Opinion issued December 1, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00262-CR

RAFAEL QUEZADA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1260011

MEMORANDUM OPINION

Without a sentencing recommendation from the State, appellant, Rafael Quezada, pleaded guilty to the second-degree felony offense of intoxication

manslaughter.[1] Following the preparation of a presentence investigation ("PSI") report, the trial court conducted a sentencing hearing. At the hearing, the trial court found appellant guilty of the offense of intoxication manslaughter and found the deadly-weapon allegation contained in the indictment to be true. The trial court sentenced appellant to 12 years in prison.

In two issues, appellant claims his sentence was grossly disproportionate to the offense underlying the conviction, resulting in cruel and unusual punishment in violation of the United States and Texas constitutions.[2] *See* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13. To preserve for appellate review a complaint that a sentence is grossly disproportionate, constituting 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. *See* TEX. R. APP. P. 33.1(a); *see*

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1 *See* TEX. PENAL CODE ANN. § 49.08 (Vernon 2011).

2 Appellant acknowledges that his sentence is within the statutory range of punishment. *See* TEX. PENAL CODE ANN. § 12.33 (Vernon 2011) (setting forth punishment range for second-degree felony offenses). We are, however, aware that a sentence may run afoul of the constitutional prohibition against cruel and unusual punishment although it is within the range permitted by statute. *See Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009–10 (1983). Here, appellant contends that the sentence is disproportionate because he "accidentally killed his passenger, a relative, in a one-car collision." Neither the State nor appellant presented evidence at the sentencing hearing. The trial court based its sentencing decision on the PSI report. When asked by the trial court, appellant stated that he had no objection to the report. Appellant requested the trial court to admit the PSI report into evidence. However, the trial court did not rule on the request, and the PSI report is not contained in the record. Appellant makes no complaint regarding the lack of inclusion of the PSI report. Thus, appellant's assertions in support of his appellate issues are not supported by the record.

also Rhoades v. State, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (holding that defendant waived any error regarding violation of state constitutional right against cruel and unusual punishment because argument was presented for first time on appeal); *Noland v. State*, 264 S.W.3d 144, 151–52 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (holding appellant's assertion that sentence was grossly disproportionate waived when no objection made or motion for new trial filed raising complaint in trial court); *Wynn v. State*, 219 S.W.3d 54, 61 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that defendant's failure to object to his life sentence of imprisonment as cruel and unusual punishment waived error); *Solis v. State*, 945 S.W.2d 300, 301–02 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (holding defendant could not assert cruel and unusual punishment for first time on appeal).

Appellant acknowledges that he did not object to his sentence in the trial court. He contends that "error such as this may be considered by this court for the first time on appeal." In support of his contention, appellant cites *Meadoux v. State*, 325 S.W.3d 189 (Tex. Crim. App. 2010). Contrary to appellant's assertion, the *Meadoux* court did not hold that error arising from disproportionate sentencing need not be preserved in the trial court. Rather, in that case, the court indicated that it would not reach the issue of preservation because (1) the State had failed to argue, in the court of appeals, that error was not preserved; (2) the court of appeals

did not address preservation in affirming the conviction; and (3) the Court of Criminal Appeals had not granted review to consider the issue of preservation. *Id.* at 193 n.5. Here, the State does assert that appellant failed to preserve the alleged error. We agree with the State that *Meadoux* does not support a departure from well-established precedent that claims of cruel and unusual punishment arising from disproportionate sentencing must be preserved in the trial court. *See Arriaga v. State*, 335 S.W.3d 331, 334–35 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Appellant has not preserved his constitutional complaints for our review. *See Noland*, 264 S.W.3d at 151–52.

We overrule appellant's first and second issues. We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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