Opinion issued November 29, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00544-CR

EX PARTE MIGUEL ANGEL NICANOR BARTOLO A/K/A MIGUEL A NICANOR BARTOLO, Appellant

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On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1771311

MEMORANDUM OPINION

Appellant, Miguel Angel Nicanor Bartolo, also known as Miguel A Nicanor Bartolo, challenges the trial court's order denying his pretrial application for writ of

habeas corpus.[1] In his sole issue, appellant contends that the trial court erred in denying him habeas relief.

We affirm.

Background

Appellant is charged with the felony offense of murder.[2] A Harris County Grand Jury issued a true bill of indictment, alleging that appellant, on or about April 16, 2022, "unlawfully, intentionally and knowingly cause[d] the death of David Valente Fiscal Ortega," complainant 1, "by shooting . . . [c]omplainant [1] with a deadly weapon, namely a firearm." The indictment also alleges that appellant, on or about April 16, 2022, "unlawfully intend[ed] to cause serious bodily injury to" complainant 1, and "did cause the death of . . . [c]omplainant [1,] by intentionally and knowingly committing an act clearly dangerous to human life, namely shooting . . . [c]omplainant [1] with a deadly weapon, namely, a firearm." Appellant was arrested and taken into custody in May 2022, and the trial court set appellant's bail amount at $500,000.

Pretrial Application for Writ of Habeas Corpus

Appellant filed a pretrial application for writ of habeas corpus, arguing that his confinement and restraint were illegal because he had "a high bond." Appellant

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

2 *See* TEX. PENAL CODE ANN. § 19.02(b), (c).

requested that the trial court "allow[] bail in a reasonable amount" so that he had the "opportunity to obtain release from incarceration pending trial." Appellant did not attach any exhibits to his pretrial application for writ of habeas corpus.

Hearing

The trial court held a hearing on appellant's pretrial application for writ of habeas corpus. At the hearing, Marie Nicanor Trevino, appellant's older sister, testified that appellant was "not a bad person" and he was "a caring brother." According to Trevino, appellant's bail was set at $500,000, and the bail bond companies required appellant's family to pay $50,000 for appellant to be released. Appellant's family did not "have that money." They did not have property, "any expensive jewelry," or "stocks or bonds" to give as collateral. There was no one that could loan appellant's family the money.

Trevino testified that she worked at a grocery store and appellant's parents "work[ed] paycheck by paycheck." Appellant's father "work[ed] in . . . landscaping" "almost all day."

Trevino asked that the trial court lower appellant's bail amount to $100,000 or less because appellant's family "want[ed] him home." Trevino stated that appellant's family would "make sure that he follow[ed] the rules." If appellant was given "an ankle monitor" or "put . . . on house arrest," appellant's family would make sure that he abided by the conditions of his release. Appellant would live with

his parents, who lived in Houston, Texas, and they would "make sure that he stay[ed] home and he c[ame] to court whenever" he was required to appear. Either appellant's mother or Trevino would stay at home with appellant.

The trial court admitted into evidence a copy of the indictment alleging that appellant committed the felony offense of murder on April 16, 2022. The indictment lists May 12, 2022 as appellant's arrest date for the felony offense of murder. The trial court also admitted into evidence a copy of another indictment, alleging that on May 11, 2022, appellant "unlawfully[] [and] intentionally fl[ed] from T. Serrano," complainant 2, "a peace officer employed by the Houston Police Department," who was "lawfully attempting to arrest [appellant], and [appellant] knew that . . . [c]omplainant [2] was a peace officer attempting to arrest [appellant], and [appellant] used a motor vehicle while he was in flight."[3] This indictment lists May 12, 2022 as appellant's arrest date for the felony offense of evading arrest or detention in a motor vehicle.

The trial court also took judicial notice that at the time the alleged murder was committed, appellant was subject to "general order bond[s]" that were issued on November 19, 2021 after appellant was charged with the misdemeanor offenses of

[3] *See id.* § 38.04 ("Evading Arrest or Detention").

unlawful carrying of a weapon[4] and driving while intoxicated.[5] After receiving the "two general order bonds," appellant was released from custody on bond in November 2021. The trial court admitted into evidence a copy of the bond conditions related to appellant's charge for the misdemeanor offense of unlawful carrying of a weapon, which stated, as a condition of appellant's release on bond, that appellant was not to possess any firearms, ammunition, or other weapons.

Trial Court's Ruling

After the hearing on appellant's pretrial application for writ of habeas corpus, the trial court denied appellant's application. The trial court "le[ft] the bond on [appellant's] murder charge [set] at $500,000." Appellant remains in custody for the felony offense of murder with which he is charged.

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

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4 *See id.* § 46.02.

5 *See id.* § 49.04.

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 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 denying him habeas relief because he is entitled to a "bond in a reasonable amount."

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 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.").

However, a defendant's right to pretrial bail 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. arts. 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 . . . ."), 17.15 ("Rules for setting amount of bail"); *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).

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 offense and the circumstances of its 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 offense 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 history, his conformity with previous bond conditions, and the aggravating factors alleged to have been involved in the charged offense. *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 $500,000 for the felony offense of murder with which appellant is charged. We review the factors used by the trial court to set the amount 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 offense 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. Yet, the trial court, in setting the amount of appellant's bail, was entitled to consider appellant's history of violating his bond conditions. *See* TEX. CODE CRIM. PROC. ANN. art. 17.15(1); *Golden*, 288 S.W.3d at 518–19 (bail shall be sufficiently high to give reasonable assurance that criminal defendant will appear at trial and comply with other court orders and conditions of his bond).

In May 2022, appellant was arrested and charged with the felony offense of murder. At the hearing on appellant's pretrial application for writ of habeas corpus, the trial court admitted into evidence a copy of the indictment, alleging that appellant committed the felony offense of murder on April 16, 2022. It is undisputed that at the time appellant allegedly committed the felony offense of murder, he was released on bond related to the misdemeanor offenses of unlawful carrying of a weapon and driving while intoxicated with which he was also charged. As a condition of appellant's release on bond related to his charge for the offense of unlawful carrying

of a weapon, appellant was not allowed to "possess any firearms, ammunition, or other weapons." Yet, the indictment alleging that appellant committed the felony offense of murder states that appellant, on or about April 16, 2022, "unlawfully, intentionally and knowingly cause[d] the death of" complainant 1 "by shooting . . . [c]omplainant [1] *with a deadly weapon, namely a firearm*." (Emphasis added.) The indictment also states that appellant, on or about April 16, 2022, "unlawfully intend[ed] to cause serious bodily injury to" complainant 1, and "did cause the death of . . . [c]omplainant [1,] by intentionally and knowingly committing an act clearly dangerous to human life, namely shooting . . . [c]omplainant [1] *with a deadly weapon, namely, a firearm*." (Emphasis added.) Thus, by allegedly committing the felony offense of murder, appellant violated his previously imposed bond condition related to his charge for the offense of unlawful carrying of a weapon.

Appellant's non-compliance with previously imposed bond conditions weighs against a determination that the bail amount set by the trial court was excessive. *See, e.g.*, *Ex parte Anderson*, Nos. 01-20-00572-CR to 01-20-00574-CR, 2021 WL 499080, at *10–12 (Tex. App.—Houston [1st Dist.] Feb. 11, 2021, no pet.) (mem. op., not designated for publication) (explaining defendant's history of non-compliance with his bond conditions weighed against determination that bail amounts set by trial court in his three cases were excessive); *Ex parte Davila*, Nos. 04-19-00276-CR to 04-19-00279-CR, 2019 WL 4280067, at *1–3 (Tex. App.—San

Antonio Sept. 11, 2019, no pet.) (mem. op., not designated for publication) (considering defendant's history of non-compliance with his bond conditions in determining trial court did not err in setting bail amounts); *Ex parte Owens*, Nos. 05-96-01540-CR, 05-96-01541-CR, 1997 WL 145170, at *4 (Tex. App.—Dallas Apr. 1, 1997, no pet.) (not designated for publication) ("In light of the evidence that [defendant] did not comply with the conditions of his bonds and was charged with a new felony offense while out on bond, we cannot conclude that the [bail amounts set by the trial court were] excessive.").

B. Nature and Circumstances of the Offense

The trial court must consider the nature and surrounding circumstances of the charge against appellant in setting his bail amount. *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 64, 67 (Tex. App.—San Antonio 2015, no pet.) ("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.").

Appellant is charged with the felony offense of murder, which constitutes a first-degree felony offense. *See* TEX. PENAL CODE ANN. § 19.02(b), (c). The indictment alleges that appellant, on or about April 16, 2022, "unlawfully, intentionally and knowingly cause[d] the death of" complainant 1 "by shooting . . . [c]omplainant [1,] with a deadly weapon, namely a firearm." And the indictment alleges that appellant, on or about April 16, 2022, "unlawfully intend[ed] to cause serious bodily injury to" complainant 1, and "did cause the death of . . . [c]omplainant [1] by intentionally and knowingly committing an act clearly dangerous to human life, namely shooting . . . [c]omplainant [1] with a deadly weapon, namely, a firearm."

The felony offense of murder with which appellant is charged is serious and violent in nature. *See Ex parte Walker*, No. 07-22-00048-CR, 2022 WL 2176306, at *3 (Tex. App.—Amarillo June 16, 2022, no pet.) (mem. op., not designated for publication) ("Murder is unquestionably a serious offense." (internal quotations omitted)); *Ex parte Harber*, No. 04-10-00643-CR, 2010 WL 5141509, at *2 (Tex. App.—San Antonio Dec. 15, 2010, no pet.) (mem. op., not designated for publication) ("high bond amount . . . was reasonable" given defendant charged with "serious offense" of murder for "causing death of [individual] by shooting him with a firearm"); *Ex parte Chavfull*, 945 S.W.2d 183, 186–87 (Tex. App.—San Antonio 1997, no pet.) (holding $750,000 bail not excessive for defendant charged with

murdering individual with firearm given violent nature of crime); *Hughes v. State*, 843 S.W.2d 236, 237 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (first-degree felony offense of murder constitutes "a violent crime"); *see also Ex parte Tata*, 358 S.W.3d at 399 n.6 ("[T]his Court has previously approved bail amounts ranging from $100,000 to $600,000 for first[-]degree felony offenses . . . ."); *Milner v. State*, 263 S.W.3d 146, 148–49 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("In other murder cases, $500,000 for bail has been held not to be excessive.").

Further, "when considering the nature of the offense [charged] in setting [a defendant's] bail" amount, the trial court may also consider "the punishment permitted by law" for the offense with which the defendant is charged. *See Ex parte Vasquez*, 558 S.W.2d at 480; *see also 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."). As noted, appellant is charged with the first-degree felony offense of murder. *See* TEX. PENAL CODE ANN. § 19.02(c). A first-degree felony offense has a range of punishment of confinement for life or for any term not less than five years, but no more than ninety-nine years and a fine not to exceed $10,000. *See id.* § 12.32 ("First Degree Felony Punishment"); *see also Ex parte Anderson*, 2021 WL 499080, at *13–14 (considering defendant "could ultimately face confinement for thirty years" in concluding "potential sentences [defendant] face[d] . . . weigh[ed] against a

determination that the bail amounts set by the trial court . . . were excessive"); *O'Brien v. State*, No. 02-12-00176-CR, 2012 WL 2922545, at *5 (Tex. App.—Houston [1st Dist.] July 5, 2012, no pet.) (mem. op., not designated for publication) (possibility of substantial sentence supported setting of high bail amount). If convicted of the felony offense of murder, appellant would not be "eligible for release on parole until [his] actual calendar time served, without consideration of good conduct time, equals one-half of [his] sentences or 30 calendar years, whichever is less, but in no event [would appellant be] eligible for release on parole in less than two calendar years." TEX. GOV'T CODE ANN. § 508.145(d); *see Rau v. State*, No. 02-15-00208-CR, 2017 WL 1289351, at *24 (Tex. App.—Fort Worth Apr. 6, 2017, pet. ref'd) (mem. op., not designated for publication) (noting defendant convicted of felony offense of murder "not eligible for release on parole until his actual calendar time served equal[ed] one-half of the sentence or thirty calendar years, whichever [was] less"); *see also Ex parte Estrada*, 640 S.W.3d 246, 254 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (considering defendant's parole eligibility when concluding, "[i]n light of the substantial punishments for which [defendant] is eligible if convicted, [the nature and circumstances of the offenses] indicate[d] the trial court acted within its discretion in setting the bail amount it did").

The serious and violent nature of the first-degree felony offense of murder with which appellant is charged and the potential sentence appellant faces related to

charged-felony offense weigh against a determination that the bail amount sent by the trial court was excessive. *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 pretrial habeas application and] not . . . reduce the amount of his bonds.").

C. Future Safety of the Community

The trial court must also consider the future safety of the community in setting appellant's bail amount. *See* TEX. CODE CRIM. PROC. ANN. art. 17.15(5); *Golden*, 288 S.W.3d at 518. We first note the seriousness of the first-degree felony offense of murder with which appellant is charged. *See Milner*, 263 S.W.3d at 151 ("[T]he gravity and nature of the charges against [defendant] indicates that he presents a risk to the safety of the community."); *see also Priel v. State*, No. 07-09-0349-CR, 2010 WL 445287, at *1–3 (Tex. App.—Amarillo Feb. 9, 2010, no pet.) (mem. op., not designated for publication) (given "the severity of the crime involved," appellate court could not conclude "that the trial court erred in refusing to reduce [defendant's] bail").

The indictment alleges that appellant, on or about April 16, 2022, "unlawfully, intentionally and knowingly cause[d] the death of" complainant 1 "by

shooting . . . [c]omplainant [1] with a deadly weapon, namely a firearm." And the indictment alleges that appellant, on or about April 16, 2022, "unlawfully intend[ed] to cause serious bodily injury to" complainant 1, and "did cause the death of . . . [c]omplainant [1,] by intentionally and knowingly committing an act clearly dangerous to human life, namely shooting . . . [c]omplainant [1] with a deadly weapon, namely, a firearm." *See Ex parte Flores*, Nos. 14-15-00619-CR, 14-15-00620-CR, 2015 WL 9241455, at *3 (Tex. App.—Houston [14th Dist.] Dec. 15, 2015, no pet.) (mem. op., not designated for publication) (allegation defendant "possessed a weapon warranted a bond sufficient to ensure the safety of the community as a whole"); *Ex parte Ragston*, 422 S.W.3d 904, 908 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("The violent nature of the offense demonstrates a potential risk to the community."); *see also Ex parte Bowman*, No. 14-17-00736-CR, 2017 WL 6545099, at *3 (Tex. App.—Houston [14th Dist.] Dec. 21, 2017, no pet.) (mem. op., not designated for publication); *Ex parte Jackson*, Nos. 14-10-00979-CR to 14-10-00983-CR, 2011 WL 166933, at *5 (Tex. App.—Houston [14th Dist.] Jan. 13, 2011, no pet.) (mem. op., not designated for publication) (defendant's possession of weapon weighed against reduction of his bonds).

Further, we note that it is undisputed that at the time appellant allegedly committed the felony offense of murder, he was released on bond related to the misdemeanor offenses of unlawful carrying of a weapon and driving while

intoxicated with which he was also charged. *See Ex parte Anderson*, 2021 WL 499080, at *14–15 (considering defendant committed new felony offenses "[w]hile on pretrial community supervision after posting bond" when addressing future safety of community); *Ex parte Delgado*, No. 04-20-00425-CR, 2021 WL 469021, at *5 (Tex. App.—San Antonio Feb. 10, 2021, no pet.) (mem. op.) (considering defendant violated condition of "a prior bond by committing a new offense" and noting defendant's pattern of arrests "indicate[d] his disregard of the court's authority"); *Ex parte Brossett*, 524 S.W.3d 273, 276 (Tex. App.—Waco 2016, pet. ref'd) ("[T]he defendant's commission of crimes while released on bail warrants a bail sufficient to ensure the safety of the community . . . ."); *Wilson v. State*, No. 01-13-00048-CR, 2013 WL 655263, at *6 (Tex. App.—Houston [1st Dist.] Feb. 21, 2013, no pet.) (mem. op., not designated for publication) ("The trial court may consider that the defendant continued to commit crimes while released on bail as a continuing danger to the public."). And although as a condition of appellant's release on bond related to his charge for the misdemeanor offense of unlawful carrying of a weapon, appellant was not allowed to "possess any firearms, ammunition, or other weapons," appellant allegedly shot complainant 1 with a firearm. *See Ex parte Hopkins*, Nos. 03-19-00695-CR, 03-19-00715-CR, 2020 WL 4929775, at *3 (Tex. App.—Austin Aug. 20, 2020, no pet.) (mem. op., not designated for publication) ("[T]he trial court

could have reasonably inferred that [defendant's] access to a [deadly weapon] while out on bond could pose at least some risk to the safety of the community.").

Still yet, appellant also allegedly committed the felony offense of evading arrest or detention in a motor vehicle while released on bond related to the misdemeanor offense of unlawful carrying of a weapon and the misdemeanor offense of driving while intoxicated. At the hearing on appellant's pretrial application for writ of habeas corpus, the trial court admitted into evidence a copy of an indictment, alleging that on May 11, 2022, appellant "unlawfully[] [and] intentionally fle[d] from" complainant 2, "a peace officer employed by the Houston Police Department," who was "lawfully attempting to arrest [appellant], and [appellant] knew that . . . [c]omplainant [2] was a peace officer attempting to arrest [appellant], and [appellant] used a motor vehicle while he was in flight."[6] *See Ex parte Anderson*, 2021 WL 499080, at *14–15 (considering defendant committed new felony offenses "[w]hile on pretrial community supervision after posting bond" when addressing future safety of community); *Ex parte Delgado*, 2021 WL 469021, at *5 (considering defendant violated condition of "a prior bond by committing a new offense" and noting defendant's pattern of arrests "indicate[d] his disregard of the court's authority"); *Ex parte Brossett*, 524 S.W.3d at 276 ("[T]he defendant's commission of crimes while released on bail warrants a bail sufficient to ensure the

6 *See id.* § 38.04.

safety of the community . . . ."); *Wilson*, 2013 WL 655263, at *6 ("The trial court may consider that the defendant continued to commit crimes while released on bail as a continuing danger to the public.").

Here, the trial court could have reasonably found that appellant posed a danger to the community and the potential danger that appellant poses to the community weighs against a determination that the bail amount set by the trial court is excessive. *See Salerno*, 481 U.S. at 750–51 (defendant's right to pretrial bail may be subordinated to greater needs of society).

D. Ability to Make Bail

Although the ability or inability to make bail does not control the amount of bail set, it is a factor that the trial court must consider in setting a defendant's bail amount. *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. That said, a defendant's inability to pay the bail amount set by the trial court does not automatically render the amount 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 amount would be eliminated and the defendant would be in the position to determine the amount of bail. *Milner*, 263 S.W.3d at 150.

Generally, to show that he cannot make bail, a defendant must demonstrate that his funds and his family's funds have been exhausted. *Ex parte Tata*, 358 S.W.3d at 400. At the hearing on appellant's pretrial application for writ of habeas corpus, Trevino, appellant's older sister, testified that appellant's bail was set at $500,000, and the bail bond companies required appellant's family to pay $50,000 for appellant to be released. Appellant's family did not "have that money." They did not have property, "any expensive jewelry," or "stocks or bonds" to give as collateral. There was no one that could loan appellant's family the money. Trevino testified that she worked at a grocery store and appellant's parents "work[ed] paycheck [by] paycheck." Appellant's father "work[ed] in . . . landscaping" "almost all day." Trevino asked the trial court to lower appellant's bail amount to $100,000 or less because appellant's family "want[ed] him home."

Notably, Trevino did not provide any evidence at the hearing about appellant's specific assets or financial resources, and she did not explain what efforts, if any, were made by appellant to furnish bail in the amount set by the trial court. *See Ex parte Anderson*, 2021 WL 499080, at *15–16; *see also Ex parte Childers*, No. 01-21-00493-CR, 2022 WL 2976545, at *7 (Tex. App.—Houston [1st Dist.] July 28, 2022, no pet.) (mem. op., not designated for publication) ("To demonstrate an inability to make bail, a defendant generally must establish that his and his family's funds have been exhausted. Absent such a showing, a defendant

usually must establish that he unsuccessfully attempted to make bail before [the appellate court] can determine that bail is excessive." (internal citations omitted)); *Ex parte Williams*, No. 03-20-00457-CR, 2021 WL 1583882, at *5–6 (Tex. App.—Austin Apr. 23, 2021, no pet.) (mem. op.) (defendant failed to meet his burden of showing amount of bail was excessive where defendant "presented no evidence regarding any unsuccessful attempts to pay bail or establishing that his funds and the funds of his family members ha[d] been exhausted"); *Ex parte Goodson*, No. 01-15-00288-CR, 2015 WL 1868771, at *4 (Tex. App.—Houston [1st Dist.] Apr. 21, 2015, no pet.) (mem. op., not designated for publication) (defendant did not present any documentary evidence of his assets or financial resources and because of "the dearth of evidence presented by [defendant] regarding his finances," trial court could have concluded that bail amount was reasonable); *Ex parte Miller*, 631 S.W.2d 825, 827 (Tex. App.—Fort Worth 1982, pet. ref'd) ("[I]t [is] incumbent on the accused . . . to show that he . . . made an effort to furnish bail in the amount set.").

Further, even if appellant is unable pay the bail amount set by the trial court, this does not by itself render the bail amount excessive and given the lack of detail in the evidence presented about appellant's claimed inability to make bail, the trial court could have concluded that the amount of bail set by it was reasonable. *See Ex parte Anderson*, 2021 WL 499080, at *16; *Awadalla v. State*, No. 02-18-00513-CR,

2019 WL 984860, at *4 (Tex. App.—Fort Worth Feb. 28, 2019, pet. ref'd) (mem. op., not designated for publication) ("Although worth considering, inability to make bail does not control over the other factors."); *Ex parte Castillo-Lorente*, 420 S.W.3d 884, 889 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also Ex parte Scott*, 122 S.W.3d at 870–71 (affirming trial court's denial of pretrial habeas application and citing, as factor, absence of evidence on defendant's ability to make bond when defendant's evidence consisted of his testimony that he and his family lacked sufficient assets or financial resources to post bond, but he did not detail either his or his family's specific assets and financial resources nor his efforts to furnish bond).

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 offense 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 evidence that the trial court set appellant's bail amount at $500,000 for the felony offense of murder to keep appellant incarcerated. *See Ex parte Anderson*, 2021 WL 499080, at *16–17; *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").

We note that the bail amount set by the trial court in this case is akin to other cases involving a defendant charged with a first-degree felony offense. *See Ex parte Dupuy*, 498 S.W.3d at 233–34 (review of bail set in other cases may be instructive); *Ex parte Piceno*, No. 02-13-00421-CR, 2014 WL 2611191, at *4 (Tex. App.—Fort Worth June 12, 2014, no pet.) ("When reviewing the appropriate bail for a particular offense, appellate courts often compare bail amounts in other cases involving offenses of the same degree."); *see, e.g.*, *Ex parte Stocker*, Nos. 14-20-00467-CR to 14-20-00469-CR, 2020 WL 7711348, at *3 (Tex. App.—Houston [14th Dist.] Dec. 29, 2020, pet. ref'd) (mem. op., not designated for publication) ("Recent opinions from our sister [appellate] courts support a finding that $500,000 is reasonable bail in a . . . murder case . . . ."); *Ex parte Tata*, 358 S.W.3d at 399 n.6 ("[T]his Court has

previously approved bail amounts ranging from $100,000 to $600,000 for first-degree felony offenses . . . ."); *Ex parte Phillips*, No. 05-10-00616-CR, 2010 WL 3548739, *4 (Tex. App.—Dallas Sept. 14, 2010, no pet.) (not designated for publication) (determining $500,000 bail was not excessive for first-degree murder charge); *Milner*, 263 S.W.3d at 148–49 ("In other murder cases, $500,000 for bail has been held not to be excessive."); *see also Ex parte Mitchell*, Nos. 07-20-00298-CR, 07-20-00299-CR, 2021 WL 865343, at *1–6 (Tex. App.—Amarillo Mar. 8, 2021, no pet.) (mem. op., not designated for publication) (trial court did not err in refusing to reduce amounts of defendant's bail which were set at $100,000 for state-jail felony offense and $500,000 for first-degree felony offense).

F. Other Factors

Along with considering the factors set out in Texas Code of Criminal Procedure article 17.15, the trial court, when setting the bail amount, can 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 offense. *See Ex parte Rubac*, 611 S.W.2d at 849–50; *Montalvo*, 315 S.W.3d at 593. We have already discussed the nature and circumstances of the serious and violent first-degree felony offense of murder with which appellant is charged and his failure to adhere to the previously imposed bond conditions while released on bond related to the

misdemeanor offenses of unlawful carrying of a weapon and driving while intoxicated with which he was charged. Thus, we turn to the remaining factors that the trial court could have considered in setting the bail amount in appellant's case.

A defendant's ties to the community in which he lives can be an assurance that he will appear at trial for the offenses charged. *See Ex parte Nimnicht*, 467 S.W.3d at 68 (noting court's review of defendant's ties to community includes assessment of defendant's residence history, family ties to community, and work history). But no evidence was presented at the hearing on appellant's pretrial application for writ of habeas corpus as to appellant's residence history or work history. There is no evidence that appellant was living in Harris County, Texas before his arrest in May 2022.

Trevino testified that if appellant was released from custody on bond, appellant would live with his parents, who lived in Houston, Texas. And either appellant's mother or Trevino would stay at the home with appellant to "make sure that he stay[ed] home and he c[ame] to court whenever" he was required to appear. But there is no evidence as to how long appellant's parents have lived in Houston or whether appellant's family has ties to the community.

As to appellant's prior criminal history, at the time of the hearing on his pretrial application for writ of habeas corpus, appellant had been charged, in 2021, with the misdemeanor offense of unlawful carrying of a weapon and the

misdemeanor offense of driving while intoxicated. And, in 2022, in addition to being charged with the felony offense of murder, appellant was charged with the felony offense of evading arrest or detention in a motor vehicle.

Although there is some evidence, albeit minimal, of appellant's ties to the Houston community, the trial court, as the fact finder, was in the best position to judge the witness's credibility, and it was free to doubt Trevino's testimony. *See Powell v. State*, 479 S.W.2d 685, 687 (Tex. Crim. App. 1972); *see also Ex parte Sells*, 2020 WL 7639574, at *4. And the other relevant factors, including appellant's criminal history, inability to conform to previous bond conditions, and aggravated factors related to the charged offense, weigh against a determination that the bail amount set by the trial court was excessive. *See Ex parte Davila*, 2019 WL 4280067, at *2–3 (evidence of defendant's inability to afford bail and his family ties to community were not enough to establish bail amount set by trial court was excessive); *see also Ex parte Anderson*, 2021 WL 499080, at *17–18 (other factors, such as defendant's "inability to conform to previous bond conditions" and "aggravating factors alleged to have been involved in the charged offenses" weighed against determination that bail amounts set by trial court were excessive).

Appellant had the burden to show that the bail amount set by the trial court was excessive. *See Ex parte Rubac*, 611 S.W.2d at 849; *Montalvo*, 315 S.W.3d at

592. Given the balance of all the relevant factors discussed above,[7] we cannot conclude that the trial court erred by setting appellant's bail at $500,000 for the felony offense of murder. We hold that the trial court did not err in denying appellant's pretrial application for writ of habeas corpus.

We overrule appellant's sole issue.

Conclusion

We affirm the order of the trial court.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Countiss and Rivas-Molloy.

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

[7] *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.).