NUMBER 13-19-00175-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

RICKY DONALD HAMILTON JR., **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 28th District Court of Nueces County, Texas.

MEMORANDUM OPINION

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

Appellant Ricky Donald Hamilton Jr. appeals from the revocation of his community supervision. By one issue, appellant argues that the punishment assessed by the trial court was excessive. We affirm.

I. BACKGROUND

In May 2018, appellant was indicted for burglary of a habitation with intent to commit a felony, a first-degree felony. *See* TEX. PENAL CODE ANN. § 30.02(d). Appellant entered into a plea agreement with the State, pleaded guilty to the offense, and was placed on deferred adjudication community supervision for six years.

In March 2019, the State filed a motion to revoke appellant's community supervision alleging appellant committed multiple violations of the conditions of his supervision. Specifically, the State alleged appellant committed nine new criminal offenses and failed to: submit to a urinalysis, report to his supervision officer, pay supervision fees, complete a drug treatment program, perform community service, and refrain from contacting the victim of his burglary offense. Appellant pleaded true to the allegations that he failed to pay supervision fees, perform community service, and not contact the victim; appellant pleaded not true to all of the other allegations. After a hearing, the trial court found the majority of the allegations true,[1] adjudicated appellant guilty, and assessed punishment at ten years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice.

This appeal followed.

II. DISCUSSION

By his sole issue, appellant argues that the punishment assessed by the trial court was excessive under the facts of the case.

The Eighth Amendment of the United States Constitution, which is applicable to state courts through the Due Process Clause of the Fourteenth Amendment, prohibits

[1] The trial court found not true the allegations that appellant failed to report in January 2019, committed the offense of stalking, and failed to complete drug treatment.

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); *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016). The United States Supreme Court has only twice held that a non-capital sentence imposed on an adult was constitutionally disproportionate. *See, e.g.*, *Solem v. Helm*, 463 U.S 277, 303 (1983) (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) (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).

In addition, for an issue to be preserved on appeal, there must be a timely objection that specifically states the legal basis for the objection. TEX. R. APP. P. 33.1(a); *Layton v. State*, 280 S.W.3d 235, 238–39 (Tex. Crim. App. 2009). When the sentence imposed is within the punishment range and not illegal, the failure to specifically object in open court or in a post-trial motion waives any error on appeal. *See Noland v. State*, 264 S.W.3d

144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *Trevino v. State*, 174 S.W.3d 925, 927–29 (Tex. App.—Corpus Christi–Edinburg 2005, pet. ref'd) (concluding that failure to object to the sentence as cruel and unusual forfeits error).

Here, appellant received a sentence of ten years, which is well below the ninety-nine year maximum prescribed for the offense by the Legislature. *See* TEX. PENAL CODE ANN. §§ 12.32(a) (providing that an individual adjudged guilty of a first degree felony shall be punished by imprisonment "for life or for any term of not more than 99 years or less than five years"), 30.02(d) (providing that burglary of a habitation with intent to commit a felony is a first-degree felony). As such, appellant's sentence was not prohibited as per se excessive, cruel, or unusual. *See Trevino*, 174 S.W.3d at 928. Furthermore, appellant did not object at the trial court to the sentence imposed. Therefore, appellant has forfeited his complaint on appeal, and we conclude this issue has been waived. *See* TEX. R. APP. P. 33.1(a); *Trevino*, 174 S.W.3d at 928. Finally, even if appellant had preserved error, imprisonment for ten years is not a grossly disproportionate sentence considering the evidence presented. *See Solem*, 463 U.S. at 292; *Trevino*, 174 S.W.3d at 928; *Sullivan v. State*, 975 S.W.2d 755, 757 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.).

We overrule appellant's sole issue.

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Chief Justice

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

Delivered and filed the
28th day of May, 2020.