NUMBER 13-16-00249-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

FRED MARTINEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 117th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Benavides, and Longoria
Memorandum Opinion by Justice Longoria

Appellant Fred Martinez challenges the trial court's judgment revoking his deferred-adjudication probation, finding him guilty of two counts of indecency with a child, and imposing sentences of imprisonment for twelve years. *See* TEX. PENAL CODE ANN. § 21.11(a)(1) (West, Westlaw through 2015 R.S.). By two issues, appellant argues that

the court erred when it denied his motion for new trial and that his sentences constitute cruel and unusual punishment. We affirm.

I. BACKGROUND

In July of 2014, the State charged appellant by indictment with two counts of indecency with a child. *See id.* Appellant pled guilty to both counts as part of a plea agreement. The trial court received appellant's plea, deferred its adjudication of guilt, and placed appellant on community supervision for ten years. Appellant also agreed to register as a sex offender and abide by the special community-supervision conditions applicable to sex offenders. *See generally* TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 13B, 13G (West, Westlaw through 2015 R.S.).

On January 7, 2016, the State filed a motion to revoke, alleging that appellant committed thirty separate violations of the conditions of his supervision including, but not limited to, possession of pornography, possession of a cell phone with internet access, using that cell phone to search for sexual encounters online, failing to report by mail to his probation officer, and failing to pay his supervision fees. Appellant pled "not true" to all of the allegations.

Testimony at the revocation hearing revealed that appellant had moved to Bexar County from Nueces County and applied to have his supervision transferred there. The Bexar County Adult Probation Office refused to accept him on two different occasions because he lived too close to a school in violation of a condition of his supervision.

On January 6, 2016, two probation officers from Bexar County visited appellant at his new residence to evaluate him for a third time. Kevin Allen, one of the probation officers, testified that he found pornographic materials and DVDs during a search and

that appellant admitted that the pornography belonged to him. Allen's colleague, Monique Powell, testified that she examined appellant's cell phone and discovered that it had internet capability. A search of the phone's internet history showed that someone had used it to browse Craigslist ads of men seeking sexual encounters with other men. According to Powell, appellant admitted to using his phone to visit the Craigslist ads.

Lori Lee Garza had been appellant's supervising probation officer in Nueces County until two weeks before the revocation hearing. Garza testified that appellant had been instructed as a condition of his supervision to report by mail to her office every month, but that the office had not received reports for June, September, and October of 2015. She further testified that appellant was $1,200 behind on fees at the time of his most recent arrest on February 26, 2016.

Appellant testified in his own defense. Regarding the pornography, appellant explained that it was given to him by entertainers he hired to perform at clubs he owned in the past and that he boxed it up and forgot he still owned it. Appellant further testified that he had removed internet capability from his phone but the phone company added it back on without his knowledge when his contract renewed. Appellant argued that it must have been Joseph Willman,[1] his boyfriend, who used his phone to access Craigslist because appellant was asleep at the time. Regarding the fees, appellant explained that he had not paid because he did not know where to send his payments.

The trial court revoked appellant's probation, adjudicated him guilty, and imposed two concurrent sentences of twelve years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice. Appellant obtained new counsel and filed a motion

[1] Joseph's last name is also spelled in the record as "Wilmon."

for new trial, alleging his trial counsel provided ineffective assistance, and a "Motion for Reconsideration or Reduction of Sentence." The trial court denied both motions following a hearing. This appeal followed.

II. Discussion

In his first issue, appellant argues that the trial court abused its discretion when it denied his motion for new trial. Appellant argues in his second issue that the sentences imposed by the trial court constitute cruel and unusual punishment in violation of the Eighth Amendment.

A. Ineffective Assistance of Counsel

Appellant argues in his first issue that his trial counsel was ineffective because he failed to call Willman and Emily Delgado, appellant's sister, as witnesses.

1. Standard of Review

We review the trial court's decision to deny a motion for new trial for an abuse of discretion. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). We view the evidence in the light most favorable to the trial court's ruling and will uphold the ruling if it is within the zone of reasonable disagreement. *Id*. We do not substitute our judgment for that of the trial court but only decide whether its decision was arbitrary and unreasonable. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). "Thus, a trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling." *Id.*

2. Applicable Law

Courts evaluate a claim that trial counsel was ineffective under the two-part standard established by the United States Supreme Court in *Strickland v. Washington*.

466 U.S. 668, 687 (1984). To obtain reversal under *Strickland*, a defendant must show by a preponderance of the evidence both that: (1) his counsel performed deficiently; and (2) the deficient performance prejudiced the defendant's case. *Id.* Failure to make either required showing defeats a claim of ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

A defendant establishes deficient performance by showing that his counsel's professional assistance was "not within the range of competence demanded of attorneys in criminal cases as reflected by prevailing professional norms." *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). As part of this showing, the defendant must overcome a strong presumption that his trial counsel's performance was professionally reasonable. *Id.* A defendant establishes prejudice by demonstrating a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ex parte Napper*, 322 S.W.3d 202, 248 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 694).

3. Discussion

Appellant alleges that his trial counsel was ineffective for failing to call Willman and Delgado to testify during the revocation hearing. The State argues that appellant cannot show that his counsel did not make a strategic decision to not call Willman and Delgado or that his decision caused appellant to suffer prejudice. We agree with the State.

We address the prejudice prong first because it is dispositive. *See Ex parte Martinez*, 330 S.W.3d 891, 900 (Tex. Crim. App. 2011). Appellant argues that his counsel should have called Willman as a witness because his testimony would have confirmed

appellant's own testimony regarding the age of the pornography and the use of his cell phone to browse the internet. But even if the trial court decided to believe Willman's testimony, possession of pornography and a cell phone with internet access are both violations of the terms of appellant's supervision.

Furthermore, the State also presented evidence that appellant violated the terms of his supervision in other ways: he lived too close to a school on two occasions, failed to report to his probation officer for several months, and did not pay any of his supervision fees.

Regarding Delgado, appellant argues she would have testified that he supported her as she finished her graduate education and cared for his ailing mother. Appellant does not explain the significance of her testimony, however, because he testified to exactly the same facts during the revocation hearing.

Viewing all of this evidence in the light most favorable to the trial court's ruling, we conclude the trial court did not abuse its discretion in concluding that appellant did not establish a reasonable probability that the result of the revocation hearing would have been different if it was not for his counsel's failure to call Willman and Delgado as witnesses. Appellant has failed to meet his burden under the second prong of *Strickland*, and the trial court properly denied appellant's motion for new trial on ineffective-assistance grounds. *See Riley*, 378 S.W.3d at 460. We overrule appellant's first issue.[2]

[2] Appellant also argues generally that his counsel "suffered from ill health due to alleged issues with alcohol, which diminished the effectiveness of his representation of [a]ppellant" and that "it was clear to [a]ppellant that his counsel was unprepared for the hearing." Appellant, however, does not explain how his counsel's alleged failure to prepare, ill health, or consumption of alcohol the night before the revocation hearing caused him prejudice. We conclude that appellant has not met his burden to establish prejudice under the second prong of *Strickland*. *See Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013).

B. Cruel and Unusual Punishment

Appellant argues in his second issue that his sentences of twelve years' imprisonment constitute cruel and unusual punishment. *See* U.S. CONST. amend VIII. The State argues that appellant waived this issue by failing to preserve it and, alternatively, that his punishment was not disproportionate.

We agree with the State regarding waiver. To preserve a complaint for appellant review, a party must make a timely and specific objection or motion and obtain a ruling from the trial court. TEX. R. APP. P. 33.1(a). Failure to specifically object in the trial court can waive an issue for appeal, including many constitutional issues. *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). The protection against cruel and unusual punishment is subject to the preservation requirement. *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995); *Rodriguez v. State*, 459 S.W.3d 184, 200 (Tex. App.—Amarillo 2015, pet. ref'd). Appellant did not object to his sentence at the time the trial court imposed it, and he did not raise the issue in either of his post-judgment motions. We conclude that appellant has not preserved this issue for our review. *See Curry*, 910 S.W.2d at 497; *Rodriguez*, 459 S.W.3d at 200. We overrule appellant's second issue.

III. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

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

Delivered and filed the
16th day of March, 2017.