# NUMBER 13-19-00262-CR

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**ARTURO JESUS RIOS,** **Appellant,**

**v.**

**THE STATE OF TEXAS,** **Appellee.**

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**On appeal from the 105th District Court of Kleberg County, Texas.**

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# MEMORANDUM OPINION

## Before Justices Hinojosa, Perkes, and Tijerina
## Memorandum Opinion by Justice Perkes

Appellant Arturo Jesus Rios appeals his third-degree felony driving while intoxicated (DWI) conviction, asserting that the trial court's sentencing was disproportionate to the seriousness of the alleged offense. *See* U.S. CONST. amends. VIII, XVIII; TEX. PENAL CODE ANN. §§ 49.04, 49.09(b)(2). We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Rios pleaded guilty to felony DWI[1] pursuant to a plea bargain agreement on December 14, 2016. The trial court sentenced Rios to five years' imprisonment[2] and probated the sentence for a period of five years. Rios's conditions of probation, in part, required that he "abstain from the consumption of alcoholic beverages" and prohibited the commitment of an "offense against the laws of this State or of the United States."

On October 26, 2018, the State filed a motion to revoke Rios's community supervision, alleging sixteen violations ranging from testing positive for alcohol to failing to complete the Texas Repeat Offender Program. On November 28, 2018, Rios pleaded true to the allegations. The trial court sanctioned Rios to the Intermediate Sanction Facility (ISF) substance abuse and cognitive treatment tracts, placed Rios on intensive supervision for the six-month period following his completion of ISF, and extended Rios's probation for one year.

On March 4, 2019, the State filed its second motion for revocation and alleged a single violation: the commission of a new offense, namely, DWI. Rios pleaded true, and the trial court sentenced Rios to five years' imprisonment and ordered the sentence to run concurrent with Rios's sentence of three years' imprisonment in the new DWI case out of a different county.

This appeal followed.

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[1] Rios also pleaded true to two prior DWI offenses, which were used to enhance the DWI underlying this cause to a felony DWI. *See Couthern v. State*, PD-0560-18, ___ S.W.3d ___, ___, 2019 WL 1715913, at *2 (Tex. Crim. App. Apr. 17, 2019) ("If the State can prove a defendant has been previously convicted two times of an offense related to operating a motor vehicle while intoxicated, the driving while intoxicated offense becomes a third-degree felony.").

[2] The punishment range for a third-degree DWI is "not more than 10 years or less than 2 years." TEX. PENAL CODE ANN. §§ 12.34, 49.04, 49.09(b)(2).

## II. EXCESSIVE PUNISHMENT

In his sole issue on appeal, Rios contends that his five-year sentence is excessive and in violation of the Eighth and Fourteenth Amendment. *See* U.S. CONST. amends. VIII, XVIII.

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."); *see also Meadoux v. State*, 325 S.W.3d 189, 193 (Tex. Crim. App. 2010) (acknowledging that the Eighth Amendment is applicable to the states by virtue of the Fourteenth Amendment (citing *Robinson v. California*, 370 U.S. 660, 666–67 (1962)). A successful challenge to proportionality is exceedingly rare and requires a finding of "gross disproportionality." *Simpson*, 488 S.W.3d at 322–23 (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)); *Trevino v. State*, 174 S.W.3d 925, 928 (Tex. App.—Corpus Christi–Edinburg 2005, pet. ref'd) (providing that as long as the sentence is assessed within the legislatively determined range, it will unlikely be disturbed on appeal).

However, in order to preserve for appellate review a complaint that a sentence is grossly disproportionate or 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); *Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986); *Navarro v. State*, 588 S.W.3d 689, 690 (Tex. App.—Texarkana

2019, no pet.) (holding that to preserve a disproportionate-sentencing complaint, the defendant must make a timely, specific objection in trial court or raise the issue in a motion for new trial); *Toledo v. State*, 519 S.W.3d 273, 284 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (same); *Pantoja v. State*, 496 S.W.3d 186, 193 (Tex. App.—Fort Worth 2016, pet. ref'd) (same); *Trevino*, 174 S.W.3d at 928 (same).

At no time prior to this appeal did Rios argue that the sentence imposed was disproportionate to the offense charged or in violation of his constitutional rights. *See* U.S. CONST. amends. VIII, XVIII. Accordingly, we hold that Rios failed to preserve his complaint for review. *See Smith*, 721 S.W.2d at 855; *Trevino*, 174 S.W.3d at 927–28 ("Because the sentence imposed is within the punishment range and is not illegal, we conclude that the rights [appellant] asserts for the first time on appeal are not so fundamental as to have relieved him of the necessity of a timely, specific trial objection."). We overrule Rios's sole point of error.

## III. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

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

Delivered and filed the
13th day of August, 2020.