NUMBER 13-19-00245-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

GABRIEL HERNANDEZ, **Appellee.**

On appeal from the 370th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Chief Justice Contreras

Appellee Gabriel Hernandez entered an open plea of guilty to murder, a first-degree felony. *See* TEX. PENAL CODE ANN. § 19.02(b). The trial court found him guilty and sentenced him to forty years' imprisonment. Appellee then filed two post-judgment motions alleging excessive punishment, and the trial court granted both, first reducing the sentence to thirty-nine years and then to thirty years. The State argues by two issues on

appeal that: (1) the trial court erred in granting appellee's second post-judgment motion, and (2) the judgment should be reformed to reflect the correct punishment range. Finding both of the State's issues meritorious, we will affirm as modified.

I. BACKGROUND

The indictment alleged that, on or about October 1, 2017, appellee intentionally or knowingly caused the death of Angel Sanchez by shooting him with a firearm. *See id.* The indictment also alleged, for punishment enhancement purposes, that appellee had a prior felony conviction for manslaughter. *See id.* § 12.42(c)(1) (providing that, if it is shown that the defendant has previously been finally convicted of a felony other than a state jail felony, on conviction for a first-degree felony the defendant shall be punished by imprisonment for life or for any term of not more than ninety-nine years or less than fifteen years).

A. Initial Sentencing

Without a plea agreement, appellee pleaded guilty to the murder charge and true to the enhancement paragraph on December 17, 2018.[1] At a sentencing hearing on February 6, 2019, the trial court questioned appellee in detail about both the charged offense and the prior manslaughter conviction. As to the 2017 murder charge, appellee explained that he was in a strip club with his uncle when they encountered Sanchez. According to appellee, Sanchez was a "dangerous" drug trafficker and a "bad guy" who had previously beaten up his uncle and who had threatened appellee that night. Appellee claimed that he wanted to leave the club, noting that he had just been released from jail,

[1] The reporter's record contains no transcript of any proceedings held on December 17, 2018. However, the first judgment of conviction in this case, signed on February 6, 2019, states that appellee pleaded guilty on December 17, 2018. That judgment also states that appellee pleaded "true" to the enhancement paragraph and that the trial court found the paragraph true.

but his uncle encouraged him to take cocaine and to shoot Sanchez. Appellee did so. When asked whether he believed his uncle was "just as or more responsible for this than you," appellee replied: "Yes. I think he is."

Appellee agreed with the trial court that his uncle believed he was capable of shooting someone because he had done so before, referring to the earlier manslaughter conviction. In that incident, according to appellee, he was also at a strip club when he got into a fight with some men, one of whom pulled a handgun on him. Appellee stated that, when the fight moved outside, he "defended [him]self" by shooting at the men. He shot one of the men in the face and another in the chest; both survived. Unfortunately, appellee also shot a bystander—his cousin—in the leg, and his cousin bled to death. Appellee was initially charged with attempted capital murder, but eventually pleaded guilty to manslaughter.

The trial court observed on the record as follows:

> [Appellee's] story seems to be consistent with the evidence. There's no question that he—he is the killer. There's no question he's the one that pulled the trigger. There's no question that he intended to pull the trigger, and there's no question that he had done it before. But there's also no question, if we believe this man, that [appellee's uncle] is the one that had the beef with the deceased, and [appellee's uncle] is the one that better knew his nephew and was able to utilize him as the instrument of the murder.

The trial court then asked the State why appellee's uncle would be offered a plea agreement with a shorter sentencing recommendation than that offered to appellee.[2] The prosecutor replied that the State does not believe all of appellee's story; he noted that

[2] Later, the trial court told the prosecutor: "You can't have two people charged with the same crime, with the same type of responsibility, and think that you're being just if I sentence this man to 60 years, and the other man gets probation. How is that just?" According to the prosecutor, however, the State was considering offering appellee's uncle a plea deal including a recommendation of a sixty-year sentence, not probation, though the State had not yet made the offer at the time of appellee's sentencing hearing.

appellee "single-handedly smuggled the weapon into the bar" and did not previously claim to be coerced, whereas his uncle "immediately" cooperated with police. The prosecutor further observed that appellee has not shown remorse or apologized for his actions. He asked the trial court to sentence appellee to sixty years' imprisonment. Defense counsel asked the court to "consider" the minimum fifteen-year sentence.

The trial court also briefly examined appellee's mother, who asked for "mercy" for her son. Further, the court read a letter from "Ms. Sanchez," who is "one of the ladies who had children with the deceased and was married to him at one time." The trial court stated that the letter was "very ironic" because "the man she's describing is a man that gets up in the morning with a lunch pail, and goes to work, and works hard, comes home to his family, and devotes himself to his children and his family, and that's not the case." The court noted specifically that "[t]he deceased had been arrested several times for assault against family members" and "was part of the drug business."

After observing that appellee would not be eligible for parole until he completed half of his sentence, the trial court pronounced appellee's sentence at forty years' imprisonment. A judgment of conviction setting the sentence at forty years was rendered later on the day of the hearing.

B. Motions for Reconsideration of Sentence

Appellee filed his first "Motion for Reconsideration of Sentence" on February 27, 2019. In it, appellee argued that his sentence is "excessive in light of the evidence," noting that "the victim's violent criminal activities and history with Defendant's uncle lent to the circumstances which gave rise to this incident." The motion argued that appellee's "early exposure to a violent, criminal lifestyle was a result of circumstances beyond his control"

and that both the indicted offense and the prior conviction "were based on incidents related to the drug trade." The motion further stated: "The Court recognized that the one who orders a killing has more responsibility than he who carries it out, and in this case the shooting was carried out at the persistent urging of [his uncle]." Appellee asked for the sentence to be reduced to the fifteen-year minimum.

At a hearing on the motion on March 8, 2019, appellee asked for forgiveness from the court and explained that "[t]he alcohol and the drugs made me do that . . . . The pressure coming from my uncle."

The court noted on the record that the hearing was a "last-minute deal"—and thus, the victim's family was not able to appear—because the court had just concluded a three-week jury trial and "neglected to set this timely." The court explained that appellee's motion "didn't contain anything that the Court could view as a motion for new trial," and therefore, the court's plenary power was set to expire that day. *See State v. Aguilera*, 165 S.W.3d 695, 697–98 (Tex. Crim. App. 2005) (noting that "a trial court retains plenary power to modify its sentence if a motion for new trial or motion in arrest of judgment is filed within 30 days of sentencing") (citing TEX. R. APP. P. 21.4, 22.3). The court stated:

> I had to take action on this case in one form or another in order to be able to retain some jurisdiction over the case to the extent that we would need to actually have a full blown-out hearing . . . .
>
> [I]n order for me to continue to maintain jurisdiction of the case and possibly reevaluate this case with more detail, having the victims here and stuff, the only thing I can do is consider the motion at this point. And if I modify this judgment, I maintain jurisdiction for at least another 30 days.
>
> So at this time what I will do is for now . . . I am going to assess punishment not at 40 years, but at 39 years . . . .

The trial court subsequently rendered a written order granting the motion for reconsideration and reducing the sentence to thirty-nine years.

Appellee filed a second "Motion for Reconsideration of Sentence" on March 18, 2019, largely repeating the arguments made in his first motion. He argued his sentence is "excessive and grossly disproportionate" under the Eighth Amendment to the United States Constitution and *Solem v. Helm*, 463 U.S. 277, 290 (1983). The second motion contained an additional allegation that, with respect to both the murder and the manslaughter cases, appellee "had good reason to believe and did believe that he would at some point in the near future be threatened, harmed, or killed himself by the persons he shot at based on their statements." Appellee asked that his sentence be reduced to twenty years.

At hearings on May 2, May 15, and May 21, 2019, the trial court heard arguments on the second motion, but it took no additional testimony. On May 22, the trial court granted the second motion and re-sentenced appellee to thirty years' imprisonment. The State filed this appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(3) (providing that the State is entitled to appeal an order granting a new trial in a criminal case).

II. DISCUSSION

A. Standard of Review and Applicable Law

We review a trial court's granting of a motion for new trial for abuse of discretion.[3] *State v. Thomas*, 428 S.W.3d 99, 103 (Tex. Crim. App. 2014); *State v. Herndon*, 215 S.W.3d 901, 906 (Tex. Crim. App. 2007). The test for abuse of discretion is not whether,

[3] Appellee's "Motion[s] for Reconsideration of Sentence" are each equivalent to a motion for new trial on punishment. *See* TEX. R. APP. P. 21.1(b) ("*New trial on punishment* means a new hearing of the punishment stage of a criminal action after the trial court has, on the defendant's motion, set aside an assessment of punishment without setting aside a finding or verdict of guilt."); *State v. Savage*, 933 S.W.2d 497, 499 (Tex. Crim. App. 1996) ("[W]hen an order is the functional equivalent of granting a motion for new trial, the reviewing court can look past the label assigned to the order by the trial court and treat the order as a motion for new trial."). Therefore, when the first motion was filed on February 27, 2019, the trial court's plenary power was extended to seventy-five days after sentencing. *See* TEX. R. APP. P. 21.8; *State v. Aguilera*, 165 S.W.3d 695, 697–98 (Tex. Crim. App. 2005).

in the opinion of the appellate court, the facts present an appropriate case for the trial court's action, but rather, whether the trial court acted without reference to any guiding rules or principles. *Thomas*, 428 S.W.3d at 103–104 (noting that "[t]he mere fact that a trial court may decide a matter differently from an appellate court does not demonstrate an abuse of discretion."). We view the evidence in the light most favorable to the trial court's ruling, defer to the court's credibility determinations, and presume that all reasonable fact findings in support of the ruling have been made. *Id.* at 104.

Texas Rule of Appellate Procedure 21.3 states that "[t]he defendant must be granted a new trial, or a new trial on punishment" for any one of several reasons, including that "the verdict is contrary to the law and the evidence." TEX. R. APP. P. 21.3(h). Although the list of reasons given in Rule 21.3 is non-exclusive, a trial court abuses its discretion if it grants a new trial for a "non-legal or a legally invalid reason." *Thomas*, 428 S.W.3d at 103–104. For example, the trial court cannot grant a new trial "just because it personally believes that the defendant is innocent or received a raw deal." *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016). Nor may a trial court grant a new punishment trial based only on "second thoughts" about the sentence that it imposed upon a defendant. *Id.* On the other hand, a trial court does not generally abuse its discretion in granting a motion for new trial if the defendant: (1) articulates a valid legal claim in his motion for new trial; (2) produces evidence or points to evidence in the trial record that substantiates his legal claim; and (3) shows prejudice to his substantial rights under the standards in Rule 44.2 of the Texas Rules of Appellate Procedure. *Id.* (citing *Herndon*, 215 S.W.3d at 909).

The Eighth Amendment of the United States Constitution, which is applicable to

state courts through the Due Process Clause of the Fourteenth Amendment, prohibits punishments that are "grossly disproportionate to the severity of the crime" and those that do not serve any "penological purpose." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1144 (2019) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 & n.7 (1976)); *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); *id.* amend. XIV. However, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Ewing v. California*, 538 U.S. 11, 21 (2003); *Simpson*, 488 S.W.3d at 323. The United States Supreme Court has only twice held that a non-capital sentence imposed on an adult was constitutionally disproportionate. *See Solem*, 463 U.S. at 303 (concluding that life imprisonment without parole was a grossly disproportionate sentence for the crime of "uttering a no-account check" for $100); *Weems v. United States*, 217 U.S. 349, 383 (1910) (concluding that punishment of fifteen years in a prison camp was grossly disproportionate to the crime of falsifying a public record). Generally, as long as a sentence is legal and assessed within the legislatively determined range, it will not be found unconstitutional. *Ex parte Chavez*, 213 S.W.3d 320, 323–24 (Tex. Crim. App. 2006) (orig. proceeding) (noting that "the sentencer's discretion to impose any punishment within the prescribed range is essentially unfettered"); *see Foster v. State*, 525 S.W.3d 898, 912 (Tex. App.—Dallas 2017, pet. ref'd).

B. Analysis

By its first issue, the State contests only the trial court's granting of appellee's second motion seeking a reduced sentence—it did not appeal the granting of appellee's first motion and does not argue that such ruling is reviewable in this appeal. We will limit

our review accordingly.

The State contends that, though appellee asserted a valid legal claim, he failed to substantiate it. We agree. A claim that a particular sentence is unconstitutional because it is cruel, unusual, excessive, or grossly disproportionate to the crime is a legally valid claim which, if substantiated, would warrant a new trial on punishment. *Simpson*, 488 S.W.3d at 322. To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses. *Graham v. Florida*, 560 U.S. 48, 60 (2010); *Simpson*, 488 S.W.3d at 323.[4] "In the rare case in which this threshold comparison leads to an inference of gross disproportionality, the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Graham*, 560 U.S. at 60; *Simpson*, 488 S.W.3d at 323.

Appellee pleaded guilty to a first-degree felony and true to an enhancement paragraph alleging a prior second-degree felony conviction; therefore, the applicable punishment range was imprisonment for life or for a term of fifteen to ninety-nine years. *See* TEX. PENAL CODE ANN. § 12.42(c)(1). Appellee's sentence of thirty-nine years fell squarely within this range. *See Ex parte Chavez*, 213 S.W.3d at 323–24. Consideration of the factors elucidated in *Graham* underscores the proportionality of this sentence. In particular, the "harm caused or threatened to the victim" in this case was maximal—i.e.,

[4] Notably, these cases do not indicate that the victim's prior arrest record or threats made against the defendant are proper considerations in determining the proportionality of a sentence.

death—and appellee had previously been convicted of manslaughter when he shot at two people and accidentally killed his cousin. *See Graham*, 560 U.S. at 60 (noting that the "severity and irrevocability" of homicide crimes distinguishes them from all other crimes and that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers"). Though the trial court apparently credited appellee's story that his uncle convinced him to shoot Sanchez, and though that evidence was certainly relevant to the trial court's initial sentencing decision, that does not render the earlier sentence disproportionate. *See Simpson*, 488 S.W.3d at 324 ("The evidence adduced at the hearing on the motion for new trial—evidence about Simpson's minimal role in the offense, the age and circumstances of the prior offenses, his need for drug treatment, his employment—was undoubtedly relevant to the trial court's normative punishment decision. It did not, however, substantiate Appellee's legal claim that his sentence was unconstitutional."). We conclude that the thirty-nine-year sentence was not disproportionate to the crime. Accordingly, the punishment was constitutional, and we need not compare other sentences. *See Graham*, 560 U.S. at 60; *Simpson*, 488 S.W.3d at 323.

It is apparent that, in this case, the trial court had "second thoughts" about the sentence it initially imposed. That is not a permissible basis upon which to grant a new trial on punishment. *See Simpson*, 488 S.W.3d at 322. In his brief, appellee principally relies on the longstanding case law providing that trial courts have wide discretion in sentencing. But when a defendant, after being convicted and sentenced, asks the trial court to reduce the sentence on grounds that it is unconstitutionally excessive or

disproportionate, the trial court essentially plays the role of an appellate court in assessing the constitutional claim. No appellate court in this State—or for that matter, this Nation—would find that a thirty-nine-year sentence was an unconstitutionally disproportionate punishment for murder, given the facts presented here. *See, e.g.*, *State v. Thomas*, 426 S.W.3d 233, 241 (Tex. App.—Houston [1st Dist.] 2012) (finding life sentence not disproportionate punishment for murder where appellant's co-defendant entered guilty plea and received ten-year sentence), ***aff'd***, 428 S.W.3d at 99; *Ham v. State*, 355 S.W.3d 819, 827 (Tex. App.—Amarillo 2011, pet. ref'd) (finding ninety-nine-year sentence not disproportionate punishment for murder where appellant had no prior criminal convictions but argued that his intoxication mitigated the gravity of his actions); *Battle v. State*, 348 S.W.3d 29, 32 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (finding life sentence without parole not disproportionate sentence for capital murder where was conviction based on appellant's liability as a co-conspirator); *Quintana v. State*, 777 S.W.2d 474, 480 (Tex. App.—Corpus Christi–Edinburg 1989, pet. ref'd) (finding ninety-nine-year sentence not disproportionate punishment for murder where sentence was stacked upon previous sixty-year murder sentence and appellant also had a prior conviction for attempted rape). The trial court acted without regard to guiding rules and principles and abused its discretion by making that finding in this case. *See id.*

The State's first issue is sustained.

C. Reformation of Judgment

By its second issue, the State argues that the final judgment should be modified because it incorrectly states that the applicable punishment range was "LIFE OR 5-99 YEARS IN PRISON." We observe that the final judgment also incorrectly states that

appellee entered no plea, and the trial court made no finding, as to the enhancement paragraph in the indictment. The record reflects instead that appellee pleaded "true" to the enhancement paragraph, and that the trial court found the allegation true based on appellee's plea.

We sustain the State's second issue and will modify the trial court's judgment accordingly. *See French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) ("[A]n appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source.").

III. CONCLUSION

We modify the trial court's final judgment, dated May 22, 2019, to reflect: (1) the punishment imposed is thirty-nine years' imprisonment; (2) the applicable punishment range is life or fifteen to ninety-nine years' imprisonment; (3) appellee pleaded "true" to the enhancement paragraph; and (4) the trial court found the enhancement paragraph true. The judgment is affirmed as modified. *See* TEX. R. APP. P. 43.2(b).

DORI CONTRERAS
Chief Justice

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

Delivered and filed the
14th day of May, 2020.