

**IN THE COURT OF APPEALS OF IOWA**

No. 2-666 / 11-1565  
Filed September 19, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JESUS JAVIER DUENAS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Douglas Staskal,  
Judge.

Jesus Duenas appeals from his sentence for robbery in the first degree claiming a violation of his right against cruel and unusual punishment under State and Federal Constitutions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Martha J. Lucey, Assistant State Appellate Defender, and Tyler J. Buller, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

**BOWER, J.**

Jesus Javier Duenas appeals his sentence following his conviction for robbery in the first degree, in violation of Iowa Code section 711.2 (2011). Duenas contends the mandatory minimum prison sentence of seventeen-and-a-half years violates his right against cruel and unusual punishment under the State and Federal Constitutions. Upon our review, we affirm Duenas's sentence.

**I. Background Facts and Proceedings.**

On January 22, 2011, at approximately 1:20 p.m., Bianca Mireles heard a noise like the door "being forced open" in the basement of her Des Moines home. Bianca looked downstairs and saw two men. The men saw Bianca then "turned around" and "ran." Bianca called her brother, Miguel, to ask if he could come home because she was "scared" and "thought someone had just broken in." Miguel told Bianca to lock the doors and that he was on his way. Bianca stayed on the phone with Miguel as she walked downstairs to lock the door. As Bianca approached the door, she saw "the two guys talking to each other."

The men noticed Bianca. One of the men "pulled out a gun" and pointed it at her. The man with the gun then walked toward Bianca, "grabbed" her by her hair, and "slammed" her head against the wall and a door. The man "threw [Bianca] on the floor" and started kicking her in the face, back, and the back of her head. He then hit her head with the gun, and yelled "to give him money" and "give him [her] phone." The other man went upstairs briefly and then said, "Let's go." The two men then "ran out the same door" in the basement. Des Moines Police Officers arrived shortly thereafter.

Bianca stated the man with the gun was wearing a “black hoodie” during the robbery. Bianca recognized the man as “Gremlin,” also known as Jesus Duenas. Bianca stated she knew Duenas because he had dated her friend, Cammy. At one point while the man with the gun was beating her, Bianca said, “Gremlin, why are you doing that?” to which the man said “Shut up.” The following day, Bianca identified Duenas from a line-up with six photographs shown to her by police. Bianca also identified Duenas at trial. Bianca stated she was “100 percent sure” the man with the gun was Duenas. Bianca could not identify the other man.

Miguel’s testimony corroborated Bianca’s recollection of the phone call that took place during the course of the robbery. Miguel called the police after his phone call with Bianca disconnected.

During an interview with police, Duenas stated he was working during the time of the robbery and that he had only left work to have lunch at Target. Police contacted Duenas’s employer, West Glen, to obtain surveillance records. West Glen Operations Manager Jodi Runge testified that West Glen tracks entry into most buildings with records of digital key-fob use and surveillance video. The records for Duenas on the day of the robbery revealed a gap in the time-log between 11:48 a.m. and 2:43 p.m. Video surveillance showed Duenas walking south off West Glen property—not in the direction of Target—at approximately 11:48 a.m. Video surveillance showed Duenas returning to the property as a

passenger in a car at 2:26 p.m. Duenas then entered a West Glen bathroom and left a black hooded sweatshirt in a stall.<sup>1</sup>

The State charged Duenas with robbery in the first degree. The jury found Duenas guilty as charged. The court sentenced Duenas to serve a twenty-five-year prison term, subject to a mandatory minimum sentence of seventy percent. See Iowa Code § 902.12(5). Accordingly, Duenas' mandatory minimum sentence was seventeen-and-a-half years. Duenas now appeals.

## **II. Scope and Standard of Review.**

Duenas contends his sentence violates the state and Federal Constitutions and is therefore illegal. Review of this constitutional claim is de novo. *State v. Oliver*, 812 N.W.2d 636, 639 (Iowa 2012).

## **III. Discussion.**

The Eighth Amendment of the United States Constitution and article I, section 17 of the Iowa Constitution prohibit the imposition of cruel and unusual punishment. U.S. Const. amend. VIII; Iowa Const. art. I, § 17; see *State v. Bruegger*, 773 N.W.2d 862, 872, 882 (Iowa 2009). Embodied in this ban is a “concept of proportionality” that punishment for crime should be graduated and proportioned to the offense. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). A defendant can challenge the proportionality of his sentence under the “categorical” approach, or the defendant can make a “gross proportionality” challenge to his particular sentence. *Oliver*, 812 N.W.2d at 640; see *Graham*, 130 S. Ct. at 2022.

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<sup>1</sup> Police recovered the sweatshirt, but found no evidence of blood on the sweatshirt.

A categorical argument can be made by contending a mismatch exists “between the culpability of a class of offenders and the severity of a penalty” in cases in which the court implements the proportionality standard by “certain categorical restrictions” on the penalty. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012); *Graham*, 130 S. Ct. at 2022; see *Oliver*, 812 N.W.2d at 640 (“Under the categorical approach, the question is whether a particular *sentencing practice* violates the Eighth Amendment.”). Duenas does not make a categorical proportionality challenge to his robbery sentence.

Instead, Duenas asserts “that the mandatory-minimum for a first degree robbery conviction under section 902.12 is cruel and unusual as-applied to [him] in this specific case.”<sup>2</sup> As such, Duenas’s argument implicates a gross proportionality challenge, namely, a challenge “to the length of term-of-years sentences given all the circumstances in a particular case.” See *Graham*, 130 S. Ct. at 2021.

“[T]he Eighth Amendment does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime.” *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991). In determining whether a term of years is grossly disproportionate, the court “must begin by comparing the gravity of the offense and the severity of the sentence.” *Graham*, 130 S. Ct. at 2022; see *Solem v. Helm*, 463 U.S. 277, 290-91 (1983).

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<sup>2</sup> Duenas describes his argument as an “as-applied” challenge to his sentence. We will treat Duenas’s “as-applied” challenge as a “gross proportionality” challenge. See *Oliver*, 812 N.W.2d at 640–41 (observing the terminology for an Eighth Amendment challenge has changed post-*Graham*, 130 S. Ct. at 2022).

“[I]n 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*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005). If the comparative analysis under steps two and three validates the initial threshold judgment that the sentence is grossly disproportionate, then the sentence is cruel and unusual. *Id.*

Iowa also follows this three-step “fact-specific” analysis in determining whether a particular defendant’s penalty is grossly disproportionate to the crimes committed by that particular defendant. See *Oliver*, 812 N.W.2d at 640 (observing that Iowa has adopted a “more stringent gross-disproportionality review” than the federal standard). Our supreme court has acknowledged four general principles to guide our analysis under the initial threshold test: (1) substantial deference should be given to the penalties the legislature has established for crimes; (2) it is rare that a sentence will be so grossly disproportionate to the crime as to satisfy the threshold inquiry and warrant further review; (3) a recidivist offender is considered to be more culpable, and thus, more deserving of a longer sentence; and (4) in certain cases a unique combination of features can converge to generate a higher risk of gross disproportionality. *Id.* at 650–51.

Using these principles, we must determine whether Duenas’s sentence leads to an inference of gross disproportionality under the threshold test. A sentence will more likely be found disproportionate to the crime where a

defendant is “inadvertently caught by a broadly written statute.” *Id.* at 651.

Duenas was convicted of robbery in the first degree under Iowa Code sections 711.1 and 711.2. The robbery statute defines the crime as follows:

A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person’s escape from the scene thereof with or without the stolen property;

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony.

It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

Iowa Code § 711.1. First-degree robbery is committed when a person, “while perpetrating a robbery, . . . purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon.” *Id.* § 711.2. The mandatory minimum sentencing provision states in pertinent part:

A person serving a sentence for conviction of the following felonies, including a person serving a sentence for conviction of the following felonies prior to July 1, 2003, shall be denied parole or work release unless the person has served at least seven-tenths of the maximum term of the person’s sentence:

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5. Robbery in the first or second degree in violation of section 711.2 or 711.3.

Iowa Code § 902.12(5).

Duenas contends that although he “was not a juvenile at the time of the offense, he had only turned eighteen a few months before.” Duenas states his “age and limited education are relevant to evaluating whether his sentence is disproportionate to his offense.” Duenas also sets forth he “has no prior felony convictions,” although he concedes the status of his juvenile record “is not

entirely clear from the record.”<sup>3</sup> Regardless, Duenas contends the mandatory minimum sentence for first-degree robbery as applied to him is disproportionate to the crime and is a “waste of a life, a poor use of the State’s resources, and dashes any hope for future rehabilitation.”

Upon our review, we find Duenas’s actions on January 22, 2011, fall squarely within the well-defined parameters of the robbery statute. As the district court observed:

Certainly you were charged with a crime that is fully supported by the evidence. And, as I said, the jury’s verdict was exactly correct. This is a brutal, vicious crime. You beat up this girl for absolutely no reason whatsoever, and what it proves to me is that you’re a dangerous person and that I’m doing a public service by imposing the sentence that the law requires in this case.

And I’m sure you don’t have any appreciation whatsoever for the damage that you did to that girl by what you did to her. And, again, I can’t say any more than it’s just a senseless, stupid, violent, unnecessary, vicious assault and deserves all the punishment that you’re about to get.

The legislature has chosen the mandatory sentencing scheme for serious crimes such as the crime at issue here. See *State v. Lara*, 580 N.W.2d 783, 785 (Iowa 1998) (“Substantial deference is afforded to the legislature in setting the penalty for crimes.”). There was a high risk of death or serious injury to the victim present while this first-degree robbery was committed. See *id.* Duenas’s seems to point to his age as the main factor making his sentence grossly disproportionate. However, Duenas was an adult at the time he committed this crime, and aside from a bare assertion, Duenas has not raised any evidence

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<sup>3</sup> Duenas’s juvenile record includes charges for burglary in the third degree in 2008 and possession of a controlled substance in 2010.



regarding his intelligence or emotional maturity. Duenas's age by no means leads us to a conclusion that his sentence is "off the charts." See *Bruegger*, 773 N.W.2d at 886.

We conclude Duenas's sentence does not raise an inference of gross disproportionality to his crime of robbery in the first degree. Accordingly, he cannot prevail on his individualized challenge under the cruel-and-unusual punishment provisions of the state and Federal Constitutions. We affirm the district court's imposition of the seventy percent mandatory minimum sentence under Iowa Code section 902.12.

**AFFIRMED.**