NUMBERS 13-19-00053-CR, 13-19-00054-CR, AND 13-19-00055-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI–EDINBURG

JONATHAN PIZARRO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 214th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Perkes

Appellant Jonathan Pizarro appeals[1] three concurrent sentences of twenty years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice. By one issue, Pizarro broadly argues that the sentences were excessive. We affirm.

[1] We granted appellant's motion to consolidate appeals No. 13-19-00053-CR, No. 13-19-00054-CR, and No. 13-19-00055-CR on May 30, 2019.

I. BACKGROUND

In 2017, Pizarro was charged by three separate indictments for two unrelated cases of aggravated robbery, a first-degree felony, and one case of arson, a second-degree felony. *See* TEX. PENAL CODE ANN. §§ 28.02(a)(2), 29.03(a)(2). Pursuant to a plea-bargain agreement, Pizarro pleaded guilty in all three cases on January 25, 2018, and the adjudication of guilt was deferred for ten years under terms and conditions of community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 27.13. During the plea hearing, the State admitted two exhibits into evidence: (1) Pizarro's judicial confession and stipulation of discovery, which included offense reports and victims' statements to police, and (2) the plea agreement documents.

The admitted offense reports detail how one of the victims, Maricela Padilla, was working as a cashier at Los Altos restaurant in Corpus Christi when Pizarro robbed her at gunpoint. Padilla told police she recalled telling Pizarro that the restaurant was closed for the night. She then resumed counting money at the cash register when she heard the sound of a gun slide being pulled back. Padilla said that in that instant, she "feared for her life." Pizarro demanded the money. Padilla stated she tried to get away by telling Pizarro that the restaurant "had more money in the back." With the gun pointed at Padilla, Pizarro grabbed the cash Padilla had in her hands, an estimated fifty dollars, and ran.

Yvonne Krebs, the victim in another robbery, was described by police as "shaking and crying in fear" when police made initial contact. Krebs informed police that she was using an ATM machine in south Corpus Christi at approximately 9:30 p.m. when she was approached by Pizarro, holding a gun. Pizarro reportedly lunged forward to take Krebs's ATM card and money. Krebs stated she instinctively reciprocated by mirroring Pizarro's

movements and activated her vehicle's panic alarm. According to Krebs, Pizarro yelled at an unknown male in a nearby Ford Mustang, ordering him to shoot her, as Pizarro then attempted to enter Krebs's vehicle. Krebs quickly locked her doors, and Pizarro fled the scene.

The arson charge involved a two-story, multi-family apartment complex. The fire originated in an apartment where a single mother and her four children resided. The children and their mother were asleep in their respective bedrooms when Pizarro started a fire in the living room using rolls of paper towels. Although the fire was contained to one apartment, a dog in the adjoining apartment died from smoke inhalation. Pizarro admitted to starting the fire because the apartment owner had allegedly stolen money from him.

The trial court expressed reservation before ultimately deciding to follow the State's recommendation of 10 years' deferred adjudication for all three cases. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.101(a).

Less than one year later, on January 4, 2019, the State moved to revoke Pizarro's community supervision, alleging five violations of community supervision conditions. Violations included Pizarro testing positive for both amphetamine and methamphetamine, and Pizarro's unsuccessful discharge from the Substance Abuse Felony Punishment Facility (SAFPF).[2]

At a revocation hearing, Pizarro pleaded true to all of the allegations in the State's motion to revoke. The State and defense counsel presented the trial court with a joint recommendation, requesting that the court order Pizarro to return to SAFPF. Instead,

[2] SAFPF is a treatment program available for felony probationers housed within a Texas Department of Criminal Justice, Intuitional Division facility. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.606.

the trial court revoked Pizarro's community supervision and sentenced him to twenty years' imprisonment in each case to run concurrently. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.755. The court gave, in relevant part, the following explanation:

> I remember when you were out on bond. I remember when you violated the conditions of bond. And I remember struggling with these cases as to what should be the disposition. And you got the benefit of the doubt. And you were placed on deferred adjudication where you were able to not become a convicted felon, in large part because you were still young. And we have discussed that if you were given that chance, that you would have to walk a really straight line because the range of punishment is life. . . . So, having sent you to SAFPF, I was hoping that you would really take advantage of it. It disappointments me and I know it will disappoint your family that it didn't work out the way that we were all hoping. . . .

On February 6, 2019, Pizarro filed a motion to reconsider sentence,[3] whereby he requested that the court allow him to "remain on Probation . . . or to reduce the amount of confinement." This appeal followed.

II. EXCESSIVE PUNISHMENT

In his sole issue, Pizarro contends that his concurrent twenty-year sentences are excessive.

A. Standard of Review

We review the trial court's assessment of punishment for an abuse of discretion. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984); *Quintana v. State*, 777 S.W.2d 474, 479–80 (Tex. App.—Corpus Christi–Edinburg 1989, writ ref'd). When a sentence is within the prescribed statutory range set down by the legislature, sentencing authorities have nearly "unfettered" discretion to impose any punishment within that

[3] To preserve a complaint of excessive sentence for appellate review, appellant had to present to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). A "Motion for Reconsideration or Reduction of Sentence" is "functionally indistinguishable" from a motion for new trial on punishment and preserves appellant's complaint for review. *State v. Davis*, 349 S.W.3d 535, 538 (Tex. Crim. App. 2011); *Trevino v. State*, 174 S.W.3d 925, 927–29 (Tex. App.—Corpus Christi–Edinburg 2005, pet. ref'd).

range. *Ex parte Chavez*, 213 S.W.3d 320, 323 (Tex. Crim. App. 2006); *Trevino v. State*, 174 S.W.3d 925, 928 (Tex. App.—Corpus Christi–Edinburg 2005, pet. ref'd) (providing that as long as the sentence is assessed within the legislatively determined range, it will unlikely be disturbed on appeal).

B. Applicable Law

An allegation of excessive or disproportionate punishment is a legal claim "embodied in the Constitution's ban on cruel and unusual punishment" and based on a "narrow principle that does not require strict proportionality between the crime and the sentence." *State v. Simpson*, 488 S.W.3d 318, 322–24 (Tex. Crim. App. 2016) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)); U.S. CONST. amend. VIII. A successful challenge to proportionality is exceedingly rare and requires a finding of "gross disproportionality." *Simpson*, 488 S.W.3d at 322–23 (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)).

To determine whether a sentence for a term of years is grossly disproportionate to a defendant's crime, the reviewing court must weigh the severity of the sentence in light of: (1) the harm caused or threatened to the victim, (2) the culpability of the offender, and (3) the offender's prior adjudicated and unadjudicated offenses. *Id.* at 323 (citing *Graham v. Florida*, 560 U.S. 48, 60 (2010)); *Goode v. State*, No. 13-17-00539-CR, 2018 WL 3910088, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 16, 2018, pet. ref'd) (mem. op., not designated for publication). Only if we conclude that the sentence is grossly disproportionate, do we compare the challenged sentence against the sentences of other offenders in the same jurisdiction and the sentences imposed for the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Simpson*, 488 S.W.3d at 323.

Aggravated robbery is a first-degree felony, TEX. PENAL CODE ANN. § 29.03(a)(2),

(b), and Texas law provides that "[a]n individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years." *Id*. § 12.32(a). Arson, a second-degree felony, *Id*. § 28.02(a)(2), (d), is punishable "for any term of not more than 20 years or less than 2 years." *Id*. § 12.33(a).

Pizarro's sentences of twenty years' imprisonment to run concurrent falls within the legal range afforded by the state legislature for those individual offenses. Nevertheless, Pizarro argues that the trial court's sentences were disproportionate under the facts of each case and contrary to sentencing objectives.[4] *See Id*. § 1.02. We disagree.

Here, Pizarro threatened the use of a firearm in two robberies and knowingly set an apartment ablaze, aware that residents were asleep inside. The threat of harm posed to each victim in each of Pizarro's cases was death. *See Simpson*, 488 S.W.3d at 322–24 (upholding a twenty-five-year sentence for robbery); *see, e.g.*, *Andrew v. State*, No. 07-01-0465-CR, 2002 WL 31757649, at *8 (Tex. App.—Amarillo Dec. 9, 2002, pet. ref'd) (mem. op., not designated for publication) (holding appellant's twenty-year sentence was not grossly disproportionate to the offense where appellant threatened death by brandishing a sheathed knife in commission of an aggravated assault offense).

Further, Pizarro was the primary actor, admitting to acting intentionally or knowingly, in each of the three offenses—providing for the highest level of culpability

[4] Section 1.02 states that the general purposes of the Texas Penal Code are "to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate." TEX. PENAL CODE ANN. § 1.02. "To serve those purposes, Section 1.02 [of the penal code] provides that the code shall be construed to achieve certain objectives, one of which, . . . is to prescribe penalties that are proportionate to the seriousness of offenses." *Fisk v. State*, 574 S.W.3d 917, 924 (Tex. Crim. App. 2019).

recognized under the law. *Compare* TEX. PENAL CODE ANN. § 6.02 (requirements of culpability) *with* TEX. PENAL CODE ANN. § 7.02 (criminal responsibility for the conduct of another); *see Simpson*, 488 S.W.3d at 322–24; *cf. Randall v. State*, 529 S.W.3d 566, 569 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (upholding a sentence of twenty-five years' confinement for a robbery, finding "culpability for the charged crime was high," although the appellant served only as the "getaway driver").

The record is silent as to whether, at twenty-one years old, Pizarro had any prior criminal history. However, the trial court, as we do now, was permitted to consider the three existing offenses in conjunction with one another. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) ("[E]vidence may be offered . . . , including but not limited to . . . any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt . . . , regardless of whether he has previously been charged with or finally convicted of the crime or act."); *Simpson*, 488 S.W.3d at 322–24; *see, e.g.*, *Sneed v. State*, 406 S.W.3d 638, 644 (Tex. App.—Eastland 2013, no pet.) (concluding that a twenty-five-year sentence for possession of a controlled substance is not grossly disproportionate to the offense when the trial court was presented with evidence that appellant had committed two additional serious offenses).

Pizarro failed to articulate how the sentences here, which were within the legislatively-prescribed punishment range, were grossly disproportionate to his crimes. Pizarro generally argues that, because he is only twenty-one years old, apologetic before the court, and committed "victimless acts" while under community supervision,[5] the

[5] Appellant also argues, in part, that the sentences were grossly disproportionate relative to the minor violations committed while on community supervision. However, we look only to the facts of the underlying offense to determine if a sentence is constitutionally excessive. *See State v. Simpson*, 488 S.W.3d 318, 322–24 (Tex. Crim. App. 2016) (discussing the gross disproportionality test); *Rodriguez v. State*, No. 13-17-00163-CR, 2018 WL 360162, at *4 (Tex. App.—Corpus Christi–Edinburg Jan. 11, 2018, no pet.) (mem. op., not designated for publication) ("We do not look to the grounds for adjudication in a

legislatively-prescribed range of sentences should not apply to him. Pizarro cites no authority, and we find none, supporting this contention. *See Simpson*, 488 S.W.3d at 324 (holding that evidence of "the age and circumstances of the prior offenses, [and appellant's] need for drug treatment" although "relevant to the trial court's normative punishment decision[,]" does not "substantiate [appellant's] legal claim that his sentence was unconstitutional.").

Accordingly, having applied the gross disproportionality test set forth in *Simpson*, we conclude that the trial court did not abuse its discretion in imposing the sentences it did. *See Ex parte Chavez*, 213 S.W.3d at 323; *Simpson*, 488 S.W.3d at 324; *Trevino*, 174 S.W.3d at 928. We overrule Pizarro's sole issue on appeal.

III. CONCLUSION

The trial court's judgments are affirmed.

GREGORY T. PERKES
Justice

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

Delivered and filed the
15th day of August, 2019.

motion-to-revoke proceeding to determine if the sentence is cruel and unusual."); *see also Ex parte Lea*, 505 S.W.3d 913, 915 (Tex. Crim. App. 2016) ("After a defendant is placed on community supervision, it can be revoked on a sole violation of a condition of that supervision.").