Opinion issued December 8, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00422-CR

CARNELL LOUIS DODSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 18-CR-0670

MEMORANDUM OPINION

A jury found appellant, Carnell Louis Dodson, guilty of the offense of aggravated robbery for threatening grocery store employees with a knife after they caught him attempting to steal from the store. After finding two enhancement paragraphs true, the jury assessed his punishment at 35 years' confinement. In two

issues, Dodson argues that the trial court (1) erred in allowing the State "to alter the indictment over the objection of the Defense" and (2) that his sentence was grossly disproportionate to his crime. We conclude that the trial court did not err in allowing the State to abandon claims against one of the complainants named in the indictment, and we conclude that, in light of Dodson's use of a deadly weapon to threaten the clerks and his prior criminal record, including two felony enhancements, his sentence was not grossly disproportionate. Accordingly, we affirm.

Background

Angel Pedro[1] was working at the Food Rite grocery store in Texas City, Texas when he observed Dodson putting a package of meat into a shopping bag. He approached Dodson and asked if he had a receipt, and Dodson told him that the cashier had the receipt. Pedro told Laquentin Cravens, who also worked at the store as a stocker and cashier, that he believed Dodson was attempting to steal merchandise from the store. Pedro and Cravens followed Dodson to the front of the store and confronted him, telling him that they knew he had taken something and asking him to return it. Dodson denied taking anything. Their confrontation drew the attention of the store's manager Kiet Nguyen.

[1] Angel Pedro was also referred to in the record as Pedro Angel Morena. We refer to him in this opinion as Pedro in conformity with the charging instrument.

Nguyen testified that he observed Dodson trying to leave the store while the two employees attempted to stop him. Nguyen asked Dodson if he had a receipt for the merchandise, and Dodson claimed that he had lost it. Nguyen told him, "That's fine. Let me call the police and they'll take care of it when they come." When he turned around to call the police, he saw Dodson walking out of the store. Nguyen and his employees followed Dodson outside and "tried to stop him, just tell him to wait, but he left. So we grabbed the bag [containing the meat] back." Nguyen testified that Dodson was "very defensive" and said to them, "Do you want to play that game," then "reached in his pocket and pulled out a knife." Nguyen described the knife as "one of those little pocket knives." Nguyen testified that he felt threatened at that point and was worried that he or his employees might get hurt, so he told them, "Just back up. It's not worth it. I'll let the police handle it."

Cravens likewise testified that Dodson appeared "very anxious and nervous" when they confronted him. He testified that Dodson "pulled out a knife on me and he was waving it to me, Pedro, and Mr. Kiet." Cravens testified that he was scared when Dodson waived the knife at him. He testified that he was "only about four inches . . . away from" Dodson when he pulled out the knife. Cravens described the knife as a "pocket knife" or "switch knife" and testified that Dodson could have lunged and hit him. Cravens testified that after Dodson waved the knife around, he ran off. Pedro likewise testified that Dodson pulled a small knife once they followed

him outside. Pedro was about three feet away from Dodson, and he testified that he felt afraid and worried he would get hurt once he saw the knife. He testified that he, Cravens, and Nguyen "just moved away from [Dodson]" once they saw the knife.

When the case went to trial, the indictment named two complainants in the aggravated robbery offense, alleging that Dodson "while in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally or knowingly threaten[ed] or place[d] LAQUENTIN CRAVENS AND/OR ANGEL PEDRO in fear of imminent bodily injury or death" by exhibiting a deadly weapon, a knife.

After the State had rested, Dodson's attorney objected as follows:

> What I'm objecting to and making a motion in regard to is the body of the indictment alleges two different victims and it alleges them with the words "and/or" in between them. These are two different individuals who both testified individually in this case.
>
> What I have for a motion in my objection is that I believe that having two different and/or victims violates [Dodson's] right to a fair trial under due process of the constitution, that this indictment is not specific enough to give him notice of what he's on trial for and it's further not the defense lawyer's job to draft the indictment. I believe the State is stuck with the way they've indicted this thing. It's not specific enough. I think it violates the constitution. I object to it and I move for a directed verdict of not guilty because he has not been properly indicted in this matter.

The State pointed out that Dodson had not filed a timely motion to quash the indictment, and the State argued that the indictment was sufficiently specific to give Dodson notice of the charges against him. The State further argued that a directed

verdict would be improper because it had presented more than a scintilla of evidence supporting the allegations in the indictment.

The trial court denied Dodson's motion for directed verdict, stating that the indictment "gives sufficient notice to the defendant as to what the charge is, what the elements are." Dodson then rested without presenting any evidence. Prior to submitting the case to the jury, the State made the following request: "The only other thing I would ask is that we be allowed to reopen our case and elect to proceed on submission to the jury for aggravated robbery on just Laquentin Cravens and abandon proceeding on Angel Pedro, the other victim alleged in the indictment." Dodson objected to the State's reopening its case, but the trial court overruled his objected and granted the State leave to reopen.

The State then moved "the Court to allow us to abandon the allegations involving Angel Pedro and proceed—and elect to proceed on the allegations concerning Laquentin Cravens as far as this charge is concerned." The trial court granted the motion, and the State rested again.

The trial court submitted a charge to the jury allowing it to find Dodson guilty of aggravated robbery if it found beyond a reasonable doubt that, in the course of committing theft of property, Dodson "intentionally or knowingly threaten[ed] or place[d] LAQUENTIN CRAVENS in fear of imminent bodily injury or death, and the Defendant did then an there use or exhibit a deadly weapon, to-wit: a KNIFE."

The trial court also charged the jury on lesser-included offenses of robbery and theft, and it provided a self-defense instruction. The jury found Dodson guilty of aggravated robbery.

The jury then considered Dodson's punishment. The State presented evidence of Dodson's criminal history. The State presented evidence that Dodson had previously been convicted of the following crimes: (1) a 2009 misdemeanor theft conviction; (2) a 2009 misdemeanor conviction for failure to identify; (3) a 2012 felony conviction for robbery; (4) a 2012 misdemeanor conviction for burglary of a vehicle; (5) a 2013 misdemeanor conviction for escape; (6) a 2013 felony conviction for possession of a controlled substance; (7) a 2014 misdemeanor conviction for failure to identify; (8) two 2014 misdemeanor convictions for theft; (9) a 2014 felony conviction for evading arrest, and (10) two 2017 felony convictions for the offense of theft. The State also presented the testimony of a loss-prevention officer at a Wal-Mart in Galveston County who observed Dodson leave the store with merchandise that he had not paid for. This unadjudicated theft allegation occurred after Dodson's aggravated robbery of Cravens at the Food Rite.

The State sought to enhance Dodson's punishment under Texas Penal Code section 12.42(d) based on the 2012 felony robbery conviction and the 2014 felony conviction for evading arrest. The jury found both enhancement paragraphs true and assessed Dodson's punishment at confinement for 35 years. Dodson claims that he

filed a motion for new trial, asserting in relevant part that his sentence was grossly disproportionate to his offense, and he asserts that this motion was overruled by operation of law. However, that motion does not appear in the record.

Indictment

In his first issue, Dodson contends that the trial court erred in allowing the State to reopen its case and "alter" the indictment, arguing that it was improper to allow the State to amend or abandon a portion of the indictment. The State argues, however, that it merely elected to proceed to the jury on the allegations against a single complainant to satisfy the constitutional unanimity requirements. *See, e.g.*, *French v. State*, 563 S.W.3d 228, 233 (Tex. Crim. App. 2018) (stating that Texas law requires that jury reach unanimous verdict on each statutory element of charged offense) (citing TEX. CONST. art. V § 13); *Dixon v. State*, 201 S.W.3d 731, 733 (Tex. Crim. App. 2006) (holding that one purpose served by "the election rule" is "to ensure unanimous verdicts, that is, all of the jurors agreeing that one specific incident, which constituted the offence charged in the indictment, occurred"). The State further argues that, to the extent its trial motion sought to alter the indictment, the alterations constituted an abandonment rather than an amendment.

The State may, with the consent of the court, dismiss, waive, or abandon a portion of the indictment. *Duran v. State*, 492 S.W.3d 741, 745 (Tex. Crim. App. 2016). While such an abandonment "is tantamount to an acquittal" if it occurs after

jeopardy has attached (i.e., after a jury is impaneled and sworn in a jury trial), *see id.*, those double jeopardy concerns are not implicated here where the State is not attempting a second prosecution for the same offense.

Dodson nevertheless argues that permitting the State to abandon its allegations as to Pedro was erroneous, asserting that the trial court "treated the State's motion as one for amendment or abandonment" of the indictment. He further argues that "the trial court erred [if] the State's motion was one to amend the indictment" because it was done after trial had commenced and over his objection, and he argues that the State's alteration was not "a case of abandonment, as that term is used in Texas case law." We disagree.

"An amendment is an alteration to the face of the charging instrument which affects the substance of the charging instrument," and is governed by the requirements of Code of Criminal Procedure article 28.10. *Ji Chen v. State*, 410 S.W.3d 394, 395 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citing *Eastep v. State*, 941 S.W.2d 130, 132–33 (Tex. Crim. App. 1997)), *overruled on other grounds by Riney v. State*, 28 S.W.3d 561 (Tex. Crim. App. 2000), and *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001)); *see also* TEX. CODE CRIM. PROC. art. 28.10 (governing amendment to charging instruments and providing, in relevant part, that "[a] matter of form or substance" in indictment may be amended after trial commences if defendant does not object). But not all alterations to an indictment are

an amendment. "[A]n abandonment does not affect the substance of the charging instrument," and, thus, does not invoke article 28.10's requirements. *Ji Chen*, 410 S.W.3d at 396 (citing *Eastep*, 941 S.W.2d at 133). The Court of Criminal Appeals identified three situations in which an alteration to the face of an indictment does not amount to an amendment: (1) abandonment of one or more alternative ways or means of committing an offense; (2) abandonment of an allegation if the effect is to reduce the prosecution to a lesser included offense; and (3) abandonment of surplusage. *Id.*

We agree with the State that, to the extent its motion sought to alter the indictment, the alteration did not implicate Code of Criminal Procedure article 28.10. The State indicted Dodson for a single count of aggravated robbery and identified two potential complainants—Cravens and Pedro. However, because "the gravamen of robbery offenses, including aggravated robbery, is the defendant's assaultive conduct against each victim," the State was only required to identify a single complainant. *See Ex parte Denton*, 399 S.W.3d 540, 546 (Tex. Crim. App. 2013). When the State then elected to proceed with Cravens as the sole complainant and to abandon any charges based on Pedro as a complainant, it did not alter the substance of the charging instrument. Rather, the underlying offense remained the same—Dodson continued to be charged with a single count of aggravated robbery against Cravens. The State abandoned allegations in the indictment that would have

supported an alternative way in which Dodson could have been found guilty of committing the single aggravated robbery, i.e., by threatening Pedro rather than Cravens. *See Ji Chen*, 410 S.W.3d at 396.

To the extent Dodson complains that allowing the State to proceed on the aggravated robbery charge with Cravens as the sole compliant was duplicitous or otherwise deprived him of notice of the offense with which he was charged, we note that such a complaint is a defect of form. *See Olurebi v. State*, 870 S.W.2d 58, 61 (Tex. Crim. App. 1994); *Buxton v. State*, 526 S.W.3d 666, 678 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). "A defect of form does not render an indictment insufficient unless the defect prejudices the defendant's substantial rights." *Buxton*, 526 S.W.3d at 678. The indictment informed Dodson of the State's theory against which he would have to defend himself by placing him on notice that he was charged with aggravated robbery against Cravens. The fact that the indictment identified a second potential unit of prosecution (the aggravated robbery of Pedro) that was later abandoned by the State does not render his notice of the crime against Cravens insufficient or otherwise impact Dodson's substantial rights.

In terms of harm, Dodson argues in his brief that, "[h]ad the State been properly forced to proceed in the conjunctive, i.e., forced to prove the one or the other or both had been robbed, the defense at a minimum would have been entitled to a unanimity instruction." We note, however, that the State was required to prove

that one of the complainants—Cravens—had been robbed. We further observe that any benefit that Dodson would have received from an unanimity instruction was accomplished when the trial court's jury charge identified Cravens as the sole complainant.

We overrule Dodson's first issue.

Sentence

In his second issue, Dodson argues that his sentence of 35 years was grossly disproportionate to the offense, and thus, the trial court erred in denying his motion for new trial by operation of law.

Dodson's motion for new trial does not appear in the appellate record. "To preserve for appellate review a complaint that a sentence is grossly disproportionate, constituting cruel and unusual punishment, a defendant must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired." *Russell v. State*, 341 S.W.3d 526, 527 (Tex. App.—Fort Worth 2011, no pet.); *Noland v. State*, 264 S.W.3d 144, 151–52 (Tex. App.—Houston [1st Dist.] 2007, pet, ref'd); *see* TEX. R. APP. P. 33.1(a)(1)(A); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (holding that defendant waived any error regarding violation of state constitutional right against cruel and unusual punishment because argument was presented for first time on appeal). Thus, Dodson cannot show that he

filed and presented to the trial court a motion for new trial sufficient to preserve this complaint for appeal. *See Russell*, 341 S.W.3d at 527.

Even if Dodson had preserved this complaint, we cannot say that the sentence was grossly disproportionate to his offense. "To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses." *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016) (citing *Graham v. Florida*, 560 U.S. 48, 60 (2010)). "[A] sentence is grossly disproportionate to the crime only in the exceedingly rare or extreme case." *Id.* at 322–23 (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)). Generally, punishment assessed within the statutory limits, including punishment enhanced pursuant to a habitual-offender statute, is not excessive, cruel, or unusual. *Id.* at 323; *Ex parte Chavez*, 213 S.W.3d 320, 323–24 (Tex. Crim. App. 2006).

Considering the severity of Dodson's 35-year sentence in light of the harm threatened to the complainant and Dodson's own culpability, we observe that the jury found that Dodson used a deadly weapon to threaten the complainant with serious bodily injury or death in the course of committing his theft. Considering his prior adjudicated and unadjudicated offenses, we likewise conclude that his sentence was not unreasonable. The State presented evidence of numerous previous offenses,

including one unadjudicated theft that occurred after the underlying offense. The jury found two enhancement paragraphs true, finding that Dodson had previously been convicted of the felony offenses of robbery and evading arrest. Thus, the jury was required to sentence him pursuant to Penal Code section 12.42(d), which provides that when the defendant has previously been finally convicted of two felony offenses, "and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final," the defendant "shall be punished by imprisonment . . . for life, or for any term of not more than 99 years or less than 25 years." TEX. PENAL CODE § 12.42(d). The jury assessed Dodson's punishment at 35 years' confinement, which is on the lower end of this punishment range.

Dodson focuses his argument on appeal on the fact that his attempted theft involved a package of meat with a monetary value under $100. The evidence at trial, however, focused on the charge for which he was convicted—aggravated robbery. Multiple store employees testified that Dodson threatened them with a knife. Nguyen, Cravens, and Pedro all testified that they were afraid when Dodson pulled out his knife, and they believed that they could be seriously hurt. Cravens in particular testified that he was inches away from Dodson when Dodson began waiving the knife around and that Dodson could have lunged and struck him.

In light of the serious nature of the threat against the complainant and Dodson's significant prior adjudicated and unadjudicated offenses, his 35-year sentence is not one of the "rare" cases where gross disproportionality can be inferred. *See Simpson*, 488 S.W.3d at 323.

We overrule Dodson's second issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Chief Justice Radack and Justices Hightower and Adams.

Do not publish. TEX. R. APP. P. 47.2(b).