COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ALEX MONTELONGO,	§	
	§	No. 08-18-00094-CR
Appellant,	§	Appeal from the
v.	§	120th District Court
	§	of El Paso County, Texas
THE STATE OF TEXAS,	§	(TC# 20070D01175)
Appellee.		

O P I N I O N

Alex Montelongo appeals the trial court's assessment of his terms of confinement for aggravated sexual assault of a child following revocation of deferred-adjudication community supervision.[1] In two issues, (1) Montelongo contends the trial court abused its discretion by assessing a punishment that is allegedly inconsistent with the objectives set out in Texas Penal Code § 1.02, (2) and that his failure to object to the sentences in the trial court does not prevent us from reviewing the alleged error. Because we hold Montelongo failed to preserve for review the alleged Section 1.02 error in the trial court, we affirm.

[1] Montelongo is also appealing the trial court's judgment in a companion case tried concurrently with this case. In the companion case, appellate cause No. 08–18–00093–CR (TC# 20150D02910), he appeals his adjudication and sentence for sexual assault.

BACKGROUND

In April 2008, when Montelongo was seventeen years old, he pleaded guilty to sexually assaulting his six-year-old stepbrother. The trial court deferred adjudication of guilt and placed him on community supervision for ten years. A condition of his community supervision required Montelongo attend and participate in a sex-offender treatment program.

In February 2016, while he was on probation, Montelongo pleaded guilty to sexually assaulting an adult female, for which he was again placed on deferred-adjudication community supervision, this time for four years. Again, a condition of his probation required he attend and participate in a sex-offender treatment program.

In June 2016, a few months after Montelongo was placed on community supervision for his second sexual offense, the conditions of his probation in each case were modified to require Montelongo to: (1) attend, participate, and successfully complete psychological and/or psychiatric treatment; (2) take prescribed medication as directed by a physician; and (3) attend the Intensive Probation Program under the dual supervision of the Mental Health Initiative Caseload and Child Abuse Caseload.

In October 2017, the State filed motions to adjudicate guilt in both cases alleging Montelongo violated the terms of his community supervision by failing to comply with the aforementioned modified conditions.

In April 2018, the State amended its motion in the sexual assault case to include the additional allegation Montelongo failed to "participate fully" or "successfully complete" sex-offender treatment. Montelongo pleaded "not true" to all of the State's allegations.

Contested Revocation

On May 16, 2018, a contested revocation hearing was held. Two of Montelongo's supervising probation officers, Paul Razo and Christina Chavez, testified. The trial court also heard testimony from Montelongo's sex-offender treatment providers, Norma W. Reed and Matt Bierds. Montelongo called no witnesses.

Testimony of Probation Officer Paul Razo

Razo began supervising Montelongo on a regular basis beginning on April 21, 2015. He said in August 2017, Montelongo told him he did not want to attend sex-offender counseling offered by Norma W. Reed because he could not afford to pay her fee. Although Razo immediately referred Montelongo to Matt Bierds, a treatment provider paid by the county, Montelongo did not resume counseling until January 2018. According to Razo, after Montelongo attended some sessions, Bierds ultimately dropped him from his treatment program because he refused to admit he committed the offense for which he was placed on probation.

Testimony of Probation Officer Christina Chavez

Chavez testified she is a mental health probation officer who began supervising Montelongo, along with Razo, on July 29, 2016. According to Chavez, in August 2017, Montelongo refused to take medication as prescribed by his mental health provider due to "concerns" he had about the medication.

Testimony of Treatment Provider Norma W. Reed

Reed is a licensed social worker and sex-offender treatment provider. Reed first accepted Montelongo into her treatment program in June 2008. Montelongo was required to attend group sessions once a week and an individual session once a month. Each individual session cost $85 and each group session cost $35. According to Reed, in August 2017, Montelongo stopped

attending all sessions. Reed eventually dropped him from her treatment program in January 2018 due to his nonattendance.

Testimony of Treatment Provider Matt Bierds

Matt Bierds is a licensed sex-offender treatment provider. Montelongo's first group session with Bierds was on January 17, 2018. Bierds' treatment notes described Montelongo at that time as "Resistant. Denies offense." Montelongo was required to attend weekly group meetings and to perform weekly assignments related to treatment. According to Bierds, between January 17 and April 18, Montelongo appeared at the group session eleven times. On four of those occasions he was either late (missing one session entirely) or left early. Bierds also testified Montelongo did not complete the weekly work assignments. Bierds said Montelongo refused to accept responsibility for the sexual assaults and that refusal interfered with treatment. Beirds discharged Montelongo from his treatment program on April 19, 2018 due to "failing to make progress."

At the conclusion of the contested revocation hearing, the trial court found the allegations in the State's motions "true," and determined Montelongo had violated the conditions of his probation.

Punishment

At the punishment hearing, the State called twelve witnesses, including AMR, a former girlfriend, who testified she too was sexually assaulted by Montelongo in 2011. She said she reported the assault to police but ultimately dropped the case because she moved to a different city to get away from Montelongo.

Both Chavez and Razo testified at punishment. They portrayed Montelongo as a noncompliant and problematic probationer. Chavez testified about Montelongo's persistent

reluctance to take his prescribed medication. Chavez and Razo chronicled the many other probation violations Montelongo committed through the years, including committing new offenses, taking a knife to an MHMR appointment, breaking curfew, consuming alcohol, allowing himself to be in the presence of children, repeatedly denying he committed the offenses for which he was on probation even though polygraph results confirmed commission, and continuous noncompliance with sex-offender treatment. According to Razo, there was simply "nothing more probation [could] do for him."

Reed testified during the punishment phase as well. According to Reed, in the ten years Montelongo had been in sex-offender treatment, she terminated him from the program five times for failing to participate. She said Montelongo's "wrong thinking or justification and rationalization" about who is responsible for sexual assault was not successfully modified in part because Montelongo refused to acknowledge his thinking required modification. Reed testified her attempts to treat Montelongo were ultimately unsuccessful in large part because Montelongo refused to do "the work that would enable him to work through [the] goals [of treatment]," which included addressing the cognitive distortions that prevented him from recognizing the difference between deviant and healthy sexual behavior. Finally, Reed testified, in her opinion, due to his age, the type of offenses for which he was convicted or charged, and failure to successfully complete sex-offender treatment, there existed an above-average risk Montelongo would commit sexual abuse in the future.

Montelongo testified he had been in the custody of Child Protective Services since he was ten years' old and he started using marijuana at a young age. He acknowledged he needed and wanted "help," but had been unable to "find" it. He said he had a job delivering dialysis medicine

to patients in El Paso and the surrounding areas and he was proud of that job. He also said he had been in a relationship with a woman for a year and seven months and he had a four-year-old child living in Garland, Texas to whom he sent child support.

Finally, Montelongo's girlfriend, Candace Kendrick, testified she and Montelongo had been in a relationship for over a year, Montelongo was a "positive male figure" in her son's life, she was pregnant with Montelongo's child, and that Montelongo provided her with financial assistance.

After taking the time to consider the evidence overnight, the trial court assessed punishment at sixty years' confinement for the first-degree aggravated sexual assault of a child and twenty-years' confinement for the second-degree sexual assault, to run concurrently.

DISCUSSION

Here, Montelongo contends that his prison sentences are inconsistent with the statutory objectives set out in Section 1.02 of the Texas Penal Code.[2]

[2] Section 1.02 of the Texas Penal Code provides:

The general purposes of this 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. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:

(1) to insure the public safety through:

(A) the deterrent influence of the penalties hereinafter provided;

(B) the rehabilitation of those convicted of violations of this code; and

(C) such punishment as may be necessary to prevent likely recurrence of criminal behavior;

(2) by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;

(3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;

A. Failure to Object

Before addressing the merits of Montelongo's claim, we must first determine whether Montelongo preserved for review his Section 1.02 challenge. *See Ford v. State*, 305 S.W.3d 530, 532 (Tex.Crim.App. 2009)("If an issue has not been preserved for appeal, neither the court of appeals nor this Court should address the merits of that issue"). Montelongo concedes, as he must, that he did not object to the sentences in the court below by either asserting an objection after the sentences were announced in court or by filing a motion for new trial. He argues, however, that an objection was not required.

In support of his argument, Montelongo first relies on language contained in Texas Rule of Evidence 103, entitled "Rulings on Evidence," which provides:

> (a) **Preserving a Claim of Error**. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, *unless it was apparent from the context*; or
>
> (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. [Emphasis added].

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(4) to safeguard conduct that is without guilt from condemnation as criminal;

(5) to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons suspected, accused, or convicted of offenses; and

(6) to define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

TEX.PENAL CODE ANN. § 1.02.

TEX.R.EVID. 103(a). Montelongo also relies on similar language contained in Texas Rules of Appellate Procedure 33.1, which provides in relevant part:

> (a) **In General**. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> > (1) the complaint was made to the trial court by a timely request, objection, or motion that:
> >
> > (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, *unless the specific grounds were apparent from the context*; and
> >
> > (B) complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure; and
> >
> > (2) the trial court:
> >
> > (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> >
> > (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal. [Emphasis added].

TEX.R.APP.P. 33.1(a). Montelongo argues that the italicized language above, i.e. "unless the specific grounds were apparent from the context" excuses his failure to object because he claims the error is apparent from the context in the record. We disagree with Montelongo's interpretation of the rules. Rules 103 and 33.1(a) allow for a *general* objection when the *specific* basis for the objection can be gleened from the context in which it was made, but an objection must be made in the first instance. In other words, the relevant language excepts only the requirement that the objection be "specific," not the requirement that an objection be made.

Moreover, the Court of Criminal Appeals has addressed how Rule 103 and Rule 33.1 operate together:

> [B]oth Texas Rule of Appellate Procedure 33.1 and Texas Rule of Evidence 103

> are judge-protecting rules of error preservation. The basic principle of both rules is that of party responsibility. . . [T]he party complaining on appeal (whether it be the State or the defendant) about a trial court's admission, exclusion, or suppression of evidence must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule or statute in question and its precise application to the evidence in question. The issue . . . is not whether the trial court's ruling is legally correct in every sense, but whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal. [Internal footnotes and quotation marks omitted]

Golliday v. State, 560 S.W.3d 664, 669 (Tex.Crim.App. 2018)(*citing Reyna v. State*, 168 S.W.3d 173, 177 (Tex.Crim.App. 2005).

Here, Montelongo made no "timely request, objection, or motion" to his sentences, as required by the rules. Moreover, we see nothing in this record that would have alerted the trial court to the Section 1.02 complaint he raises here. For example, Montelongo did not argue below, as he does here, that the trial court was compelled by Section 1.02 to assess a fifteen to twenty-year prison term. Indeed, Section 1.02 was never even mentioned at the punishment hearing. Rather, Montelongo argued that due to his age and need for psychological counseling, he deserved "one more shot" at rehabilitation and he should be continued on probation, which the trial court was unwilling to do. Consequently, even if Montelongo had raised a *general* objection after the sentences were announced, which he did not, there simply is no "context" in this record to which his Section 1.02 complaint can be tethered. Montelongo's first issue is overruled.

Second, Montelongo urges us to construe his Section 1.02 challenge to the trial court's punishment assessment as one of legal insufficiency, which does not require an objection to preserve error. *See Mayer v. State,* 309 S.W.3d 552, 555 (Tex.Crim.App. 2010)("[a]n appellate court must always address challenges to the [legal] sufficiency of the evidence . . . [and such challenges] need not be preserved for review at the trial level and is not waived by the failure to

do so."); *see also Moff v. State*, 131 S.W.3d 485, 488 (Tex.Crim.App. 2004)("If a defendant challenges the legal sufficiency of the evidence to support his conviction on direct appeal, the appellate court always has a duty to address that issue, regardless of whether it was raised in the trial court.").

We decline to do so. Underpinning legal-sufficiency review is the principle that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). While an appellate court always has the responsibility to confirm, when challenged, that the evidence at issue comports with the beyond-a-reasonable-doubt standard during the guilt/innocence stage of a criminal proceeding, the same need not be said during the punishment phase. Except for enhancement allegations, which, like criminal elements, impose on the State a beyond-a-reasonable-doubt standard of evidentiary proof, *see e.g. Wood v. State*, 486 S.W.3d 583, 589 (Tex.Crim.App. 2016)(applying legal sufficiency review to evidence supporting "true" finding of enhancement paragraph), when it comes to assessing the appropriate punishment applicable to a particular defendant, "neither party carries the burden of proving what punishment should be assessed within the statutorily prescribed range applicable to a given offense," *Jordan v. State*, 256 S.W.3d 286, 291 (Tex.Crim.App. 2008).

Indeed, we have found no case in which the Court of Criminal Appeals has ever applied a legal-sufficiency review to a punishment proceeding that did not involve some form of statutory enhancement allegation which increased the punishment applicable to a given offense. Rather, in the context of punishment assessment alone, the Court has observed that when "considering all of

the evidence admitted during the guilt and punishment phases, the factfinder engages in a normative process that is uninhibited by any required, specific fact determination to decide what particular punishment to assess within the range prescribed by law." *Jordan*, 256 S.W.3d at 292. In such a context, the fact finder's discretion to impose any punishment within the prescribed range is essentially "unfettered." *Ex parte Chavez*, 213 S.W.3d 320, 323 (Tex.Crim.App. 2006). Consequently, absent an enhancement paragraph or its equivalent, any complaint related to assessment of punishment that falls within the statutory range is mere trial error necessitating preservation under Rules 103 and 33.1. *Jordan*, 256 S.W.3d at 291-92.

Here, because there was no enhancement allegation to consider in sentencing, and the trial court assessed punishment within the statutory range, a review of the legal sufficiency of the evidence on which the trial court based its punishment assessment is simply not possible. For these reasons, we hold that Montelongo was required to preserve error by objecting to his sentences in the trial court on the ground that they violated Section 1.02 of the Texas Penal Code. Because he failed to do so, we overrule Montelongo's second issue.

CONCLUSION

The trial court's judgment is affirmed.

July 17, 2020

YVONNE T. RODRIGUEZ, Justice

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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