusual Punishment

Appellant asserts that his sentence for the offense possession with intent to deliver a controlled substance violates the Eighth Amendment's prohibition against cruel and unusual punishment because "even if a sentence falls within the statutory punishment range, the sentence may violate the Eighth Amendment if the sentence is grossly disproportionate to the offense or to sentences in other similar offenses." Appellant cites *Solem v. Helm*, 463 U.S. 277, 289-90 (1983).[4] Appellant, however, has waived this complaint.

For error to be preserved for appeal, the record must show appellant made a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1). Constitutional rights, including the right to be free from cruel and unusual punishment, may be waived. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.). When appellant's sentence was announced, appellant did not object to his sentence as violating his constitutional rights. Appellant did not raise this argument in a post-trial motion. Accordingly, appellant has not preserved this issue for appellate review.

Notwithstanding appellant's failure to preserve error, however, his argument would fail. Generally, punishment assessed within the statutory range is not unconstitutionally cruel and unusual. *Castaneda*, 135 S.W.3d at 723. Possession

[4] *See also Ewing v. California*, 538 U.S. 11, 23 (2003).

with intent to deliver a controlled substance in the amount of four grams or more but less than 200 grams is a first-degree felony. *See* TEX. HEALTH & SAFETY CODE § 481.112(d) ("An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams."). "An 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." *See* TEX. PENAL CODE § 12.32(a). Here, appellant was sentenced to forty-five years imprisonment based at least in part on the State's evidence of appellant's gang membership and numerous prior convictions including aggravated assault, unlawful possession of a controlled substance, terroristic threat, driving while intoxicated, violation of a protective order, driving with a suspended license, and failure to identify. Appellant's sentence is in the middle of the statutory range and appellant does not direct us to evidence or similar cases for comparative evaluation. *See State v. Simpson*, 488 S.W.3d 318, 323-24 (Tex. Crim. App. 2016) ("In the rare case in which this threshold comparison leads to an inference of gross disproportionality, the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. . . . [The defendant] presented evidence that his sentence was too

harsh, not that it was unconstitutional. . . . [H]e did not produce evidence or point to evidence existing in the record that substantiated this legal claim.").

In this case, appellant failed to preserve this issue. Even if he had preserved it, appellant's punishment fell within the statutory range and the jury was free to consider his prior criminal history. Accordingly, we overrule appellant's second issue.

CONCLUSION

We resolve appellant's issues against him and affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID JASON GARCIA, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-19-01165-CR V.	Trial Court Cause No. F18-39433-H.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans. Justices Schenck and Pedersen, III participating.

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

Judgment entered July 31, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID JASON GARCIA, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-19-01166-CR V.	Trial Court Cause No. F19-00494-CR.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans. Justices Schenck and Pedersen, III participating.

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

Judgment entered July 31, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID JASON GARCIA, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-19-01167-CR V.	Trial Court Cause No. F17-39675-H.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans. Justices Schenck and Pedersen, III participating.

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

Judgment entered July 31, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID JASON GARCIA, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-19-01168-CR V.	Trial Court Cause No. F17-39676-H.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans. Justices Schenck and Pedersen, III participating.

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

Judgment entered July 31, 2020.