

Affirmed and Memorandum Opinion filed December 9, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00787-CR

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MICHAEL ROBIN DEESE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause Nos. 1224254 & 1131862**

MEMORANDUM OPINION

Appellant entered guilty pleas to two charges of theft of over \$200,000, without an agreed recommendation on punishment. The trial court ordered a pre-sentence investigation. After a punishment hearing, the trial court assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for thirty-five years in each case, with the sentences to be served concurrently. Appellant challenges his sentences on appeal. We affirm.

In a single issue, appellant contends that his punishment is grossly disproportionate to the crimes committed, violating his freedom from cruel and unusual punishment.¹ He asserts that his sentences are disproportionate to the crimes because he had no prior felony criminal record, his crimes were not violent, he admitted his guilt and helped one victim recover part of its loss, both victims were able to recover part of their losses from insurance proceeds, and he could have made restitution if he had been placed on probation.

To preserve a complaint for appellate review 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); *Nicholas v. State*, 56 S.W.3d 760, 768 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (holding that failure to complain to trial court that sentences were cruel and unusual waived claim of error for appellate review). Here, after the trial court announced its sentence at the punishment hearing, appellant made no objection to the trial court about the punishment assessed. In addition, appellant did not move for a new trial. Accordingly, appellant has waived his complaint.

Even if appellant had preserved this complaint, he would not prevail. We review the punishment imposed by the trial court for an abuse of discretion. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). As a general rule, if the sentence assessed is within the statutory limits, it is not cruel and unusual punishment and will not be disturbed on appeal. *Buerger v. State*, 60 S.W.3d 358, 365 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Appellant argues that although a sentence may be within the statutory range, “it may nevertheless run afoul of the Eighth Amendment prohibition against cruel and unusual punishment.” *See Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App.—Houston [14th

¹ Appellant cites to both the Eighth Amendment to the United States Constitution and Article I, section 13 of the Texas constitution. *See* U.S. Const. amend. VIII; Tex. Const. art. I, § 13. Appellant has not argued that the state constitution provides broader protection against cruel and unusual punishment than the Eighth Amendment. Accordingly, we need not separately address appellant’s issue with respect to the state constitution. *See Puga v. State*, 916 S.W.2d 547, 550 (Tex. App.—San Antonio 1996, no pet.).

Dist.] 2000, pet. ref'd).

Under the Eighth Amendment prohibition against cruel and usual punishment, a criminal sentence must be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm*, 463 U.S. 277, 284, 103 S.Ct. 3001, 3006 (1983). The Supreme Court has set forth objective factors to be considered in reviewing the proportionality of a sentence under the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *See id.*, 463 U.S. at 290-91, 103 S.Ct. at 3011.

We first make a threshold comparison of the offense against the severity of the sentence, judging the gravity of the offense in light of the harm caused or threatened to the victim or society and the culpability of the offender. *Culton v. State*, 95 S.W.3d 401, 403 (Tex. App.—Houston [1 Dist.] 2002, pet. ref'd). A sentence is grossly disproportionate to the crime only when this objective comparison reveals the sentence to be extreme. *Harris v. State*, 204 S.W.3d 19, 29 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). If we determine that the sentence is grossly disproportionate to the offense, we must then consider the remaining factors of the *Solem* test and compare the sentence received to sentences for similar crimes in this jurisdiction, and sentences for the same crime in other jurisdictions. *Baldrige v. State*, 77 S.W.3d 890, 893 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

Appellant acknowledged that he was guilty of two separate offenses of theft of over \$200,000, each a first degree felony. *See* Tex. Penal Code § 31.03(e)(7). The statutory range of punishment for a first degree felony offense is from five to ninety-nine years or life in prison and up to a \$10,000 fine. Tex. Penal Code § 12.32. Thus, appellant's sentences are well within the statutory range.

The record contains evidence that appellant stole over \$1 million from two different employers over a three-year period. Specifically, there was evidence that from January 2003 to June 2004, appellant stole \$742,854 from his former employer Lansdowne-Moody Company, a family owned business selling tractors and construction equipment. During that period, the company experienced cash flow problems and for the first time considered eliminating employee positions and layoffs. Appellant prepared spread sheets illustrating positions that could be eliminated and showing the savings to the company. Because of its financial losses, the company also was unable to carry out a planned expansion and was unable to provide increased benefits to its employees. After the theft was discovered, the company spent \$150,000 in attorney's fees in attempting to recoup losses. The company also paid \$50,000 to an accounting firm to correct audits and tax filings. The thefts were personally devastating to the founder of the company. Lansdowne-Moody was able to recover only part of its losses; it recovered \$150,000 from appellant, \$100,000 in insurance proceeds, and \$138,000 from a civil suit against an accounting firm that had not identified inconsistencies in Lansdowne-Moody's records.

After Lansdowne-Moody terminated appellant, he was hired by John Daugherty Realtors. Appellant did not disclose that he had been employed by Lansdowne-Moody, or that he had been terminated for theft. Appellant was employed as controller from November 2006 to December 2007, and during that time stole \$750,000 in cash and forged company checks. There was evidence that John Daugherty Realtors incurred a total loss of \$1.8 million, which also included overdraft charges, late fees, attorney's fees, and fees to an investigator and a forensic accountant firm. Its losses were only partially offset by recovery of \$500,000 in insurance proceeds.

During the period of the thefts, appellant enjoyed a lifestyle that greatly exceeded what his salary would provide. Testimony showed that he was paid \$60,000 per year by Lansdowne-Moody and \$100,000 per year by John Daugherty Realtors. Appellant had a large truck and recreational vehicle, three custom motorcycles, and he purchased a

swimming pool, decks and gazebo for his residence. Evidence was also introduced that thousands of dollars were paid from appellant's bank account to support appellant's lifestyle, including payments to an art broker, a boutique, and a luxury hotel.

Appellant also presented evidence at the punishment hearing. Appellant's family members testified that he was a devoted family man who treated his step-children well. There was testimony that the children's grades had declined since appellant was incarcerated. A family friend also testified that appellant acted like a father to him and took him into his home for two or three years, encouraging him to continue his education.

The record contains ample evidence showing the seriousness of the thefts appellant committed and the harm done to his victims. Appellant's former employers suffered huge losses and have been able to recover only a portion of the money that was stolen. Appellant purchased extravagant luxuries while other employees faced layoffs. We conclude that appellant's sentences are not disproportionate when compared to the gravity of the thefts appellant committed. *See Ajisebutu v. State*, 236 S.W.3d 309, 315 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (holding that 60-year sentence for money laundering approximately \$172,000 was not a grossly disproportionate punishment); *Peto v. State*, 51 S.W.3d 326, 329 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (holding that 16-year sentence for theft of over \$220,000 from a business was not grossly disproportionate).

Because the threshold showing that appellant's sentences were excessive in comparison to his crimes has not been demonstrated, no further review is required. Even if appellant had met the threshold burden, however, he provided no evidence comparing his sentence with those imposed against other defendants convicted of similar offenses in Texas and other jurisdictions. *See Solem*, 463 U.S. at 292; *Ajisebutu*, 236 S.W.3d at 315 n. 5.

In conclusion, we overrule appellant's sole issue. The judgments of the trial court are affirmed.

/s/ Leslie Brock Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Mirabal.²

Do Not Publish — TEX. R. APP. P. 47.2(b).

² Senior Justice Margaret Garner Mirabal sitting by assignment.