Affirmed and Memorandum Opinion filed May 18, 2021 (Justices Bourliot and Hassan concurring in the judgment only).

In The

Fourteenth Court of Appeals

NO. 14-20-00292-CR
NO. 14-20-00293-CR
NO. 14-20-00294-CR
NO. 14-20-00295-CR

BILLY RYAN DEVENPORT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 415th District Court
Parker County, Texas
Trial Court Cause Nos. CR19-0158, CR19-0159, CR19-0160, CR19-0458

M E M O R A N D U M O P I N I O N

Appellant Billy Ryan Devenport pleaded guilty without an agreed recommendation on punishment to one count of continuous sexual abuse of a child under fourteen, seventeen counts of possession of child pornography, and ten counts of promotion of child pornography. After a hearing, the trial court sentenced him to

(1) life imprisonment for the single count of continuous sexual abuse of a child under fourteen, (2) ten years' confinement for each of the seventeen counts of possession of child pornography, and (3) twenty years' confinement for each of the ten counts of promotion of child pornography. The court ordered that the sentences run consecutively, resulting in a life sentence plus 370 years.

Appellant challenges his punishment in three issues. Presenting his first two issues together, appellant contends that the sentencing scheme of the continuous sexual abuse of a child statute, Penal Code section 21.02, violates both state and federal constitutional prohibitions against cruel and unusual punishment. However, the Second Court of Appeals, from which this case was transferred, has directly addressed and rejected identical arguments. Applying that court's binding precedent,[1] we overrule appellant's first two issues.

In his third issue, appellant asserts that the trial court deprived him of his right to be free from cruel and unusual punishment by ordering his sentences to run consecutively. We overrule this issue because appellant has not shown an abuse of discretion.

We affirm the judgment.

Background

A grand jury indicted appellant for one count of continuous sexual abuse of a child under fourteen, seventeen counts of possession of child pornography, and ten counts of promotion of child pornography. The single count of continuous sexual abuse of a child under fourteen was based on four predicate or component alleged offenses against appellant's daughter: (1) two offenses under Penal Code section 21.11 (indecency with a child); (2) one offense under section 22.021 (aggravated

[1] Tex. R. App. P. 41.3.

sexual assault of a child); and (3) one offense under section 43.25 (sexual performance of a child). To each of these counts, appellant pleaded guilty. There was no agreed recommendation on punishment, and the trial court conducted a punishment hearing, during which the State presented among other evidence the following.

Appellant sexually abused his nine-year-old daughter for several months and recorded multiple videos and images of the abuse. He taught her that sexual contact between a father and daughter was normal and that she should act happy when it occurred. As the victim later explained to her therapist, appellant told her to "fake like she was happy" and "smile for the pictures that he shared with friends."[2] Appellant prepared the images in such a way as to indicate that he expected them to be viewed by others. He also gave his daughter alcohol regularly, as well as marijuana and "something crystal to smoke." Appellant's daughter has suffered long-term harm and may require life-long therapy.

Additionally, appellant downloaded to his phone and other devices thousands of images and videos of child pornography, which depicted all ranges of sexual activity among infants and young children, including activity between young girls and adult men and women, girls with other girls, boys with other boys, and bestiality. Some images showed sexual bondage and torture of children. The investigating officer said appellant's offenses were "among the worst" he had seen.

At the hearing's conclusion, the trial court sentenced appellant to confinement for life for the count of continuous sexual abuse of a child under fourteen; ten years' confinement for each of the seventeen counts of possession of child pornography;

[2] Appellant frequented a website known as a platform for people seeking to have sex with children. He also possessed a spreadsheet containing the names and addresses of all registered sex offenders in Parker County.

and twenty years' confinement for each of the ten counts of promotion of child pornography. The trial court ordered the sentences to run consecutively. After the court pronounced punishment, appellant's counsel objected that the "sentence is disproportionate constituting cruel and unusual punishment under the Texas and U.S. Constitutions" and that Penal Code section 21.02 (continuous sexual abuse of a child) is unconstitutional both facially and as applied to appellant. The trial court stated no ruling on appellant's objections but signed judgments consistent with its oral pronouncements.

Appellant timely appealed.

Issues Presented

In his first two issues, appellant contends that Penal Code section 21.02 is categorically unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 13, of the Texas Constitution. There are essentially three prongs to his argument. Noting the difference in punishment ranges between a conviction under section 21.02 on the one hand, and convictions under all four predicate offenses on the other, appellant claims that the more severe punishment range for a section 21.02 conviction turns on the distinction that the predicate acts occurred over an arbitrary period of thirty or more days. The thirty-day duration stated in section 21.02, appellant asserts, renders his punishment disproportionate when compared to the predicate offenses' punishment ranges. According to appellant, the identical conduct, if committed in twenty-nine days or less, would have dramatically and more favorably altered his potential punishment. Further, appellant argues that community supervision and parole are available for the predicate offenses individually, whereas neither is available for a conviction under section 21.02. For these reasons, appellant asserts that the "punishment scheme" under section 21.02 is cruel and unusual and thus constitutionally infirm.

In his third issue, appellant argues that the court violated both federal and state constitutional prohibitions against cruel and unusual punishment by ordering that all sentences run consecutively.

Analysis

A. Applicable Law

Both the United States and Texas constitutions prohibit cruel and unusual punishment. *See* U.S. Const. amend. VIII (prohibiting "cruel and unusual punishment"); Tex. Const. art. I, § 13 (prohibiting "cruel or unusual punishment"). Appellant acknowledges that we analyze his federal and state constitutional complaints similarly. *See Cantu v. State*, 939 S.W.3d 627, 645 (Tex. Crim. App. 1997). The cruel and unusual punishment prohibition protects individuals from excessive sanctions. *Miller v. Alabama*, 567 U.S. 460, 469 (2012); *Roper v. Simmons*, 543 U.S. 551, 560 (2005). The right to be free from excessive punishment stems from the basic principle that criminal punishment should be graduated and proportioned to fit both the offender and the offense. *See Roper*, 543 U.S. at 560; *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Welch v. State*, 335 S.W.3d 376, 379-80 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

B. Penal Code section 21.02 does not violate federal and state constitutional prohibitions on cruel and unusual punishment.

We turn to appellant's first and second issues, in which he contends that Penal Code section 21.02's punishment scheme violates federal and state constitutional prohibitions on cruel and unusual punishment.

At the outset, we consider the State's contention that appellant failed to preserve these issues for our review because his trial court objection was untimely, and because he failed to secure a ruling. *See* Tex. R. App. P. 33.1(a). Appellant objected immediately after the trial court pronounced his sentence. The State says

appellant should have objected sooner because he was aware that the court would sentence him under section 21.02 even before the sentence was pronounced. Because the question is not determinative, however, we presume without deciding that appellant properly and timely preserved his first two issues by asserting them immediately after sentencing, when the court implicitly overruled the objection by signing a judgment consistent with the court's oral pronouncement. *See* Tex. R. App. P. 33.1(a)(2)(A).

Appellant observes that the predicate or component offenses supporting the charged offense under section 21.02 were (1) two acts of indecency with a child, (2) aggravated sexual assault of a child, and (3) sexual performance by a child. Indecency with a child is a second-degree felony; aggravated sexual assault of a child is a first-degree felony; and sexual performance by a child is a first-degree felony. *See* Tex. Penal Code §§ 21.11 (indecency); 22.021 (aggravated sexual assault); 43.25(c), (d) (sexual performance). The punishment range for second-degree felonies is imprisonment for "not more than 20 years or less than 2 years." *Id.* § 12.33(a). The punishment range for first-degree felonies is imprisonment "for life or for any term of not more than 99 years or less than 5 years." *Id.* § 12.32(a). In contrast, the punishment range for continuous sexual abuse of a child is imprisonment "for life, or for any term of not more than 99 years or less than 25 years." *Id.* § 21.02(h). Additionally, appellant states that had he pleaded guilty to each component offense, he would have been eligible for deferred-adjudication community supervision. *See* Tex. Code Crim. Proc. arts. 42A.101(a)-.102(a). For continuous sexual abuse of a child, however, he was not. *See id.* art. 42A.102(b)(3)(A). And for the component offenses, appellant would have been eligible for release on parole, but for continuous sexual abuse of a child, parole is not available. *Compare* Tex. Gov't Code § 508.145(d)(1)(A), (2) (inmate eligible

for parole for offenses under Penal Code §§ 21.11, 22.011, 43.25), *with id.* § 508.145(a) (inmate serving sentence for continuous sexual abuse of a child is not eligible for parole).

Appellant maintains that these differences turn on the arbitrary distinction that the component offenses occurred over thirty or more days, *see* Tex. Penal Code § 21.02(b)(1), which renders his punishment disproportionate when compared to the punishment ranges applicable separately to each component offense. Appellant characterizes his complaint as a "categorical one, in that he objects to being labeled a section 21.02 offender when the identical conduct, if committed in twenty-nine days or less, would have dramatically altered his punishment scheme." He applies a four-factor analysis applicable to similar categorical constitutional challenges based on the Supreme Court's opinion in *Graham v. Florida*, 568 U.S. 48, 61, 67 (2010), and the Texas Court of Criminal Appeals' decision in *Meadoux v. State*, 325 S.W.3d 189, 194 (Tex. Crim. App. 2010). In *Meadoux*, the Court of Criminal Appeals interpreted *Graham* as requiring courts to consider: (1) whether there is a national consensus against imposing the particular punishment at issue; (2) the offenders' moral culpability in light of their crimes and characteristics; (3) the severity of the punishment; and (4) whether the punishment serves legitimate penological goals. *Meadoux*, 325 S.W.3d at 194. The *Meadoux* court applied these factors to the punishment there at issue—life without parole for juvenile capital offenders—and held the punishment not categorically unconstitutional. *Id*. at 196.

The Second Court of Appeals transferred this case to us pursuant to the Texas Supreme Court's docket equalization efforts. *See* Tex. Gov't Code § 73.001. By rule, "the court of appeals to which [a] case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the

precedent of the transferor court." Tex. R. App. P. 41.3. As the transferee court, we must "'stand in the shoes' of the transferor court so that an appellate transfer will not produce a different outcome, based on application of substantive law, than would have resulted had the case not been transferred." *Rutledge v. State*, No. 14-17-00290-CR, 2018 WL 3354468, at *1 n.1 (Tex. App.—Houston [14th Dist.] July 10, 2018, pet. ref'd) (mem. op., not designated for publication) (quoting *In re Reardon*, 514 S.W.3d 919, 922-23 (Tex. App.—Fort Worth 2017, orig. proceeding)); *see also Brazos Elec. Power Coop., Inc. v. Tex. Comm'n on Envtl. Quality*, 576 S.W.3d 374, 382 n.6 (Tex. 2019) (same).

Our court has not considered the questions raised in appellant's first two issues, but the Second Court of Appeals has decided them squarely in a binding precedential decision for that court. *See McCain v. State*, 582 S.W.3d 332, 336 (Tex. App.—Fort Worth 2018, no pet.). In *McCain*, as here, McCain was found guilty of continuous sexual abuse of a child under fourteen. *Id.* at 335. McCain's section 21.02 conviction was based on two component offenses (first- and second-degree felonies), *id*. at 336; in today's case, appellant's section 21.02 conviction is based on four component offenses (two first- and two second-degree felonies). McCain was sentenced to thirty years' confinement. *Id*. at 335. McCain argued that the sentencing scheme under section 21.02 categorically violates federal and state constitutional prohibitions against cruel and unusual punishment for the same reasons appellant advances here. *Id*. at 336-37.

The *McCain* court addressed each *Meadoux* factor in assessing whether section 21.02's punishment scheme constituted cruel and unusual punishment. *Id.* at 338-46. Regarding the first factor, the court saw no "national consensus against long sentences, long minimum sentences, or the absence of the possibility of parole" for offenders like McCain, who continuously sexually abuse young children. *Id*. at

344. The second factor focuses on the moral culpability of the category of offenders subject to the punishment in question. Section 21.02 offenders are highly culpable because they represent authority figures engaged in sexually abusive relationships with young children marked by continuous or numerous acts of sexual abuse. *See id*. at 345 (citing *Dixon v. State*, 201 S.W.3d 731, 736-37 (Tex. Crim. App. 2006) (Cochran, J., concurring)).[3] As to the severity of the punishment, McCain attacked the same aspects of section 21.02 punishment as appellant does here. *McCain*, 582 S.W.3d at 345. As noted, the punishment range is twenty-five years to life, with no community supervision or parole eligibility. The *McCain* court did not find this range categorically offensive when compared to the available punishment ranges for section 21.02 component offenses.[4] *McCain*, 582 S.W.3d at 345-46. McCain, for example, was assessed a thirty-year sentence for his section 21.02 conviction, but he could have received thirty years for the first-degree felony offense of aggravated sexual assault, together with a consecutive sentence of up to twenty years for the second-degree felony, if those component offenses were tried independently. *Id*. at 345.[5] Additionally, the *McCain* court did not find that parole ineligibility under section 21.02 weighed in favor of unconstitutionality. *Id*. at 346. As to the final factor, the *McCain* court concluded that the penological interests of both deterrence

[3] *See also Glover v. State*, 406 S.W.3d 343, 346-50 (Tex. App.—Amarillo 2013, pet. ref'd) (explaining that the repetitive nature of section 21.02 offense and the vulnerability of child victims combine to make the moral culpability of offenders weigh in favor of finding the punishment scheme constitutional).

[4] All component offenses that can support a section 21.02 conviction are first- or second-degree felonies. *See* Tex. Penal Code § 21.02(c).

[5] Here, although appellant was assessed the maximum sentence available under section 21.02, judges have discretion to assess less in any given case, as *McCain* illustrates. And, had appellant's component offenses been tried independently, he could have received two life sentences and two twenty-year sentences, consecutively stacked.

and incapacitation are served by the sentencing scheme in question, as pedophiles and sexual predators tend to repeat their offenses. *Id*.

After addressing the four *Meadoux* factors, the *McCain* court held that the punishment scheme of section 21.02 does not run afoul of the federal and state constitutional prohibitions against cruel and unusual punishment. *Id.* at 338-46 (citing *Glover v. State*, 406 S.W.3d 343, 348 (Tex. App.—Amarillo 2013, pet. ref'd), and *DeLeon v. State*, No. 03-13-00202-CR, 2015 WL 3454101, at *8-9 (Tex. App.—Austin May 29, 2015, pet. ref'd) (mem. op., not designated for publication)).[6]

Following binding precedent for the Second Court of Appeals, we overrule appellant's first two issues.

C. Consecutive sentences are not cruel and unusual punishment.

In his third issue, appellant contends the trial court abused its discretion by ordering his sentences to run consecutively, as opposed to concurrently. *See* Tex. Code Crim. Proc. art. 42.08(a); Tex. Penal Code § 3.03(b)(2)(A), (3). With the exception of a conviction in a separate charge not at issue on appeal, the trial court ordered all appellant's sentences to be served consecutively. Appellant urges that cumulating the sentences violates his constitutional right to be free from cruel and unusual punishment and that the cumulated sentences are grossly disproportionate.

Appellant did not present this argument to the trial court. 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

[6] The Second Court of Appeals followed *McCain* in at least two subsequent decisions. *Mele v. State*, No. 02-18-00185-CR, 2018 WL 6565948, at *2 (Tex. App.—Fort Worth Dec. 13, 2018, no pet.) (mem. op., not designated for publication); *Long v. State*, Nos. 02-17-00406-CR, 02-17-00407-CR, 2018 WL 3581008, at *1-2 (Tex. App.—Fort Worth July 16, 2018, pet. ref'd) (mem. op., not designated for publication).

a timely request, objection, or motion stating specific grounds for the ruling desired. Tex. R. App. P. 33.1(a); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Nicholas v. State*, 56 S.W.3d 760, 768 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Although he insisted that the sentencing scheme constituted cruel and unusual punishment for the reasons discussed above, he asserted no objection to the court's decision or authority to impose consecutive rather than concurrent sentences, or that the cumulative sentence was grossly disproportionate to the offenses. An order cumulating sentences is separate from the sentences imposed. *See, e.g.*, *Ex parte Carter*, 521 S.W.3d 344, 347 (Tex. Crim. App. 2017) (labeling improperly cumulated sentences as "void" is inaccurate because "the infirmity lies in the order setting how the sentences will be served, not in the assessed sentences themselves). At least one court of appeals has overruled an appellate challenge to a trial court's discretionary order cumulating sentences for child sexual offenses under Penal Code section 3.03(b) when the appellant failed to specifically object that the cumulation order constituted cruel and unusual punishment in violation of the United States and Texas constitutions. *See Hopkins v. State*, No. 03-16-00746-CR, 2018 WL 1660831, at *15-18 (Tex. App.—Austin Apr. 6, 2018, no pet.) (mem. op., not designated for publication).

In any event, presuming the issue was preserved, appellant has not demonstrated that the trial court abused its discretion in cumulating appellant's sentences. We review a trial court's order "stacking" sentences consecutively for an abuse of discretion. *See* Tex. Code Crim. Proc. art. 42.08(a); *Beedy v. State*, 194 S.W.3d 595, 597 (Tex. App.—Houston [1st Dist.] 2006), *aff'd*, 250 S.W.3d 107, 115 (Tex. Crim. App. 2008); *Nicholas*, 56 S.W.3d at 765. In the present context, an abuse of discretion will generally be found only if (1) the trial court imposes consecutive sentences when the law requires concurrent sentences, (2) the trial court

imposes concurrent sentences when the law requires consecutive ones, or (3) the trial court otherwise fails to observe the statutory requirements pertaining to sentencing. *Nicholas*, 56 S.W.3d at 765.

The Eighth Amendment, applicable to state courts through 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*, —— U.S. ——, 139 S. Ct. 1112, 1144 (2019). Generally, as long as a sentence is legal and assessed within the legislatively determined range, it will not be considered excessive, cruel, or unusual. *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016); *see Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006) (orig. proceeding) (noting that "the sentencer's discretion to impose any punishment within the prescribed range is essentially unfettered"). Moreover, if the law authorizes the imposition of cumulative sentences, a trial judge has absolute discretion to stack sentences. *Nicholas*, 56 S.W.3d at 765; *Quintana v. State*, 777 S.W.2d 474, 480 (Tex. App.—Corpus Christi 1989, pet. ref'd) (citing *Smith v. State*, 575 S.W.2d 41, 41 (Tex. Crim. App. 1979), and *Carney v. State*, 573 S.W.2d 24, 27 (Tex. Crim. App. 1978)).

Appellant's punishment and cumulative sentences are within statutory parameters. Under Code of Criminal Procedure article 42.08, the trial judge has the discretion to order sentences for convictions in two or more cases to run consecutively. Tex. Code Crim. Proc. art. 42.08(a); *Byrd v. State*, 499 S.W.3d 443, 446 (Tex. Crim. App. 2016) (trial court has "absolute discretion to cumulate sentences" when, as here, cumulation is authorized by law). Separately, a trial court may order sentences served consecutively when an accused is found guilty of more than one offense arising out of the same criminal episode, if the convictions are for offenses including, among others, Penal Code sections 21.02 and 43.26. *See* Tex.

Penal Code § 3.03(b)(2)(A), (3).[7] Appellant was convicted of one count of continuous sexual abuse of a child under fourteen (Penal Code section 21.02), seventeen counts of possession of child pornography (Penal Code section 43.26(a), (d)), and ten counts of promotion of child pornography (Penal Code section 43.26(e), (g)).

Acknowledging both this statutory authority and precedent holding that the cumulation of sentences generally does not constitute cruel and unusual punishment,[8] appellant asserts nonetheless that the trial court's stacking order in the present case violates his federal and state constitutional rights because the total sentence is grossly disproportionate to his offenses.

A sentence that is within the applicable range of punishment may nevertheless be cruel or unusual in the "exceedingly rare" or "extreme" case in which the sentence is grossly disproportionate to the offense. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003); *see Solem v. Helm*, 463 U.S. 277, 290-92 (1983). Outside the context of capital punishment, however, successful challenges to the disproportionality of particular sentences have been "exceedingly rare." *Ewing v. California*, 538 U.S. 11, 21 (2003); *Simpson*, 488 S.W.3d at 323. "The gross disproportionality principle

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[7] In Penal Code chapter 3, "criminal episode" means "the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

(1) The offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or

(2) The offenses are the repeated commission of the same or similar offenses."

Tex. Penal Code § 3.01. Appellant does not argue that the offenses to which he pleaded guilty and was convicted did not arise out of the same criminal episode.

[8] *See, e.g.*, *Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984).

reserves a constitutional violation for only the extraordinary case." *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

The disproportionality analysis appellant invokes is based on *Solem*, which held that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 290-92. The first *Solem* criteria constitutes a threshold inquiry, in which we are to determine whether the sentence is grossly disproportionate to the offense, considering the severity of the former compared to the gravity of the latter. *See Simpson*, 488 S.W.3d at 323. We proceed to consider the second and third criteria only if we conclude that the threshold comparison leads to an inference of gross disproportionality. *E.g.*, *id.*[9]; *Dale v. State*, 170 S.W.3d 797, 799-800 (Tex. App.—Fort Worth 2005, no pet.) ("We judge the gravity of the offense in light of the harm caused or threatened to the victim or society and the culpability of the offender. Only if we determine that the sentence is grossly disproportionate to the offense do we consider the remaining *Solem* factors." (citations omitted)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1004-05 (1991); *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992) (noting in light of *Harmelin*, *Solem* is to apply only when threshold comparison of crime committed to sentence imposed leads to inference of "gross disproportionality"). Should we proceed to the

[9] "To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, 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. 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." *Simpson*, 488 S.W.3d at 323 (citations omitted).

second and third factors and conclude that they "validate[] an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Simpson*, 488 S.W.3d at 323.

Appellant has not attempted to apply in his brief any of *Solem*'s factors other than the first one. And his argument on that sole point is limited to noting his cumulative sentence amounts to confinement for life plus 370 years. He does not present to us, and did not present to the trial court, any discussion or evidence why the cumulation of his sentences is grossly disproportionate to his offenses when considering their nature, his culpability, and the harm he caused. *E.g.*, *Simpson*, 488 S.W.3d at 323; *Dale*, 170 S.W.3d at 799-800.

These considerations do not weigh in appellant's favor regarding *Solem*'s threshold inquiry. Appellant repeatedly sexually abused his nine-year-old daughter for several months, while she may have been under the influence of alcohol, marijuana, or other drugs. He led her to believe that sexual activity between a father and daughter was normal. He documented the sexual contact between them in multiple digital photos and video recordings, which he intended to share with others. Supplementing his library of child pornography, appellant searched for and downloaded thousands of images and videos depicting other children in the act of being sexually abused, including pictures of children in bondage, children as young as three years old engaged in sex acts, and bestiality. The nature of appellant's offenses—which we have merely summarized out of respect for the reader's sensibilities—is particularly depraved.

Appellant's abuse has caused his daughter such substantial harm that any fair attempt at its description is depressingly heart-wrenching. A nine-year-old child has endured at least several months of sexual abuse at her father's hands. His conduct has unsurprisingly taken its toll on her school performance and psychological state.

She suffers from mood disorders and symptoms consistent with post-traumatic stress disorder. Only after nine months of therapy could she begin showering or bathing alone. She has a learning gap from her peers, is socially immature, and has poor sexual boundaries. She likely will need years of therapy. Dealing with memories is not the only obstacle to her future well-being; how long the digital vestiges of her ordeal could remain in cyberspace, or how many may have viewed the images of the crimes perpetrated against her, is anyone's guess.[10]

Appellant does not direct us to any cases supporting his view that the present circumstances constitute the rare instance giving rise to an inference of gross disproportionality. The authority we have located suggests otherwise. *See Cisneros v. State*, No. 13-18-00652-CR, —S.W.3d—, 2021 WL 822302, at *6-7 (Tex. App.—Corpus Christi Mar. 4, 2021) (op. on remand) (consecutive 99-year sentences for two counts of continuous sexual abuse of a child neither cruel and unusual nor grossly disproportionate); *Williamson v. State*, 175 S.W.3d 522, 525 (Tex. App.—Texarkana 2005, no pet.) (cumulation of three life sentences for aggravated sexual assault of a young child not cruel and unusual); *Shivers v. State*, No. 02-16-00387-CR, 2017 WL 6884303, at *4-5 (Tex. App.—Fort Worth Oct. 19, 2017, pet. ref'd) (mem. op., not designated for publication) (cumulation of three life sentences for aggravated sexual assault of a child not cruel and unusual). In each of these cases

[10] *See Paroline v. United States*, 572 U.S. 434, 441 (2014) (explaining that victim of child pornography's suffering was hard to grasp; "she knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her"); *Savery v. State*, 767 S.W.2d 242, 245 (Tex. App.—Beaumont 1989, no pet.) ("The Legislature may have determined that child pornography is even more damaging to the child victim than sexual abuse or prostitution, inasmuch as the helpless child's actions are reduced and memorialized on a recording or film and that type of pornography may haunt and damage the child for many long years in the future after the original misdeed occurred. Indeed, the effect is devastating and of long duration on the child who has been photographed performing certain acts. That child must go through his adult life with the knowledge that the recording or picture or photograph or film exists and may, at some time in later years, be distributed or circulated.").

involving extraordinarily lengthy or life-long cumulated sentences for sexual offenses against young children, the courts found it unnecessary to reach the second or third *Solem* factors because the cumulated sentences in question were not grossly disproportionate to the offenses. Considering the nature of appellant's actions, the volume of child pornography recovered from his home, appellant's clear culpability, and the damage his actions have caused, we too conclude that the cumulated sentences are not grossly disproportionate to appellant's offenses. Therefore, we need not address *Solem*'s second and third factors. *See Simpson*, 488 S.W.3d at 322-24; *Foster v. State*, 525 S.W.3d 898, 910-11 (Tex. App.—Dallas 2017, pet. ref'd); *Dale*, 170 S.W.3d at 799-800; *see also Speckman v. State*, Nos. 07-13-00232-CR, 07-13-00233-CR, 2014 WL 2191997, at *3 (Tex. App.—Amarillo May 23, 2014, pet. ref'd) (mem. op., not designated for publication); *Williams v. State*, No. 12-01-00311-CR, 2003 WL 1883474, at *5 (Tex. App.—Tyler Apr. 16, 2003, pet. ref'd) (mem. op., not designated for publication) (holding that 99-year sentence for sexual assault of a child was not grossly disproportionate to offense committed; thus, court did not need to consider *Solem*'s second and third elements). We cannot say that the trial court abused its discretion by remaining within, though maximizing, statutorily available punishment for these crimes. *See Cisneros*, 2021 WL 822302, at *6-7; *Williamson*, 175 S.W.3d at 525; *Dale*, 170 S.W.3d at 800-01; *Shivers*, 2017 WL 6884303, at *4-5.

Even presuming for argument's sake that this record gives rise to an inference of gross disproportionality, appellant has not briefed or presented argument or evidence under *Solem*'s second and third factors supporting why the cumulation of his sentences should be deemed cruel and unusual. Appellant's failure to offer evidence in support of his point in the trial court leaves us unable to perform the evaluation he says applies, and thus compels us to reject his challenge. *See Pantoja*

v. State, 496 S.W.3d 186, 193 n.4 (Tex. App.—Fort Worth 2016, pet. ref'd) (declining to undergo proportionality analysis because appellant offered no evidence of sentences imposed in same jurisdiction and other jurisdictions); *Hammer v. State*, 461 S.W.3d 301, 303-04 (Tex. App.—Fort Worth 2015, no pet.) (noting that, even if threshold factor of comparing gravity of appellant's offense to sentence imposed were resolved in appellant's favor, his claim that punishment was grossly disproportionate to offense would still fail because appellant offered no evidence in connection with motion for new trial of sentences imposed for same crime in same jurisdiction and other jurisdictions); *Williamson*, 175 S.W.3d at 525; *see also Speckman*, 2014 WL 2191997, at *3; *Myers v. State*, No. 13-08-00202-CR, 2009 WL 2914477, at *2 (Tex. App.—Corpus Christi Aug. 28, 2009, no pet.) (mem. op., not designated for publication); *Mitchamore v. State*, No. 09-03-061-CR, 2003 WL 21673188, at *2 (Tex. App.—Beaumont July 16, 2003, no pet.) (mem. op., not designated for publication); *Williams*, 2003 WL 1883474, at *5 n.1. Thus, appellant has failed to carry his burden to demonstrate that his consecutive sentences were grossly disproportionate to his offenses and thus unconstitutional.

Finally, appellant complains within his third issue that the record contains no findings of fact supporting the trial court's decision to stack sentences. However, neither Penal Code section 3.03 nor Code of Criminal Procedure article 42.08 specify an evidentiary burden to trigger the court's authority to cumulate sentences. *See* Tex. Code Crim. Proc. art. 42.08; Tex. Penal Code § 3.03; *Bonilla v. State*, 452 S.W.3d 811, 816 n.22 (Tex. Crim. App. 2014). Thus, the trial court was not required to make fact findings showing a need to stack appellant's sentences. *See Griffin v. State*, No. 02-19-00020-CR, 2021 WL 126650, at *6 (Tex. App.—Fort Worth Jan. 14, 2021, no pet. h.) (mem. op., not designated for publication).

We overrule appellant's third issue.

Conclusion

Having overruled each of appellant's three issues, we affirm the trial court's judgments.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Bourliot, and Hassan (Justices Bourliot and Hassan concurring in the judgment only).

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