Opinion issued April 14, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00612-CR

NO. 01-21-00613-CR

NO. 01-21-00614-CR

NO. 01-21-00615-CR

NO. 01-21-00616-CR

NO. 01-21-00617-CR

NO. 01-21-00618-CR

NO. 01-21-00619-CR

NO. 01-21-00620-CR

NO. 01-21-00621-CR

EX PARTE JORGE MAZUERA, Appellant

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case Nos. 1744133, 1744135, 1744136, 1744137, 1744138, 1744139, 1744140, 1744141, 1744143 & 1744144

MEMORANDUM OPINION

Appellant, Jorge Mazuera, challenges the trial court's orders in ten separate trial court cases denying in part his pretrial applications for writ of habeas corpus.[1] In his sole issue, appellant contends that the trial court erred in partially denying him habeas relief.

We reverse and remand.

Background

Appellant is charged with ten separate felony offenses of possession of child pornography.[2] Appellant was arrested and taken into custody in August 2021, and the trial court set appellant's bail at $100,000 for each felony offense for a total bail amount of $1,000,000. Appellant remains in custody for the ten felony offenses of possession of child pornography with which he is charged.

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1 *See* TEX. R. APP. P. 31.

2 *See* TEX. PENAL CODE ANN. § 43.26(a); appellate cause no. 01-21-00612-CR, trial court cause no. 1744133 (offense I); appellate cause no. 01-21-00613-CR, trial court cause no. 1744143 (offense II); appellate cause no. 01-21-00614-CR, trial court cause no. 1744139 (offense III); appellate cause no. 01-21-00615-CR, trial court cause no. 1744138 (offense IV); appellate cause no. 01-21-00616-CR, trial court cause no. 1744135 (offense V); appellate cause no. 01-21-00617-CR, trial court cause no. 1744141 (offense VI); appellate cause no. 01-21-00618-CR, trial court cause no. 1744140 (offense VII); appellate cause no. 01-21-00619-CR, trial court cause no. 1744137 (offense VIII); appellate cause no. 01-21-00620-CR, trial court cause no. 1744144 (offense IX); appellate cause no. 01-21-00621-CR, trial court cause no. 1744136 (offense X).

Pretrial Applications for Writ of Habeas Corpus

Appellant filed pretrial applications for writ of habeas corpus in his ten trial court cases, arguing that his confinement and restraint were illegal because he was "entitled to bail that he c[ould] make."[3] According to appellant, he had "significant ties to the community and [had] been a resident of Harris County, Texas for [thirty-three] years." Before his arrest in August 2021, appellant was living with his mother in Spring, Texas. Appellant had "no ties outside of the [United States] and [had] only been overseas while he was enlisted in the United States Marine Corps." Appellant was honorably discharged from the United States Marine Corps in 2014 and then "served an additional [four] years in the Army National Guard" before receiving an honorable discharge in 2018. Since that time, appellant had "attended college and . . . started a job working as a ramp attendant for FedEx." Appellant asserted that he had "no prior criminal history and all charges [against him arose] out of the same transaction." Because appellant had "no criminal history and ha[d] strong ties to the community," he argued that he was "not a danger to the community or a flight risk." According to appellant, the trial court could "set conditions of [his release on] bond . . . such as [a] curfew, electronic monitoring, and restriction on

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[3] *See* TEX. CODE CRIM. PROC. ANN. art. 17.15; *see also id.* art. 1.08 ("The writ of habeas corpus is a writ of right and shall never be suspended."); *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001) (when faced with excessive bail, defendant has right to assert his constitutional right to reasonable bail through use of application for pretrial writ of habeas corpus).

access to the internet." Appellant requested that the trial court set bail at $10,000 for each of the ten felony offenses with which he is charged for a total bail amount of $100,000. Appellant attached a declaration to his pretrial applications for writ of habeas corpus "declar[ing] under penalty of perjury" that the statements made in his applications were "true and correct."

Hearing

The trial court held a hearing on appellant's pretrial applications for writ of habeas corpus. At the hearing, Corina Camarillo, appellant's former girlfriend and friend, testified that she had known appellant for "at least[] three years." Appellant was from Houston, Texas and was thirty-four years old. Appellant graduated from high school in Spring and had attended "some college" in the area. Appellant did not have any significant ties to foreign countries.

According to Camarillo, appellant served in the United States Marine Corps for four years before being honorably discharged. He then served in the Army National Guard for four years before being honorably discharged.[4] Appellant did not have a criminal history. Before being taken into custody, appellant worked at FedEx "for a good amount of time." Camarillo stated that appellant was "a

[4] The trial court admitted into evidence at the hearing on appellant's pretrial applications for writ of habeas corpus documents reflecting appellant's honorable discharges from the United States Marine Corps and the Army National Guard.

law-abiding citizen." Appellant was employed when Camarillo initially met him three years ago.

In Camarillo's opinion, appellant was not a "flight risk," and she believed that he would "abide by" any bond conditions that the trial court imposed. Camarillo stated that she had talked to appellant's family and the family could not afford the current bail amount that was set. Camarillo stated that appellant's family was a "blue collar family" and "income is kind of a set issue." Camarillo believed that bail set in the amount of $10,000 in each of appellant's ten cases would be more affordable for appellant's family.

In his closing argument at the hearing, appellant's trial counsel noted that he and the State had agreed for bail to be set at $15,000 for each of the ten felony offenses with which appellant is charged, and counsel requested that the trial court set bail in accord with the agreement. The State, in its closing argument, stated that it had agreed with appellant's trial counsel for bail to be set at $15,000 for each of the ten felony offenses with which appellant is charged and also requested that the trial court set bail in accord with the agreement. The State explained that it based its request on appellant's lack of criminal history, his employment with FedEx, "his community ties with this family being in Spring," his military history, and the fact that appellant had been in custody since August 2021. At the conclusion of the hearing, the State "ask[ed] for $15,000 for each bond – for each case."

Trial Court's Ruling

After the hearing on appellant's pretrial applications for writ of habeas corpus, the trial court granted appellant's applications in part and denied appellant's applications in part. The trial court set appellant's bail at $75,000 for each of the ten felony offenses of possession of child pornography with which appellant is charged for a total bail amount of $750,000.

Standard of Review

In a habeas proceeding for a claim of excessive bail, we review a trial court's decision about the amount of bail for an abuse of discretion. *See Ex parte Rubac*, 611 S.W.2d 848, 850 (Tex. Crim. App. 1981); *Montalvo v. State*, 315 S.W.3d 588, 592 (Tex. App.—Houston [1st Dist.] 2010, no pet.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Ex parte Hunt*, 138 S.W.3d 503, 505 (Tex. App.—Fort Worth 2004, pet. ref'd). A reviewing court will not disturb a decision of the trial court if that decision is within the zone of reasonable disagreement. *Ex parte Tata*, 358 S.W.3d 392, 397 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd). We acknowledge that an abuse-of-discretion review requires more of the appellate court than simply deciding that the trial court did not rule arbitrarily or capriciously. *Montalvo*, 315 S.W.3d at 593. An appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made. *Id.* It is not an abuse of discretion for the trial court

merely to decide a matter within its discretion in a different manner than the appellate court would under similar circumstances. *Ex parte Miller*, 442 S.W.3d 478, 481 (Tex. App.—Dallas 2013, no pet.).

Excessive Bail

In his sole issue, appellant argues that the trial court erred in partially denying him habeas relief because the trial court should have reduced and set a reasonable bail amount in each of appellant's ten cases. Appellant asserts that "[s]ufficient evidence was presented to the [trial] court to show that [he was] not a flight risk, [was] not a danger to the community, and [had] sufficient ties to the community." The $75,000 bail amount set by the trial court for each of appellant's ten felony offenses combines for a total bail amount of $750,000 and "acts as an instrument of oppression." And appellant notes that the State, at the hearing on his pretrial applications for writ of habeas corpus, requested that the trial court set appellant's bail at $15,000 for each of appellant's ten cases.[5]

Before conviction, every citizen accused of a criminal offense has a "strong interest in liberty." *United States v. Salerno*, 481 U.S. 739, 750 (1987). Thus, the Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

[5] We note that the State has taken a different position in its appellee's brief filed in this Court.

punishments inflicted." U.S. CONST. amend. VIII; *see also Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (Eighth Amendment's prohibition of excessive bail applies to states). The Texas Constitution also guarantees that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident." TEX. CONST. art. I, § 11; *see also* TEX. CONST. art. I, § 13 ("Excessive bail shall not be required . . . ."); TEX. CODE CRIM. PROC. ANN. art. 1.07 ("Any person shall be eligible for bail unless denial of bail is expressly permitted by the Texas Constitution or by other law.").

A defendant's right to pretrial bail, however, may be subordinated to the greater needs of society. *Salerno*, 481 U.S. at 750–51; *see also Ex parte Beard*, 92 S.W.3d 566, 573 (Tex. App.—Austin 2002, pet. ref'd) (noting "a balance must be struck between the defendant's presumption of innocence and the State's interest"). In balancing the liberty interest of a defendant and the safety interest of society, the Texas Legislature has adopted rules and guidelines for determining when a defendant should obtain pretrial release through the posting of adequate bail. *See* TEX. CODE CRIM. PROC. ANN. art. 17.01 ("'Bail' is the security given by the accused that he will appear and answer before the proper court the accusation brought against him . . . ."); *Ex parte Jefferson*, No. 07-20-00123-CR, 2020 WL 4249743, at *2 (Tex. App.—Amarillo July 23, 2020, no pet.) (mem. op., not designated for publication). The primary purpose of pretrial bail is to secure a defendant's

appearance at trial on the offenses with which he is charged. *See* TEX. CODE CRIM. PROC. ANN. art. 17.01; *Ex parte Rodriguez*, 595 S.W.2d 549, 550 (Tex. Crim. App. [Panel Op.] 1980); *Ex parte Vasquez*, 558 S.W.2d 477, 479 (Tex. Crim. App. 1977).

In exercising its discretion in setting the dollar amount of bail and any conditions of bail, a trial court must consider the following statutory factors:

1. Bail shall be sufficiently high to give reasonable assurance that a criminal defendant will appear at trial and comply with other court orders and conditions of the bond;

2. The power to require bail is not to be used as an instrument of oppression;

3. The nature of the offenses and the circumstances of their commission;

4. The ability to make bail is to be regarded, and proof may be taken on this point; and

5. The future safety of a victim of the alleged offenses and the community.

See TEX. CODE CRIM. PROC. ANN. art. 17.15; *see also Ludwig v. State*, 812 S.W.2d 323, 324 (Tex. Crim. App. 1991); *Golden v. State*, 288 S.W.3d 516, 518 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). In determining an appropriate amount of bail, the trial court may also consider a defendant's work record, his family and community ties, his residence, his prior criminal record, his conformity with previous bond conditions, and the aggravating factors alleged to have been involved in the charged offenses. *See Ex parte Rubac*, 611 S.W.2d at 849–50; *Montalvo*, 315

S.W.3d at 593. The burden of proof is on the defendant who claims that his bail is excessive. *See Ex parte Rubac*, 611 S.W.2d at 849; *Montalvo*, 315 S.W.3d at 592.

The trial court has set appellant's bail at $75,000 for each of the ten felony offenses of possession of child pornography with which appellant is charged for a total bail amount of $750,000. We review the factors used by the trial court to set the amounts of appellant's bail to determine whether bail is excessive.

A. Sufficiency of Bail

The primary purpose of pretrial bail is to secure a defendant's appearance at trial on the offenses with which he is charged. *See* TEX. CODE CRIM. PROC. ANN. art. 17.01; *Ex parte Rodriguez*, 595 S.W.2d at 550; *Ex parte Vasquez*, 558 S.W.2d at 479. Appellant's work history and ties to the community bear on the amount of bail that will suffice to ensure that appellant will appear at trial. *See Ex parte Tata*, 358 S.W.3d at 400; *Richardson v. State*, 181 S.W.3d 756, 759 (Tex. App.—Waco 2005, no pet.). Here, there is nothing in the record that would suggest that appellant would fail to appear for trial. *See, e.g.*, *Ex parte Williams*, No. 12-21-00032-CR, 2021 WL 2816404, at *2 (Tex. App.—Tyler June 30, 2021, no pet.) (mem. op., not designated for publication); *Ex parte Hernandez*, Nos. 14-18-00955-CR, 14-18-00957-CR, 14-18-00958-CR, 14-18-00959-CR, 14-18-00960-CR, 14-18-00961-CR, 14-18-00962-CR, 2019 WL 1388640, at *5–7 (Tex. App.—Houston [14th Dist.] Mar. 28, 2019, no pet.) (mem. op., not designated for

publication) (reducing bail amount where "[t]here [was] no evidence that [defendant had] ever failed to appear in court, or that he [had] a history of fleeing the jurisdiction"); *Ex parte Smith*, Nos. 09-06-104-CR, 09-06-105-CR, 2006 WL 1511480, at *5, *7 (Tex. App.—Beaumont May 31, 2006, no pet.) (mem. op., not designated for publication) (noting there was "no evidence . . . that, if released, [defendant] would not appear as required by the trial court"); *see also Ex parte Ramirez-Hernandez*, No. 04-21-00340-CR, --- S.W.3d ---, 2022 WL 218770, at *4–11 (Tex. App.—San Antonio Jan. 26, 2022, no pet.) (concluding trial court erred in denying defendant's application for writ of habeas corpus to reduce his cumulative bail where State presented no evidence showing defendant ever failed to appear for court appearance and "there [was] no evidence that, if released, [defendant] would not appear as required by the trial court").

Camarillo, appellant's former girlfriend and friend, testified, at the hearing on appellant's pretrial applications for writ of habeas corpus, that appellant was thirty-four years old and from Houston. Appellant graduated from high school in Spring and attended "some college" in the area. Appellant did not have any significant ties to foreign countries. Before being taken into custody in August 2021, appellant worked at FedEx "for a good amount of time." Appellant was employed when Camarillo initially met him three years ago. In Camarillo's opinion, appellant was not a "flight risk." *See Ex parte Nimnicht*, 467 S.W.3d 64, 68 (Tex. App.—San

Antonio 2015, no pet.) ("A defendant's ties to the community in which he lives can be an assurance he will appear in court for trial. A court's review of this factor includes an assessment of the defendant's residence history, family's ties to the community, and work history." (internal citations omitted)); *see, e.g.*, *Ex parte Flores*, Nos. 12-21-00079-CR, 12-21-00080-CR, 2021 WL 3922919, at *1, *5–6 (Tex. App.—Tyler Sept. 1, 2021, no pet.) (mem. op., not designated for publication) (holding total bail amount of $825,000 excessive where defendant charged with offenses of aggravated sexual assault of child, "sexual performance by a child," and "indecency with a child" because "there [was] no specific evidence that [defendant] intend[ed] to flee").

In his pretrial applications for writ of habeas corpus, appellant stated that he had "significant ties to the community and [had] been a resident of Harris County . . . for [thirty-three] years." Before his arrest in August 2021, appellant was living with his mother in Spring. Appellant had "no ties outside of the [United States] and [had] only been overseas while he was enlisted in the United States Marine Corps." Appellant was honorably discharged from the United States Marine Corps in 2014 and then "served an additional [four] years in the Army National Guard" before receiving an honorable discharge in 2018. Since that time, appellant

had "attended college and . . . started a job working as a ramp attendant for FedEx."[6] *See Ex parte Nimnicht*, 467 S.W.3d at 68; *Ex parte Sabur-Smith*, 73 S.W.3d 436, 441 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (where defendant charged with second-degree felony offense of sexual assault, appellate court held $150,000 bail amount to be excessive and reduced bail to $30,000, while noting defendant "had lived in the community for three years, had extensive family ties to the area," and had good work record); *see also Ex parte Smith*, 2006 WL 1511480, at *1–7 (where defendant charged with offenses of aggravated sexual assault of child and indecency with child, appellate court held $250,000 bail amount for aggravated sexual assault offense and $200,000 bail amount for indecency with child offense to be excessive and reduced bail to $50,000 and $25,000, respectively, while noting defendant had excellent work record, no criminal history, and significant ties to prosecuting county).

The Certificate of Release or Discharge from Active Duty from the United States Marine Corps, a copy of which the trial court admitted into evidence at the hearing on appellant's pretrial applications for writ of habeas corpus, states that appellant entered active duty in 2010 and was released from active duty in 2014. As to appellant's "Place of Entry into Active Duty," the certificate lists Houston, and as

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[6] Appellant attached a declaration to his pretrial applications for writ of habeas corpus "declar[ing] under penalty of perjury" that the statements made in his applications were "true and correct."

to appellant's "Home of Record at Time of Entry," the certificate lists Spring. As to appellant's nearest relative at the time of appellant's release from active duty, the certificate lists appellant's mother and her address in Spring.

At the hearing on appellant's pretrial applications for writ of habeas corpus, the State presented no witnesses and failed to submit any evidence to the trial court in an attempt to controvert appellant's evidence presented to the trial court. *See Ex parte Smith*, 2006 WL 1511480, at *5 (holding bail amounts set by trial court were excessive when State failed to produce evidence to controvert or rebut defendant's evidence). And the State and appellant's counsel told the trial court at the hearing on appellant's pretrial applications for writ of habeas corpus that they had agreed that appellant's bail should be set at $15,000 for each of the ten felony offenses with which appellant is charged. The State, in its closing argument at the hearing, "ask[ed] for $15,000 for each bond – for each case" based on appellant's employment with FedEx, "his community ties with his family being in Spring," his military history, and the fact that appellant had been in custody since August 2021. *See Ex parte Nimnicht*, 467 S.W.3d at 68. It is safe to assume that the State, in agreeing to a $15,000 bail amount in each of appellant's ten cases, believed that amount to be sufficient to give reasonable assurance that appellant would comply with the trial court's orders and appear at trial. *See Ex parte Williams*, 2021 WL 2816404, at *2 ("It is safe to assume that the State, in agreeing to a total bail of

$100,000, believed this amount sufficient to give reasonable assurance that [defendant] would comply with court orders and appear for trial."); *see also Ex parte Cravens*, 220 S.W.2d 467, 468 (Tex. Crim. App. 1949) (State agreed with defendant "that bail in sum of $1[,]500 would be reasonable and sufficient" and trial court "by virtue of the stipulation . . . set the amount of [defendant's] bail at $1[,]500").

This evidence weighs in favor of a determination that the bail amounts set by the trial court were excessive and in favor of a reduction of the bail amount set in each of appellant's ten cases. *See Ex parte Tata*, 358 S.W.3d at 400 (evidence of family and community ties to area weighed in favor of reduction of bail amount).

B. Nature and Circumstances of the Offenses

The trial court must consider the nature and surrounding circumstances of the charges against appellant in setting his bail amounts. *See* TEX. CODE CRIM. PROC. ANN. art. 17.15(3); *Golden*, 288 S.W.3d at 518; *see also Ex parte Sells*, No. 02-20-00143-CR, 2020 WL 7639574, at *3 (Tex. App.—Fort Worth Dec. 23, 2020, no pet.) (mem. op., not designated for publication) (noting "bail is not set in a vacuum" and courts "must consider the nature and surrounding circumstances of the charges against" defendant); *Ex parte Nimnicht*, 467 S.W.3d at 67 ("When determining reasonable bail, a trial court shall give the most weight to the nature of the offense and the length of the possible sentence."). When the offenses charged are serious and involve potentially lengthy sentences, a defendant may have a strong

incentive to flee the jurisdiction and bail must be set sufficiently high enough to secure the defendant's presence at trial. *See Ex parte Castillo-Lorente*, 420 S.W.3d 884, 888 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also Compian v. State*, 7 S.W.3d 199, 200–01 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (nature of offense plays role in fixing amount of pretrial bail because "where the nature of the offense is serious and involves aggravating factors, the likelihood of a lengthy prison sentence following trial is great"; thus, pretrial bail in such cases "should be set sufficiently high to secure the presence of the [defendant] at trial").

Appellant is charged with the ten separate felony offenses of possession of child pornography. *See* TEX. PENAL CODE ANN. § 43.26(a). Each offense constitutes a third-degree felony offense. *See id.* § 43.26(d); *see also Assousa v. State*, No. 05-08-00007-CR, 2009 WL 1416759, at *4 (Tex. App.—Dallas May 21, 2009, pet. ref'd). Generally, the felony offense of possession of child pornography is considered to be serious in nature. *See Ex parte Bentley*, No. 10-15-00301-CR, 2015 WL 9592456, at *3 (Tex. App.—Waco Dec. 31, 2015, no pet.) (mem. op., not designated for publication) ("[P]ossession of child pornography is a serious offense."); *Savery v. State*, 767 S.W.2d 242, 245 (Tex. App.—Beaumont 1989, no pet.) ("The Texas Legislature has obviously determined that it was necessary to prohibit possession of child pornography in order to halt sexual exploitation and abuse of children. . . . [C]hild pornography is . . . damaging to the child

victim . . . inasmuch as the helpless child's actions are reduced and memorialized on a recording or film and that type of pornography may haunt and damage the child for many long years in the future . . . .").

Yet, we note that there was no evidence presented at the hearing on appellant's pretrial applications for writ of habeas corpus about the nature and circumstances of the ten offenses with which appellant is charged. *See, e.g.*, *Ex parte Williams*, 2021 WL 2816404, at *2–4 (where "[n]o . . . evidence was presented regarding the nature or details of the" sexual assault of child offenses and indecency of child offenses that defendant allegedly committed, appellate court concluded that trial court erred in setting appellant's bail at $75,000 for each offense for total bail amount of $600,000). And the trial court did not take judicial notice of the district clerk's record in any of appellant's ten cases, which would have, at the time, contained the complaints and the probable cause affidavits related to appellant's cases and could have provided details as to the nature and circumstances of the offenses with which appellant is charged.[7] *Cf. Ex parte Jackson*, 257 S.W.3d 520, 522–23 (Tex. App.—

[7] The State, in closing argument at the hearing on appellant's pretrial applications for writ of habeas corpus, attempted to explain to the trial court the nature and circumstances of the offenses with which appellant is charged, but counsel's statements during closing argument are not evidence. *See Mata v. State*, 1 S.W.3d 226, 228 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.). The State did not present any witnesses nor submit any evidence to the trial court as to the nature and circumstances of the felony offenses with which appellant is charged. Further, even if we were to consider the statements made by the State during its closing argument that briefly discussed the offenses with which appellant is charged, as the State urges us to do in its appellee's brief, we note that the State, with full knowledge of the

Texarkana 2008, no pet.) (noting although little testimony was given at hearing on defendant's habeas application, trial court took judicial notice of complaint, arrest warrant, and attachments and thus "had information before it setting out the nature of the offense").

As to the potential punishment appellant faces for the third-degree felony offenses with which he is charged,[8] each third-degree felony offense has a range of punishment of confinement for two to ten years and a fine not to exceed $10,000. *See* TEX. PENAL CODE ANN. § 12.34 ("Third Degree Felony Punishment"). If appellant is found guilty of more than one felony offense of possession of child pornography, the trial court has the discretion to order appellant's sentences to run consecutively. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (trial court vested with discretion to order two or more sentences to run either concurrently or consecutively); *Beedy v. State*, 250 S.W.3d 107, 110 (Tex. Crim. App. 2008); *see*

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details of the alleged offenses, still asked the trial court to set appellant's bail at $15,000 for each of the ten felony offenses. *See Ex parte Williams*, No. 12-21-00032-CR, 2021 WL 2816404, at *2 (Tex. App.—Tyler June 30, 2021, no pet.) (mem. op., not designated for publication) ("It is safe to assume that the State, in agreeing to a total bail of $100,000, believed this amount sufficient to give reasonable assurance that [defendant] would comply with court orders and appear for trial.").

[8] "[W]hen considering the nature of the offense[s] [charged] in setting [a defendant's] bail" amounts, the trial court may consider "the punishment permitted by law" for the offenses with which the defendant is charged. *See Ex parte Vasquez*, 558 S.W.2d 477, 480 (Tex. Crim. App. 1977); *see also Ex parte Ivey*, 594 S.W.2d 98, 99 (Tex. Crim. App. [Panel Op.] 1980).

also DeLeon v. State, 294 S.W.3d 742, 745 (Tex. App.—Amarillo 2009, pet. ref'd) ("Generally, a defendant has no right to serve sentences imposed for different offenses concurrently . . . ."). Thus, if appellant is found guilty of all ten felony offenses of possession of child pornography and his punishment is assessed at confinement for ten years for each offense, then he could ultimately face confinement for one hundred years if the trial court orders his sentences to run consecutively. *See, e.g.*, *Ex parte Bentley*, 2015 WL 9592456, at *3 (noting possession of child pornography "is a third[-]degree felony [offense] and carries a maximum punishment of [ten] years" and defendant's sentences could be "stacked"). And if convicted of the third-degree felony offense of possession of child pornography, appellant will be required to register as a sex-offender. *See* TEX. CODE CRIM. PROC. ch. 62; *Ex parte Castille*, No. 01-20-00639-CR, 2021 WL 126272, at *4 (Tex. App.—Houston [1st Dist.] Jan. 14, 2021, no pet.) (mem. op., not designated for publication). Nevertheless, it is possible that if appellant is found guilty of any of the felony offenses of possession of child pornography, his punishment may not include confinement and instead he may be placed on community supervision. *See, e.g.*, *Ex parte Jones*, 473 S.W.3d 850, 853 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (defendant convicted of three third-degree felony offenses of possession of child pornography and placed on community supervision); *Brackens v. State*, 312 S.W.3d 831, 833 (Tex. App.—

Houston [1st Dist.] 2009, pet. ref'd) (defendant convicted of third-degree felony offense of possession of child pornography and placed on community supervision).

Although the seriousness of the ten third-degree felony offenses with which appellant is charged and the potential sentences appellant faces weigh against a determination that the bail amounts set by the trial court in appellant's ten cases were excessive,[9] we must remember that courts consider the nature and surrounding circumstances of the charges against a defendant in setting his bail because when the offenses charged are serious and involve potentially lengthy sentences, a defendant may have a strong incentive to flee the jurisdiction and bail must be set sufficiently high to secure the defendant's presence at trial. *See Ex parte Castillo-Lorente*, 420 S.W.3d at 888; *see also Ex parte Nimnicht*, 467 S.W.3d at 67 ("A court may also consider the possibility a[] [defendant's] reaction to a potential lengthy imprisonment might be to not appear for trial . . . ."); *Compian*, 7 S.W.3d at 200–01. Here, however, the State told the trial court at the hearing on appellant's pretrial applications for writ of habeas corpus that it believed that a $15,000 bail amount in

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[9] *See Ex parte Williams*, Nos. 12-18-00174-CR, 12-18-00175-CR, 2018 WL 5961309, at *2 (Tex. App.—Tyler Nov. 14, 2018, no pet.) (mem. op., not designated for publication) ("The . . . severe punishment ranges to which [defendant] may be subjected weigh[] in favor of the trial court's decision [to deny defendant's habeas application and] not to reduce the amount of his bonds."); *see, e.g.*, *Ex parte Nimnicht*, 467 S.W.3d 64, 67–68 (Tex. App.—San Antonio 2015, no pet.) (considering defendant's potential sentence of confinement between two and ten years and fine of up to $10,000 to be "a significant potential sentence" weighing against bail reduction).

each of appellant's ten cases was all that was necessary to give reasonable assurance that appellant would comply with the trial court's orders and appear at trial.[10] *See Ex parte Williams*, 2021 WL 2816404, at *2 ("It is safe to assume that the State, in agreeing to a total bail of $100,000, believed this amount sufficient to give reasonable assurance that [defendant] would comply with court orders and appear for trial."). Thus, we cannot conclude that the nature and circumstances of the ten felony offenses with which appellant is charged necessarily weigh against a determination that the bail amounts set by the trial court in appellant's ten cases were excessive or that reduction of the bail amounts set in each of appellant's ten cases is not warranted.

C. Future Safety of the Victim and Community

The trial court must also consider the future safety of the victim of the alleged offenses and the community in setting appellant's bail amounts. *See* TEX. CODE CRIM. PROC. ANN. art. 17.15(5); *Golden*, 288 S.W.3d at 518. We note the seriousness of the third-degree felony offenses with which appellant has been charged. *See Ex parte Bentley*, 2015 WL 9592456, at *3; *Savery*, 767 S.W.2d at 245; *but see Ex parte Williams*, 2021 WL 2816404, at *4 ("The repellent nature of

[10] At the hearing on appellant's pretrial applications for writ of habeas corpus, Camarillo, appellant's former girlfriend and friend, testified that appellant was not a "flight risk," and she believed that he would "abide by" any bond conditions that the trial court imposed.

the accusation does not diminish the presumption of the [defendant's] innocence."). But there is no evidence in the record as to the future safety of any victim of the alleged offenses or that appellant, with no prior criminal history, is a danger to the community. *See, e.g.*, *Ex parte Williams*, 2021 WL 2816404, at *2–4 (where defendant charged with felony offenses of sexual assault of child and indecency with child, noting defendant had no criminal record and "[n]o evidence was presented that [defendant's] release pose[d] a danger to the alleged victim"); *see also Ex parte Ramirez-Hernandez*, 2022 WL 218770, at *5 (explaining "[a] defendant's criminal history must be evaluated to determine whether he presents a danger to the community," but where defendant had "never been charged with a previous crime," it weighed against setting high bail amount).

At the hearing on appellant's pretrial applications for writ of habeas corpus, Camarillo, appellant's former girlfriend and friend, testified that appellant is thirty-four years old. Appellant served in the United States Marine Corps for four years before being honorably discharged. He then served in the Army National Guard for four years before being honorably discharged. Appellant did not have a criminal history. And before being taken into custody, he worked at FedEx "for a good amount of time." Camarillo stated that appellant was "a law-abiding citizen." In Camarillo's opinion, appellant was not a "flight risk," and she believed that he would "abide by" any bond conditions that the trial court imposed.

1. In his pretrial applications for writ of habeas corpus,[11] appellant stated that before his arrest in August 2021, he was living with his mother in Spring.[12] *Cf. Ex parte Castille*, 2021 WL 126272, at *1, *6–7 (where defendant charged with five felony offenses of possession of child pornography, one felony offense of compelling prostitution of child, and one felony offense of "trafficking of a child" and he "averred that he resided with his two minor sons and [had] a minor daughter, who he indicated [was] the complainant," appellate court upheld bail amounts set at $25,000 for each offense of possession of child pornography, $100,000 for offense of compelling prostitution of minor, and $100,000 for offense of trafficking of a child). Appellant also explained that he was honorably discharged from the United States Marine Corps in 2014 and then "served an additional [four] years in the Army National Guard" before receiving an honorable discharge in 2018. Since that time, appellant had "attended college and . . . started a job working as a ramp attendant for FedEx." Appellant asserted that he had "no prior criminal history and all charges [against him arose] out of the same

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11 Appellant attached a declaration to his pretrial applications for writ of habeas corpus "declar[ing] under penalty of perjury" that the statements made in his applications were "true and correct."

12 There is no evidence that appellant lives with minor children.

transaction." Because appellant had "no criminal history and ha[d] strong ties to the community," appellant stated that he was "not a danger to the community or a flight risk." According to appellant, the trial court could "set conditions of [his release on] bond . . . such as [a] curfew, electronic monitoring, and restriction on access to the internet." *See Ex parte Williams*, 619 S.W.2d 180, 183 (Tex. Crim. App. 1981) (ordering bail amount reduced from $100,000 to $15,000 where defendant "expressed a willingness to comply with whatever reasonable conditions attending his release on bail the [trial] court might impose in light of the nature of the offenses with which he" was charged); *Ex parte Bentley*, 2015 WL 9592456, at *1–3 (where defendant was "indicted on six counts of possession of child pornography," holding bail amount of $250,000 was excessive when defendant had no criminal history, had significant ties to community, had family living in area, and had stable work history).

At the hearing on appellant's pretrial applications for writ of habeas corpus, the State presented no witnesses nor submitted any evidence to the trial court in an attempt to controvert appellant's evidence presented to the trial court. *See Ex parte Smith*, 2006 WL 1511480, at *5 (holding bail amounts set by trial court were excessive when State failed to produce evidence to controvert or rebut defendant's

evidence). The State, in its closing argument at the hearing on appellant's pretrial applications for writ of habeas corpus, requested that the trial court set bail at $15,000 for each of the ten felony offenses with which appellant is charged. The State made such a request based on appellant's lack of criminal history, his employment with FedEx, "his community ties with his family being in Spring," and his military history.[13]

The evidence weighs in favor of a determination that the bail amounts set by the trial court were excessive and in favor of a reduction of the bail amount set in each of appellant's ten cases. *See Ex parte Ramirez-Hernandez*, 2022 WL 218770, at *6 (where no evidence presented about lack of safety for alleged victim if defendant released, it "weigh[ed] in favor of a lower bond"); *Ex parte Williams*, 2021 WL 2816404, at *2–4 (concluding trial court erred in setting total bail amount of $600,000 where defendant had "a good work record and no prior criminal history" and "[t]here [was] nothing in the record indicating that [defendant's] . . . release put the safety of the alleged victim at risk").

[13] The State, in its appellee's brief, does not argue that the future safety of any victim of the alleged offenses or the future safety of the community necessitate a bail amount set at $75,000 for each of the ten offenses with which appellant is charged. It does not assert that appellant is a danger to the community.

D. Ability to Make Bail

Although the ability or inability to make bail does not control the amounts of bail set, it is a factor that the trial court must consider in setting a defendant's bail amounts. *See* TEX. CODE CRIM. PROC. ANN. art. 17.15(4); *Ex parte Rodriguez*, 595 S.W.2d at 550; *Golden*, 288 S.W.3d at 518–20. A defendant's inability to pay the bail amounts set by the trial court does not automatically render the amounts excessive. *See Ex parte Vance*, 608 S.W.2d 681, 683 (Tex. Crim. App. 1980); *Ex parte Scott*, 122 S.W.3d 866, 870 (Tex. App.—Fort Worth 2003, no pet.). If the defendant's ability to make bail controlled the amount that the defendant paid, then the trial court's role in setting the bail amounts would be eliminated and the defendant would be in the position to determine the amounts of bail. *Milner*, 263 S.W.3d at 150. But bail set in an amount that cannot be satisfied has the potential to displace the presumption of innocence. *See Ex parte Peyton*, No. 02-16-00029-CV, 2016 WL 2586698, at *4 (Tex. App.—Fort Worth May 5, 2016) (mem. op., not designated for publication), *pet. dism'd*, No. PD-0677-16, 2017 WL 1089960 (Tex. Crim. App. Mar. 22, 2017) (not designated for publication); *Ex parte Bogia*, 56 S.W.3d 835, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Appellant has been in custody since he was arrested in August 2021. Appellant's inability to "make bail" or post a bond since that time is a factor that must be considered. *See Ex parte Rincon*, Nos. 04-13-00715-CR to

04-13-00718-CR, 2014 WL 2443870, at *3 (Tex. App.—San Antonio May 28, 2014, no pet.) (mem. op., not designated for publication) (defendant's "inability to make bail for . . . months is a factor to be considered"); *Ex parte Henson*, 131 S.W.3d 645, 650–51 (Tex. App.—Texarkana 2005, no pet.) (noting "[t]here [was] no evidence [that defendant had] previously been able to post a significant bond," when determining amount of bail set by trial court to be excessive); *Ex parte Sabur-Smith*, 73 S.W.3d at 440–41 (where defendant had "remained in jail [for] more than 110 days without making bail," holding he "established [that] he did not have access to $15,000 to pay a bond premium, or possess $150,000 of assets to serve as security for a bond in that amount" and $150,000 bail amount set by trial court was excessive); *Ex parte Bogia*, 56 S.W.3d at 837, 840 (considering defendant was confined in jail for six months as evidence that he could not make bail and concluding that $360,000 bail amount was "less justifiable the longer" pretrial detention continued). At the hearing on appellant's pretrial applications for writ of habeas corpus, Camarillo, appellant's former girlfriend and friend, stated that she had talked to appellant's family and the family could not afford the current bail amount that was set. Appellant's trial counsel, in his closing argument at the hearing, told the trial court that appellant and the State had agreed for bail to be set at $15,000 for each of the ten felony offenses with which appellant is charged.

While ordinarily a defendant must present evidence of his specific assets or financial resources and explain what efforts, if any, were made by appellant to furnish bail in the amounts set by the trial court,[14] given that appellant has been in custody since August 2021, his inability to make bail is clear. *See Ex parte Dueitt*, 529 S.W.2d 531, 532 (Tex. Crim. App. 1975) (excusing absence of such evidence because court should not require defendant to do "a useless thing" (internal quotations omitted)); *Ex parte Bellanger*, No. 12-09-00246-CR, 2009 WL 4981457, at *3 n.3 (Tex. App.—Tyler Dec. 23, 2009, no pet.) (mem. op., not designated for publication) (not requiring defendant to show "he [had] tried and failed to make bail"); *Ex parte Bogia*, 56 S.W.3d at 837. In asking the trial court to set appellant's bail at "$15,000 for each bond – for each case," the State, in its closing argument at the hearing on appellant's pretrial applications for writ of habeas corpus, stated that it based its request in part on the fact that appellant had been in custody since August 2021—apparently recognizing appellant's inability to make bail at the high dollar amount set by the trial court.

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[14] *See, e.g.*, *Ex parte Bordelon*, No. 04-20-00364-CR, 2021 WL 1988259, at *7 (Tex. App.—San Antonio May 19, 2021, pet. ref'd) (mem. op., not designated for publication) ("A defendant should ordinarily offer evidence of his available resources and his unsuccessful attempts to post bail in the current amount. To show that he is unable to make bail, a defendant generally must show that his funds and his family's funds have been exhausted." (internal citations and quotations omitted)).

The evidence of appellant's inability to make bail, although not determinative, weighs in favor of a determination that the bail amounts set by the trial court were excessive and in favor of a reduction of the bail amount set in each of appellant's ten cases.

E. Whether Bail is Being Used as an Instrument of Oppression

Bail needs to be sufficiently high to give reasonable assurance that a defendant will appear at trial for the offenses charged. *See Ex parte Dupuy*, 498 S.W.3d 220, 232 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Yet, when bail is set so high that a person cannot realistically pay for it, the trial court essentially "displaces the presumption of innocence and replaces it with a guaranteed trial appearance." *Id.* at 233 (internal quotations omitted). Bail may not be used as an instrument of oppression. *See Ex parte Guerra*, 383 S.W.3d 229, 233–34 (Tex. App.—San Antonio 2012, no pet.); *see also* TEX. CODE CRIM. PROC. ANN. art. 17.15(2). Bail set in a particular amount becomes oppressive when it assumes that the defendant cannot afford bail in that amount and when it is set for the express purpose of forcing the defendant to remain incarcerated. *See Ex parte Nimnicht*, 467 S.W.3d at 70; *Ex parte Durst*, 148 S.W.3d 496, 499 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (where bail amount set "solely to prevent [defendant] from getting out of jail," "bail [was] being used as an instrument of oppression").

Here, there is no direct evidence that the trial court set appellant's bail amounts at $75,000 for each of the ten felony offense of possession of child pornography, for a total bail amount of $750,000, to keep appellant incarcerated. *See Ex parte Dupuy*, 498 S.W.3d at 233; *Ex parte Nimnicht,* 467 S.W.3d at 70; *cf. Ex parte Harris*, 733 S.W.2d 712, 714 (Tex. App.—Austin 1987, no pet.) (trial court stated, "I'd rather see him in jail than to see someone's life taken"). But the Texas Code of Criminal Procedure only requires bail to be set in an amount that is "sufficiently high to give reasonable assurance" a defendant will appear at trial. *See* TEX. CODE CRIM. PROC. ANN. art. 17.15(1); *see also Ex parte Dupuy,* 498 S.W.3d at 232 (bail needs to be sufficiently high to give reasonable assurance that defendant will appear at trial for the offenses charged). "It is not the purpose of bail . . . to 'guarantee' a defendant's appearance at trial." *Ex parte Bogia,* 56 S.W.3d 840.

At the hearing on appellant's pretrial applications for writ of habeas corpus, the State asked the trial court to set bail at $15,000 for each felony offense with which appellant is charged, for a total bail amount of $150,000. Instead, the trial court set bail at $75,000 for each of the felony offenses with which appellant is charged, for a total bail amount of $750,000—five times higher than what the State at the hearing believed to be an amount sufficient to give reasonable assurance that appellant would comply with the trial court's orders and appear at trial. *See Ex parte Williams*, 2021 WL 2816404, at *2 ("It is safe to assume that the State, in agreeing

to a total bail of $100,000, believed this amount sufficient to give reasonable assurance that [defendant] would comply with court orders and appear for trial."). This evidence weighs in favor of a determination that the bail amounts set by the trial court were excessive and in favor of a reduction of the bail amount set in each of appellant's ten cases. *See Ludwig*, 812 S.W.2d at 325 (bail amount approaching seven figures is almost never required even in capital cases).

F. Guidance from Other Caselaw

Although the appropriate amount of bail is an individualized determination, a review of other cases can be instructive. *Ex parte Dupuy*, 498 S.W.3d at 233. "Courts traditionally set somewhat higher bail in cases involving offenses against children." *Ex parte Flores*, 2021 WL 3922919, at *5. But "the right to reasonable bail is a complement to and based on the presumption of innocence" and "[t]he repellent nature of the accusation[s] [against a defendant] does not diminish the presumption of [his] innocence." *Id.*; *see also Nguyen v. State*, 881 S.W.2d 141, 143 (Tex. App.—Houston [1st Dist.] 1994, no pet.).

Here, the trial court set appellant's bail amount at $75,000 for each of the ten felony offenses with which appellant is charged, making the total bail amount $750,000. *Cf. Ludwig*, 812 S.W.2d at 325 (bail amount approaching seven figures is almost never required even in capital cases); *Ex parte Dupuy*, 498 S.W.3d at 233 (noting "amounts between $500,000 and $750,000 have been upheld in murder

cases"). The bail amounts set by the trial court are not necessarily akin to other cases involving a defendant charged with the third-degree felony offense of possession of child pornography. *See*, *e.g.*, *Ex parte Castille*, 2021 WL 126272, at *4, *7 (holding trial court did not err in denying defendant's request for lower bail amount, where bail was set at $25,000 for each possession of child pornography felony offense); *Ex parte Bentley*, 2015 WL 9592456, at *1–3 (holding trial court erred in setting bail at $250,000 where defendant "indicted on six counts of possession of child pornography"; appellate court set bail at $50,000 for all "six counts of possession of child pornography"); *Ex parte Cosby*, Nos. 07-02-0482-CR, 07-02-483-CR, 2003 WL 21994760, at *2 (Tex. App.—Amarillo Aug. 21, 2003, no pet.) (mem. op., not designated for publication) (holding trial court did not err in declining to reduce bond amount, which was set at "$100,000 for [seventeen] counts of possession of child pornography," which amounted to "less than $6,000 per count"); *see also Ex parte Flores*, 2021 WL 3922919, at *1–6 (holding total bail amount of $825,000 to be excessive, even though defendant charged with offenses of aggravated sexual assault of child, "sexual performance by a child," and "indecency with a child").

An examination of other cases involving the same offenses with which appellant is charged weighs in favor of a determination that the bail amounts set by the trial court were excessive and in favor of a reduction of the bail amount set in each of appellant's ten cases.

"We acknowledge that setting reasonable bail presents trial courts with the difficult task of weighing the specific facts of a case against many, often contravening factors, and often in the face of scant evidence." *Ex parte Ramirez-Hernandez*, 2022 WL 218770, at *11 (internal quotations omitted). We note that there is no indication that the combined $750,000 bail amount set by the trial court was used as an instrument of oppression and that the possible sentences that appellant faces if convicted are not insignificant. But, given the balance of all the relevant factors discussed above,[15] we conclude that the trial court erred by setting appellant's bail at $75,000 for each of the ten felony offenses of possession of child pornography for a total bail amount of $750,000 because the bail amounts were excessive. And we hold that the trial court erred in denying in part appellant's pretrial applications for writ of habeas corpus.

We sustain appellant's sole issue.

Conclusion

We reverse the orders of the trial court and remand the cases to the trial court for further proceedings consistent with this opinion.

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[15] *See* TEX. CODE CRIM. PROC. ANN. art. 17.15; *Ex parte Rubac*, 611 S.W.2d 848, 849–50 (Tex. Crim. App. 1981); *Montalvo v. State*, 315 S.W.3d 588, 592–93 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.

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