Opinion issued August 24, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00122-CR

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ERNEST AMAYA LANDIN, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case Nos. 14-DCR-066490A & 14-DCR-066491A

MEMORANDUM OPINION

A jury convicted appellant Ernest Amaya Landin, Jr. of two offenses of sexual assault of the same child, with the offenses occurring on different days. *See* TEX. PENAL CODE § 22.011(a)(2)(A). The indictments for both offenses included

two enhancement paragraphs alleging that Landin had previous felony convictions for sexual assault and aggravated assault. The trial court found the allegations of both enhancements to be true and assessed punishment at life in prison. *See id.* § 12.42(c)(2).

Landin raises two issues on appeal. First, he contends that the trial court erred by allowing hearsay testimony. Second, he argues that the life sentence imposed by the trial court is disproportionate to the crime he committed and therefore violates the Eighth Amendment's prohibition against cruel and unusual punishment.

We affirm.

Background

Appellant Ernest Amaya Landin was performing construction work for a family in Fort Bend County when he met the complainant in this case, who was referenced at trial by the pseudonym of "J.S." At the time they met, Landin was 34 years old and J.S. was 15. Through this work, Landin became a friend of J.S.'s family and for a period of time lived in their house with his three children. Over the course of a summer, Landin and J.S. exchanged phone numbers, and she babysat for him while he was at work.

After the summer ended, J.S. returned to school. She exchanged text messages with Landin and began leaving school during the middle of the day to

meet him for lunch. On at least two of these occasions, after J.S. turned 16, they met in different hotels and had sex. Eventually J.S.'s mother caught Landin and her daughter kissing. J.S. did not admit at that time to a sexual relationship with Landin. But several years later, she reported to her mother and the police that Landin had sex with her when she was 16.

Landin was charged by two separate indictments for sexual assault of a child. One of the indictments alleged that he committed the offense of sexual assault of a child against J.S. on or about September 27, 2010, and the other alleged he committed the same offense against her on October 14, 2010. In addition to the sexual assault charges, both indictments included two enhancement paragraphs alleging that Landin previously had been convicted of two other felonies, including sexual assault and aggravated assault.

At trial, J.S. testified about her relationship with Landin and their sexual encounters. In addition, she testified about the contents of text messages she received from Landin. On at least two occasions during its direct examination, the State specifically asked J.S. what certain text messages from Landin had said. Landin objected several times to J.S.'s testimony on the basis of hearsay. The trial court overruled these objections. A jury convicted Landin of sexual assault of a child.

During the punishment phase of trial, the State introduced evidence establishing Landin's prior convictions for sexual assault and aggravated assault. Based on this evidence, the trial court found the allegations of the two enhancement paragraphs to be true and assessed punishment at life in prison. *See* TEX. PENAL CODE § 12.42(c)(2). Landin did not object to the sentence, nor did he file a motion for new trial challenging the sentence.

Landin appealed.

Analysis

Landin raises two issues on appeal. In his first issue, he argues that the trial court erred by allowing J.S. to testify about the content of text messages she received from him. He contends that her testimony constituted inadmissible hearsay. In his second issue, Landin challenges the sentence imposed by the trial court, arguing that it is disproportional to the crime of sexual assault of a child and therefore unconstitutional.

I. Hearsay

In his first issue, Landin contends that the trial court erred by admitting his text messages into evidence. He argues that J.S.'s testimony about his text messages was hearsay and inadmissible.

A trial court's decision to admit or exclude evidence is reviewed under an abuse-of-discretion standard. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim.

App. 2006); *Smith v. State*, 340 S.W.3d 41, 53–54 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990); *Smith*, 340 S.W.3d at 53–54. A trial court's evidentiary ruling will not be reversed unless that ruling falls outside the zone of reasonable disagreement. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We will not disturb a trial court's evidentiary ruling if it is correct on any theory of law applicable to that ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Hearsay is "a statement" that "the declarant does not make while testifying at the current trial or hearing" and is offered "in evidence to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801(d). This includes both oral and written expressions. TEX. R. EVID. 801(a).

J.S. testified that during the summer she babysat for Landin, she exchanged mobile phone numbers with him, and the two of them communicated by texting. The State questioned J.S. several times about the content of the text messages, asking about what was said in the texts. Defense counsel objected to J.S.'s testimony about the content of the text messages on the basis of hearsay. The trial court overruled the objections and on one occasion stated "it's not hearsay," reasoning that it was "a communication between the defendant and this witness."

The State argues that J.S.'s testimony did not constitute hearsay because it was an admission of a party opponent. A statement is an admission of a party opponent if it is (1) offered against a party and (2) the party's own statement. TEX. R. EVID. 801(e)(2)(A). An admission of a party opponent does not constitute hearsay. TEX. R. EVID. 801(e)(2); *see Trevino v. State*, 991 S.W.2d 849, 853 (Tex. Crim. App. 1999); *Jones v. State*, 466 S.W.3d 252, 265–67 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

Landin was a party to this criminal prosecution. As a result, any statement made by him and offered against him qualified as an admission of a party opponent. *See* TEX. R. EVID. 801(e)(2)(A); *Trevino*, 991 S.W.2d at 853. Landin does not contend that he did not send the text messages. The jury could consider the text messages he sent to J.S. as statements made by him. *See Jones*, S.W.3d at 262–63. Thus, through J.S.'s testimony, the State offered Landin's own statements against him.

J.S.'s testimony about the text messages consisted of statements of a party opponent and therefore was not hearsay. *See* TEX. R. EVID. 801(e)(2); *Trevino*, 991 S.W.2d at 853; *Jones*, 466 S.W.3d at 265–67. Because the testimony was not hearsay, the trial court did not err by admitting it over objections to hearsay. *See* TEX. R. EVID. 801(e)(2); *Trevino*, 991 S.W.2d at 853; *Jones*, 466 S.W.3d at 265–67. We overrule Landin's first issue.

II. Constitutionality of sentence

In his second issue, Landin argues that his mandatory life sentence, imposed pursuant to Section 12.42(c) of the Penal Code, is disproportionate to his crime and violates the Eighth Amendment to the U.S. Constitution.

Penal Code Section 12.42(c)(2) provides that "a defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life" if the defendant was convicted of an offense under Section 22.011 and "has been previously convicted of an offense" under the same statute. A jury convicted Landin of sexual assault of a child under Section 22.011. The trial judge found true an enhancement paragraph alleging that Landin previously was convicted of sexual assault, also arising under Section 22.011. As a result, Landin concedes that the text of this statute "required the judge to impose a life sentence."

Landin contends that the U.S. Constitution requires that the sentence be set aside. The Eighth Amendment requires that a criminal sentence be proportionate to the crime for which a defendant has been convicted. *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009 (1983); *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). But to preserve for appellate review a complaint that a sentence is grossly disproportionate, thereby 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. TEX. R.

APP. P. 33.1(a); *see Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Noland*, 264 S.W.3d at 151–52.

After the trial court announced its sentence at the punishment hearing, Landin made no objection to the trial court about the punishment assessed, nor did he assert his complaint in a motion for new trial or otherwise present his objection to the sentence. As a result, Landin has not preserved this issue for our review. *See* TEX. R. APP. P. 33.1(a)(1); *Noland*, 264 S.W.3d at 151–52.

Accordingly, we overrule Landin's second issue.

Conclusion

We affirm the trial court's judgment.

Michael Massengale
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

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