TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00191-CR

Marco Antonio Valdez, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 391ST JUDICIAL DISTRICT NO. D-15-0105-SB, HONORABLE THOMAS J. GOSSETT, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Marco Antonio Valdez entered an open plea of guilty to the first-degree felony of burglary of a habitation with intent to commit another felony, and the court sentenced him to 30 years' imprisonment. *See* Tex. Penal Code §§ 12.32, 30.02(d). In two issues on appeal, Valdez complains that his sentence was "grossly disproportionate" to the crime and violates the federal and state constitutional prohibitions against cruel and unusual punishment. The State contends that Valdez failed to preserve his appellate issues for review. We will affirm the judgment of conviction.

BACKGROUND

Among the witnesses at the bench trial were Valdez, the victim, and the victim's surgeon. Valdez testified that he was separated from his wife Lisa Valdez,[1] but he thought that they

[1] Because these parties share the same last name, we refer to appellant by his last name and to his wife by her first name.

were attempting reconciliation when she texted him one night, to ask if they were going to have a cigarette. Valdez stated that this was their way of inviting each other to spend the night. Valdez said that he did not respond right away because he was out with friends, but he eventually replied that he was on his way and went to her house. He stated that he had a cigarette with Lisa outside the house, but she refused to let him in, which she had never done before. Valdez testified that when he saw someone inside her house, he "lost it," kicked in the door, went inside the house, and assaulted the naked man that he found in the bedroom. Valdez denied knowing how many times he hit the victim.

The victim testified that he had a sexual relationship with Lisa. He said that when he heard a noise that sounded like someone was breaking into the house, he hid at the base of the bed. The victim stated that the next thing he remembered was waking up in the hospital where he stayed for 11 days. He testified that he had a shattered jaw that had to be wired shut, a broken face plate, a shattered nose, eye damage, nerve damage, and had undergone four surgeries for his injuries with more scheduled in the future.

Dr. Thomas Bradley Jeter, a surgeon who treated the victim, testified about the extent of the victim's "serious" and "extensive" injuries, including fractures of his lower jaw, fractures involving his teeth and the palate, fractures of the upper jaw encompassing the side walls of the nose and eye sockets, fractures of the right cheekbone causing loss of support for one eyeball, loss of his sense of smell, nerve damage to his right forehead and eyelid, and a sunken-back eye.

Valdez entered an open plea of guilty to the first-degree felony of burglary of a habitation with intent to commit another felony, and the court sentenced him to 30 years' imprisonment. Valdez filed a motion for new trial alleging that his plea was involuntary based on

ineffective assistance of counsel and contending that his sentence was "outrageous." The motion was overruled by operation of law. This appeal followed.

DISCUSSION

Before addressing the merits of Valdez's appeal, we must consider whether Valdez preserved his two appellate issues for review. *See Obella v. State*, No. PD-1032-16, 2017 Tex. Crim. App. LEXIS 170, at *3 (Tex. Crim. App. Feb. 8, 2017) ("[I]t is the duty of the appellate courts to ensure that a claim is preserved in the trial court before addressing its merits." (quoting *Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010))). Valdez contends that he preserved error in his motion for new trial. The substance of his motion for new trial complained of ineffective assistance of counsel, claimed that counsel misled him into entering the open plea, and referred to his sentence as "outrageous." Assuming without deciding that the motion preserved Valdez's issues alleging that his sentence violated the constitutional prohibition against cruel and unusual punishment, there is no showing in this record that Valdez presented the motion to the district court.

A motion for new trial must be "presented" to the trial court within 10 days of its filing. Tex. R. App. P. 21.6; *Obella*, 2017 Tex. Crim. App. LEXIS 170, at *3; *see also Carranza v. State*, 960 S.W.2d 76, 78 (Tex. Crim. App. 1998) ("[T]his Court consistently has held the filing of a motion for new trial alone is not sufficient to show 'presentment.'"). "This means the defendant must give the trial court actual notice that he timely filed a motion for new trial and requests a hearing." *Obella*, 2017 Tex. Crim. App. LEXIS 170, at *3 (citing *Rozell v. State*, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005)); *see Washington v. State*, 271 S.W.3d 755, 756 (Tex. App.—Fort Worth 2008, no pet.) ("The term 'present' means the record must show that the movant for a new

trial sustained the burden of actually delivering the motion for new trial to the attention or actual notice of the trial court."). The rationale for requiring presentment is the same as that which supports preservation of error generally. *Obella*, 2017 Tex. Crim. App. LEXIS 170, at *3. That is, "[a] trial court should not be reversed on a matter that was not brought to the trial court's attention." *Rozell*, 176 S.W.3d at 230 (citing *Carranza*, 960 S.W.2d at 78).

Presentment of a motion for new trial may be proven in many ways, including by showing the judge's signature or notation on the proposed order or court's docket sheet or a ruling on the motion. *Castro v. State*, No. 03-12-00730-CR, 2015 Tex. App. LEXIS 2399, at *12-14 (Tex. App.—Austin Mar. 3, 2015, pet. ref'd) (mem. op., not designated for publication). Examples of evidence that the Court of Criminal Appeals has found sufficient to show presentment include notes on court-generated documents like docket sheets, which are most likely made by court personnel and demonstrate court knowledge of the motion and thus presentment of the motion. *Id.* at *12-14 (citing *Stokes v. State*, 277 S.W.3d 20, 24-25 (Tex. Crim. App. 2009)). Examples of evidence that fails to show presentment include an unsigned notation on a proposed order, *see Stokes*, 277 S.W.3d at 24, counsel's certification stating that the motion was presented to the trial judge, *see Owens v. State*, 832 S.W.2d 109, 111 (Tex. App.—Dallas 1992, no pet.), the absence of a proposed order setting a date for a hearing on the motion, the absence of a separate motion for a hearing, and the absence of any written notation that the motion was ever actually presented to the court or that the court was ever put on notice that the appellant wanted a hearing. *Id.*

Here, Valdez contends that he preserved error by filing a motion for new trial that stated the grounds for his requested ruling and that the court implicitly denied. *See* Tex. R. App. P.

33.1(a). However, the Court of Criminal Appeals "consistently has held the filing of a motion for new trial alone is not sufficient to show 'presentment.'" *Carranza*, 960 S.W.2d at 78. Valdez does not contend, and the record does not show, that he presented his motion for new trial to the district court. His proposed order sets no date for a hearing on the motion, and his "Certificate of Presentment" for the judge's signature at the end of his motion for new trial was left blank. This record does not show that Valdez gave the district court actual notice that he timely filed a motion for new trial and requested a hearing. *See Obella*, 2017 Tex. Crim. App. LEXIS 170, at *3; *Washington*, 271 S.W.3d at 756. Thus, Valdez did not preserve his claim regarding the alleged disproportionate sentencing. *See Washington*, 271 S.W.3d at 756 (because defendant failed to show that he had actually delivered his motion for new trial to trial court or otherwise brought his motion to court's attention, his claim of disproportionate sentencing was not preserved). We overrule Valdez's appellate issues.

CONCLUSION

We affirm the judgment of conviction.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: June 23, 2017

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