TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00538-CR

Dustin Allen Lambert, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 277TH JUDICIAL DISTRICT
NO. 15-0989-K277, HONORABLE STACEY MATHEWS, JUDGE PRESIDING

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

Dustin Allen Lambert was charged with assault family violence, and the indictment also alleged that Lambert had previously been convicted of two substantially similar offenses in another state. *See* Tex. Penal Code § 22.01(a) (setting out elements of offense of assault), (b)(2) (elevating offense level to third-degree felony if offense is committed against someone whose relationship to defendant is governed by Family Code and if defendant has previously been convicted of same type of offense). After being charged, Lambert entered into a plea-bargain agreement with the State in which Lambert agreed to plead guilty to the charged offense in exchange for the State recommending that his sentence be suspended and that he be placed on community supervision for four years. The district court accepted the terms of the plea-bargain agreement and Lambert's guilty plea and sentenced Lambert in accordance with the terms of the agreement. More than a year after the district court rendered its judgment, the State moved to revoke Lambert's community

supervision and alleged six violations of the terms of Lambert's community supervision, including an allegation that Lambert committed another act of assault family violence against a different victim. After convening a hearing, the district court found five of the State's allegations to be true, including the allegation regarding a subsequent assault, revoked Lambert's community supervision, and sentenced Lambert to seven years' imprisonment. *See id.* § 12.34 (setting out permissible punishment range for third-degree felony). Lambert appeals his sentence. We will affirm the district court's judgment revoking Lambert's community supervision.

DISCUSSION

On appeal, Lambert argues that the district court abused its discretion by sentencing him to seven years' imprisonment because the sentence "was not necessary to prevent likely recurrence of [his] criminal behavior," because the sentence did "not meet the objective of rehabilitation," and because there are "ostensibly . . . numerous defendants currently on [community supervision] for the offense such as [his], as well as other offenses with circumstances much worse than [his] offense." Accordingly, Lambert requests that this Court reverse his sentence and remand for a new sentencing hearing.

As support for his requested relief, Lambert refers to several of the codified objectives of the Penal Code, including the purposes of "insur[ing] the public safety through . . . the rehabilitation of those convicted of violations of this Code" and "prescrib[ing] penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders." *See* Tex. Penal Code § 1.02(1)(B), (3). Further, Lambert highlights portions of the record that he asserts indicate that he is not "beyond

redemption" or rehabilitation. For example, he notes that the evidence presented at the hearing revealed that he attempted to reschedule a missed appointment with his community-supervision officer, that he made efforts to make extra payments to cover the amount of his supervision fees that were "in arrears," that he "attended Batterer's Intervention classes," that he completed the program, and that those classes had "helped him adjust his attitude." In addition, Lambert points to testimony from the victim whom Lambert allegedly assaulted after being placed on community supervision and argues that the victim had "accepted a shared responsibility for the event and maintained a relationship with him while he was in custody." Finally, Lambert contends that the district court had "less severe and more appropriate options available to it," including imposing shock probation, additional jail time as a condition of continuing his community supervision, and "intensive individual treatment." *See* Tex. Code Crim. Proc. arts. 42A.202, .301, .302, .504.

As a preliminary matter, we note that nothing in the record indicates that Lambert made any objection to his sentence when it was imposed or after the hearing. Accordingly, it does not appear that this issue has been preserved for appellate consideration. *See* Tex. R. App. P. 33.1 (stating that to preserve error for appeal, record must show that complaint was made to trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal"); *see also Noland v. State*, 264 S.W.3d 144, 151, 152 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (noting that "in order to preserve for appellate review a complaint that a sentence is grossly disproportionate, constituting cruel and unusual punishment, a defendant must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired" and concluding that defendant failed to preserve complaint by failing to object or raise

complaint in motion for new trial); *Ajisebutu v. State*, 236 S.W.3d 309, 313 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (determining that challenge to imposition of 60-year sentence was not preserved where defendant did not object at punishment hearing and did not present argument in motion for new trial); *Steadman v. State*, 160 S.W.3d 582, 586 (Tex. App.—Waco 2005, pet. ref'd) (deciding that constitutional complaints regarding defendant's punishment were not preserved for appellate review where defendant "did not raise these contentions at trial"); *Teixeira v. State*, 89 S.W.3d 190, 192 (Tex. App.—Texarkana 2002, pet. ref'd) (concluding that due-process challenges asserting that trial court erred by refusing to consider entire range of punishment or refusing to consider evidence pertaining to punishment "was waived" because no objection was made).[1]

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[1] In his brief, Lambert contends that this issue may be pursued on appeal even though he did not object to his sentence. As support for this assertion, Lambert notes that under the Rules of Appellate Procedure and the Rules of Evidence, a specific objection is only required if the specific ground *was not apparent from the context*. *See* Tex. R. App. P. 33.1(a)(1)(A); Tex. R. Evid. 103(a). Further, Lambert refers to other contexts in which an objection is not required to preserve a claim for appellate review. *See, e.g.*, *Montgomery v. State*, 99 S.W.3d 257, 259-60 (Tex. App.—Fort Worth 2003, pet. struck) (explaining that no objection was necessary to present appellate challenge to trial court's failure to withdraw defendant's guilty plea when evidence raised issue of his innocence); *Edwards v. State*, 21 S.W.3d 625, 626-27 & n.1 (Tex. App.—Waco 2000, no pet.) (determining that no objection was necessary to attack deadly-weapon finding on appeal where jury did not find that defendant used deadly weapon). In addition, Lambert contends that at least two appellate courts have acknowledged that a party may assert for the first time on appeal a complaint that a trial court refused to consider the full range of punishment when assessing its sentence. *See Hernandez v. State*, 268 S.W.3d 176 (Tex. App.—Corpus Christi 2008, no pet.); *Jaenicke v. State*, 109 S.W.3d 793 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Finally, Lambert points to federal cases addressing challenges to the reasonableness of the length of a sentence despite the absence of an objection when the sentence was imposed. *See United States v. Castro-Juarez*, 425 F.3d 430, 433-34 (7th Cir. 2005). Based on the preceding, Lambert contends that no objection should be required in the circumstances present here in order to pursue his challenges on appeal.

As set out in the body of the opinion, we will assume without deciding that Lambert has preserved his complaints for appellate consideration. However, we do note that Lambert has not pointed this Court to any Texas case law holding that no objection or other challenge to a sentence

For purposes of resolving this issue on appeal, we will assume without deciding that this issue has been preserved. A trial court "is given wide latitude to determine the appropriate sentence in a given case," and a reviewing court will not interfere with the trial court's determination absent a clear abuse of discretion. *See Tapia v. State*, 462 S.W.3d 29, 46 (Tex. Crim. App. 2015). Under that standard, a trial court's ruling will only be deemed an abuse of discretion if it is so clearly wrong as to lie outside "the zone of reasonable disagreement," *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002), or is "arbitrary or unreasonable," *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). "As a general rule, a penalty assessed within the proper punishment range will not be disturbed on appeal." *Buerger v. State*, 60 S.W.3d 358, 363 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

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is required for the type of appellate claim that Lambert is pursuing, and we can see nothing in the context of this case that would excuse the obligation to present some type of objection (specific or otherwise) to the imposition of his sentence. Moreover, unlike the circumstances present in the Texas cases referred to by Lambert as standing for the proposition that a defendant need not make an objection to a trial's alleged failure to consider the full range of punishment before presenting that issue on appeal, there is nothing in the record in this case that indicates that the district court considered improper factors when assessing Lambert's punishment. *See Hernandez*, 268 S.W.3d at 181, 184 (concluding that defendant could argue for first time on appeal that trial court did not consider full range of punishment where trial court announced that it assessed punishment for repeat offenders by doubling highest amount of punishment previously assessed in another case and commenting that "the trial judge's bias and partiality stemmed from her strict adherence to an ill-conceived mathematical formula"); *Jaenicke*, 109 S.W.3d at 795, 797 (noting that trial court stated that it listened "carefully to the testimony of the witnesses," that it had "heard many jurors reach verdicts on cases probably not as bad as this where they assessed the maximum punishment," and that it was "forced to assess the maximum punishment in this case" and concluding that statements did not constitute fundamental error because they did not show "that the trial court failed to consider the full range of punishment," "that the court based its assessment of punishment on verdicts from other cases," or that court "predetermined punishment").

As set out above, the district court assessed Lambert's sentence at seven years' imprisonment, and this falls near the middle of the statutory range authorized for the third-degree-felony offense at issue. *See* Tex. Penal Code § 12.34. Moreover, nothing in the record before this Court indicates that the district court failed to consider the full range of punishment or failed to consider any potentially mitigating evidence when assessing its punishment. *See Green v. State*, No. 14-12-00065-CR, 2012 WL 3686288, at *2 (Tex. App.—Houston [14th Dist.] Aug. 28, 2012, pet. ref'd) (mem. op., not designated for publication) (stating that "[a] trial court denies due process of law and due course of law when it arbitrarily refuses to consider the full range of punishment for an offense or refuses to consider the evidence and imposes a predetermined sentence"); *see also Servin v. State*, 745 S.W.2d 40, 41-42 (Tex. App.—Houston [14th Dist.] 1987, no pet.) (determining that "sentence of twenty-five years" was not cruel and unusual where punishment "was within the range authorized" by Penal Code despite evidence that defendant did not act violently "toward complainant or his wife" and that defendant had "no prior convictions").

In addition, even though the victim who was named in the revocation allegation did testify that she initiated that altercation by hitting Lambert and urged that Lambert should not be punished for her actions, when assessing the credibility of that testimony, the district court was aided by the victim's additional testimony that she did not tell her parents or the police that she initiated the conflict or hit Lambert when she reported the offense, that she was terrified of him, that he had hit her in the face on two prior occasions, and that he had previously tried to strangle her. Furthermore, the district court was able to consider photos that were admitted during the hearing showing the injuries that she sustained in the encounter and to consider a recording of a phone call

between Lambert and the victim while he was in jail that was played during the hearing and that chronicled Lambert speaking to the victim in an aggressive and demeaning tone.

Moreover, although Lambert correctly points out that one of the objectives of the Penal Code is to rehabilitate individuals who have been convicted of committing crimes, the Penal Code lists additional objectives, including "insur[ing] the public safety through . . . the deterrent influence of the penalties . . . provided" and providing "such punishment as may be necessary to prevent likely recurrence of criminal behavior." *See* Tex. Penal Code § 1.02(1)(A), (C). When considering what punishment was warranted under the directives of the Penal Code, the district court considered the testimony during the hearing, the conduct at issue, and Lambert's extensive criminal history. Regarding Lambert's criminal history, the district court mentioned on the record that the contents of a presentence investigation report prepared in this case revealed that Lambert had been convicted of several assaultive offenses and placed on community supervision seven times before committing the charged offense underlying his conviction. Moreover, the charged offense was for assault family violence, and Lambert pleaded true to the allegations in the indictment that he had been convicted twice of similar offenses. In addition, as discussed above, one of the revocation grounds presented by the State was an allegation that Lambert had committed yet another offense of assault family violence, and the victim testified that Lambert had assaulted her multiple times. "Incarceration will prevent the recurrence of such criminal behavior" and "does not . . . mean [Lambert] will be denied the opportunity for rehabilitation." *See Foster v. State*, 525 S.W.3d 898, 911 (Tex. App.—Dallas 2017, pet. filed). Accordingly, we cannot conclude that Lambert's sentence violates the objectives of the Penal Code. *See id.*

In addition, although Lambert correctly points out that the district court had options other than sentencing him to seven years' imprisonment, nothing in the governing statutes precluded the district court from imposing a prison sentence. Further, Lambert already received the benefit of being placed on community supervision in this case rather than being incarcerated for the charges at issue, and he was assessed a prison sentence only due to his failure to comply with the terms of his community supervision.

In light of the preceding and assuming that this issue has been preserved for appeal, we are unable to conclude that the district court abused its discretion by sentencing Lambert to seven years' imprisonment. Accordingly, we overrule Lambert's sole issue on appeal.

CONCLUSION

Having overruled Lambert's sole issue on appeal, we affirm the district court's judgment revoking his community supervision and sentencing him to seven years' imprisonment.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

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