NUMBER 13-19-00244-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JUSTIN MUNOZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 94th District Court of Nueces County, Texas.

MEMORANDUM OPINION

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

By one issue, appellant Justin Munoz challenges his sentences for aggravated sexual assault, a first-degree felony, sexual performance by a child, a second-degree felony, and possession of child pornography, a third-degree felony. *See* TEX. PENAL CODE ANN. §§ 22.021(a), 43.25(d), 43.26(a)(1). Munoz argues that his sentence is disproportionate in violation of his Eighth and Fourteenth Amendments of the United States Constitution. *See* U.S. CONST. amend. VIII, XIV. We affirm.

I. BACKGROUND

Munoz was indicted for aggravated sexual assault of a child, sexual performance by a child by production, and possession of child pornography in March 2017. *See* TEX. PENAL CODE §§ 22.021(a), 43.25(d), 43.26(a)(1). Munoz was accused of penetrating the complainant, taking and forcing the complainant to take photos of her sexual organs, and having a cell phone that contained twenty-five images and videos of the complainant, who at the time the images were discovered, was a ten-year old child.

In May 2017, Munoz was determined to be incompetent by a doctor and was committed to a state hospital. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003–.005 (incompetency to stand trial). Once he regained competency, Munoz was brought before the trial court and pleaded guilty to all three charges without a plea bargain. The trial court ordered a pre-sentence investigation (PSI) to be conducted and reset sentencing.

At the sentencing hearing, the trial court considered the PSI and heard testimony from Elizabeth and Josh Stark, the complainant's foster parents. The Starks stated that the complainant lived with them for six months and that they were in the process of formally adopting her. They both also told the trial court how fearful the complainant was of men in general and that she did not understand appropriate social and personal boundaries. They also explained that the complainant was afraid of the dark and was terrified that someone was hiding in her closet waiting to attack her at night because Munoz used to hide in her closet and molest her at night. Both parents felt that the complainant would be affected by Munoz's actions towards her for the rest of her life and told the trial court that they did not feel the complainant would be safe if Munoz was given

probation.

Following the testimony, the trial court sentenced Munoz to forty years' imprisonment on the aggravated sexual assault, twenty years' imprisonment for the sexual performance charge, and ten years' imprisonment for the possession of child pornography charge and ordered the sentences to run concurrently. This appeal followed.

II. SENTENCE WAS NOT EXCESSIVE

By his sole issue, Munoz argues that the sentence assessed is disproportionate and excessive to the offenses committed.

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); *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 the punishment of fifteen years in a prison camp was grossly disproportionate to the crime of falsifying a public record). Texas courts have generally held that a punishment that falls within the limits prescribed by valid statute is not excessive, cruel, or unusual. *See Simpson*, 488 S.W.3d at 323; *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, Munoz received a sentence of forty years' imprisonment for the aggravated sexual assault conviction, which is well below the 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"), 22.021 (providing that aggravated sexual assault is a first-degree felony.) Munoz did receive the maximum sentence permissible by law for his sexual performance of a child and possession of child

pornography charges, but those punishments are also within the range prescribed by the Legislature for a second and third-degree felonies. *See id*. §§ 12.33, 12.34.

Because the sentences are within the ranges prescribed by law, they are not prohibited as per se excessive, cruel, or unusual. *See Trevino*, 174 S.W.3d at 928. Furthermore, Munoz did not object at the trial court to the sentences imposed. Therefore, Munoz has forfeited his proportionality 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. Even if Munoz had preserved error, imprisonment for forty, twenty, and ten years for the offenses alleged are not grossly disproportionate sentences based on 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.); *see Hamilton v. State*, No. 13-19-00175-CR, 2020 WL 2776528, at *1–2 (Tex. App.—Corpus Christi–Edinburg May 28, 2020, no pet. h.) (mem. op., not designated for publication). We overrule Munoz's sole issue.[1]

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

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

Delivered and filed the
23rd day of July, 2020.

[1] In his prayer, Munoz requests that we remand this case to the trial court to determine if Munoz "lost competency." However, this issue was not raised or discussed in his brief. Therefore, we decline to make any such consideration.