NUMBER 13-22-00601-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ALONSO JUAN TREVINO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

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

OPINION

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

On July 2, 2021, appellant Alonso Juan Trevino stabbed his former coworker and was arrested. On August 27, 2021, a grand jury indicted appellant for the offense of aggravated assault with a deadly weapon, a second-degree felony. *See* TEX. PENAL CODE ANN. § 22.02(a)(2). Appellant pleaded guilty to the offense and pleaded not true to two

enhancement paragraphs in the indictment for two prior felony convictions. After a punishment trial to the bench on December 21, 2022, the trial court found the enhancement paragraphs true, increasing appellant's punishment range to that of a first-degree felony, and sentenced appellant to forty years' imprisonment. *See id.* §§ 12.32, 12.42(b). By his sole appellate issue, appellant contends that his forty-year sentence is grossly disproportionate to the offense committed in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *See* U.S. CONST. amends. VIII, XIV. We affirm.

I. DISPROPORTIONATE SENTENCING

A. Standard of Review & Applicable Law

We review a court's sentencing determination for an abuse of discretion. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). Generally, if a sentence is 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'"); *Foster v. State*, 525 S.W.3d 898, 912 (Tex. App.—Dallas 2017, pet. ref'd). The punishment range for a first-degree felony is "imprisonment . . . for life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE ANN. § 12.32.

A narrow exception to the general rule exists: "an individual's sentence may constitute cruel and unusual punishment, despite falling within the statutory range, if it is grossly disproportionate to the offense." *Alvarez v. State*, 525 S.W.3d 890, 892 (Tex. App.—Eastland 2017, pet. ref'd) (citing *Solem v. Helm*, 463 U.S. 277, 287 (1983)). An

allegation of excessive or disproportionate punishment is a legal claim "embodied in the Constitution's ban on cruel and unusual punishment" and based on a "narrow principle that does not require strict proportionality between the crime and the sentence." *State v. Simpson*, 488 S.W.3d 318, 322–24 (Tex. Crim. App. 2016) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)); *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Outside the capital punishment context, however, a successful challenge to proportionality of a particular sentence is "exceedingly rare." *Simpson*, 488 S.W.3d at 322–23 (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)).

To determine whether a sentence is grossly disproportionate, "a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses." *Id.* at 323. "In 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." *Id.* "If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.*

To preserve for appellate review a complaint that a sentence is grossly disproportionate or constitutes cruel and unusual punishment, a defendant must present to the trial court a "timely request, objection, or motion" stating the specific grounds for the ruling desired. TEX. R. APP. P. 33.1(a); *see Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986) ("It is well settled that almost every right, constitutional and statutory,

may be waived by the failure to object."). When the sentence imposed is within the punishment range and not illegal,[1] the failure to specifically object in open court or in a post-trial motion waives any error on appeal. *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). There is no "hyper-technical or formalistic use of words or phrases" required for an objection to preserve an error. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). However, "the objecting party must still 'let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.'" *Id.* (quoting *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009)).

B. Analysis

Appellant never objected to his sentences at trial or filed post-trial motions to challenge the same, so he waived his grossly disproportionate sentence argument on appeal. *See* TEX. R. APP. P. 33.1(a); *Noland*, 264 S.W.3d at 151. In any event, appellant did not receive capital punishment here, and his forty-year sentence fell within the prescribed punishment range for a first-degree felony. *See* TEX. PENAL CODE ANN. § 12.32; *Ex parte Chavez*, 213 S.W.3d at 323–24. And even if a threshold analysis led to an inference that a forty-year sentence is grossly disproportionate to the offense appellant committed, appellant provided no evidence necessary for this Court to "compare the

[1] "A sentence outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal." *Trevino v. State*, 174 S.W.3d 925, 928 (Tex. App.—Corpus Christi–Edinburg 2005, pet. ref'd) (citing *Escochea v. State*, 139 S.W.3d 67, 80 (Tex. App.—Corpus Christi–Edinburg 2004, no pet.)). "Unlike most trial errors, which are forfeited if not timely asserted, a party is not required to make a contemporaneous objection to the imposition of an illegal sentence." *Id.* (citing *Escochea*, 139 S.W.3d at 80). "Thus, an appellate court that otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence." *Id.* (citing *Escochea*, 139 S.W.3d at 80).

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." *See Simpson*, 488 S.W.3d at 323, 324; *see also Esquivel v. State*, No. 13-21-00179-CR, 2022 WL 17492274, at *2 (Tex. App.—Corpus Christi–Edinburg Dec. 8, 2022, pet. ref'd) (mem. op., not designated for publication) ("[B]ecause the trial court had no evidence before it that would allow it to engage in the comparative analysis detailed in *Simpson*, we cannot conclude it erred by sentencing Esquivel within the statutory guidelines.").

For all of these reasons, we overrule appellant's sole appellate issue.

II. FRIVOLOUS APPEALS

Appellant here acknowledges that "an appeal prefaced on the grounds of disproportionate punishment may be frivolous" under the Texas Court of Criminal Appeals' holding in *Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983) (noting that Eighth Amendment challenges to the habitual criminal statute "ha[ve] been repeatedly rejected by the courts").[2] This Court has agreed with that statement but only in unpublished memorandum opinions. *See, e.g.*, *Newman v. State*, No. 13-97-137-CR, 1998 WL 35276334, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 26, 1998, no pet.) (mem. op., not designated for publication) ("In Newman's second point of error, he contends the sentence imposed was disproportionate to the crime in violation of the Eighth and Fourteenth Amendments. Newman concedes this point may be frivolous in

[2] Appellant nevertheless raises the issue "to ensure that there was no waiver of an anticipatory claim of disproportionate punishment in Federal Court." Appellant does not explain how raising an issue on direct appeal that was not properly preserved at trial preserves the issue for federal review. We note that "a state defendant procedurally defaults a claim by failing to comply with the state's contemporaneous objection rule, and . . . this procedural default precludes consideration of the claim in a federal habeas corpus proceeding absent a showing of cause and prejudice." *Weaver v. McKaskle*, 733 F.2d 1103, 1104 (5th Cir. 1984) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87–91 (1977)).

light of the court of criminal appeals' holding in *Harris v. State* . . . . We agree. Appellant's second point is overruled."); *Holmes v. State*, No. 13-19-00052-CR, 2020 WL 6376654, at *16 (Tex. App.—Corpus Christi–Edinburg Oct. 29, 2020, pet. ref'd) (mem. op., not designated for publication) (holding that trial counsel was not ineffective for failing to object to a within-range sentence as disproportionate because "[i]t is not ineffective assistance for counsel to forego making frivolous arguments and objections"). Whether all disproportionate sentencing arguments are frivolous is a question we save for another day. We do, however, take this opportunity to address the issue of *unpreserved* grossly disproportionate sentencing arguments of the like raised in this appeal.

If, after review of the record in any given case, appellate counsel finds no non-frivolous arguments for appeal, the proper course of action is to file an *Anders* brief and a motion to withdraw as counsel. *See Anders v. California*, 386 U.S. 738, 744 (1967) ("[I]f counsel finds his [client's] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw."). An *Anders* brief demonstrates that "the appointed attorney has adequately researched the case before requesting to withdraw from further representation" and "sets out the attorney's due diligence investigation on behalf of his client." *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008). The *Anders* brief also "provides . . . a roadmap" for the appellate court to follow in its required independent review of the record in *Anders* cases, which is undertaken so that "the court itself [is] assured that the attorney has made a legally correct determination that the appeal is frivolous"—and, in turn, further protects a defendant's rights. *Id.* at 407.

"The attorney's duty to withdraw [in a case where no non-frivolous arguments exist

for appeal] is based upon his professional and ethical responsibilities as an officer of the court not to burden the judicial system with false claims, frivolous pleadings, or burdensome time demands." *Id.* at 407; *see id.* at 407 n.12 ("A lawyer, after all, has no duty, indeed no right, to pester a court with frivolous arguments, *which is to say arguments that cannot conceivably persuade the court*, so if he believes in good faith that there are no other arguments that he can make on his client's behalf he is honorbound to so advise the court and seek leave to withdraw as counsel." (emphasis changed)).

As in this case, unpreserved grossly disproportionate sentencing arguments have a consistent history of failure in this Court. *See, e.g.*, *Silva v. State*, No. 13-22-00291-CR, 2023 WL 4290070, at *2 (Tex. App.—Corpus Christi–Edinburg June 29, 2023, no pet. h.) (mem. op., not designated for publication) (concluding that appellant failed to preserve a disproportionate sentence argument for appeal and affirming the trial court's judgment); *Olvera v. State*, No. 13-22-00541-CR, 2023 WL 4115864, at *2 (Tex. App.—Corpus Christi–Edinburg June 22, 2023, pet. filed) (mem. op., not designated for publication) (same); *Powell v. State*, No. 13-22-00440-CR, 2023 WL 4113892, at *2 (Tex. App.—Corpus Christi–Edinburg June 22, 2023, no pet. h.) (mem. op., not designated for publication) (same); *Isassi v. State*, No. 13-22-00384-CR, 2023 WL 3881127, at *2 (Tex. App.—Corpus Christi–Edinburg June 8, 2023, pet. filed) (mem. op., not designated for publication) (same); *Zambrano v. State*, No. 13-22-00154-CR, 2023 WL 3116758, at *1 (Tex. App.—Corpus Christi–Edinburg Apr. 27, 2023, no pet. h.) (mem. op., not designated for publication) (same); *Waller v. State*, No. 13-22-00502-CR, 2023 WL 3015776, at *3 (Tex. App.—Corpus Christi–Edinburg Apr. 20, 2023, no pet. h.) (mem. op., not designated for publication) (same); *Beauregard v. State*, No. 13-21-00388-CR, 2022 WL 17842890,

at *2 (Tex. App.—Corpus Christi–Edinburg Dec. 22, 2022, no pet.) (mem. op., not designated for publication) (same); *Landrum v. State*, No. 13-20-00501-CR, 2022 WL 3724106, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 30, 2022, pet. ref'd) (mem. op., not designated for publication) (same); *Perez v. State*, No. 13-22-00092-CR, 2022 WL 3654758, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.) (mem. op., not designated for publication) (same); *Rosalez v. State*, No. 13-21-00164-CR, 2022 WL 3654753, at *8 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, pet. ref'd) (mem. op., not designated for publication) (same); *Fierova v. State*, No. 13-21-00373-CR, 2022 WL 3268023, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 11, 2022, no pet.) (mem. op., not designated for publication) (same); *Dang v. State*, No. 13-21-00352-CR, 2022 WL 3092560, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 4, 2022, no pet.) (mem. op., not designated for publication) (same); *Cavazos v. State*, No. 13-21-00286-CR, 2022 WL 2513518, at *4 (Tex. App.—Corpus Christi–Edinburg July 7, 2022, no pet.) (mem. op., not designated for publication) (same); *Hargis v. State*, No. 13-21-00156-CR, 2022 WL 710081, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 10, 2022, no pet.) (mem. op., not designated for publication) (same).

To state the obvious, an unpreserved grossly disproportionate sentencing argument cannot conceivably persuade this Court and is thus frivolous. *See In re Schulman*, 252 S.W.3d at 407 n.12. If appellate counsel in this district desire to raise grossly disproportionate sentencing arguments on behalf of their clients, it would behoove them to preserve error by filing appropriate post-trial motions with the requisite arguments and evidence. *See generally Simpson*, 488 S.W.3d at 322–24. Otherwise, if no non-frivolous arguments exist for appeal, this Court expects counsel to file *Anders* briefs.

III. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS
Chief Justice

Publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed on the
20th day of July, 2023.