NO. 12-16-00321-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ALOYISUS WAYNE MURRAY, SR., APPELLANT	***§***	***APPEAL FROM THE 87TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Aloyisus Wayne Murray, Sr. appeals his conviction for aggravated assault with a deadly weapon. In one issue, he argues that his punishment is excessive and grossly disproportionate to the crime for which he was convicted. We affirm.

BACKGROUND

Appellant was charged by indictment with aggravated assault with a deadly weapon, a second degree felony, punishable by not less than two years but not more than twenty years imprisonment. Appellant's indictment contained an enhancement provision alleging that he had previously been finally convicted of the felony offense of possession of a controlled substance. This allegation enhanced the punishment range for the charge to not less than five years but not more than ninety-nine years or life imprisonment. Appellant entered a plea of "not guilty" and the case proceeded to a jury trial. The jury returned a verdict of "guilty" and, after finding the enhancement allegation to be "true," assessed punishment at thirty years imprisonment.[1]

[1] The State's brief contains inconsistent statements regarding Appellant's sentence, indicating both that he was sentenced to thirty years imprisonment and that he was sentenced to life imprisonment. Similarly, the State's brief contains inconsistent statements regarding the sentencing range in Appellant's case, indicating both that the sentencing range was not less than five but not more than ninety-nine years or life imprisonment and that the applicable range was not less than twenty-five years but not more than ninety-nine years or life imprisonment. Appellant's brief indicates that the maximum possible sentencing range was not less than five years but not more

CRUEL AND UNUSUAL PUNISHMENT

In his sole issue, Appellant argues that the thirty year sentence recommended by the jury and imposed by the trial court is grossly disproportionate to the crime committed and amounts to cruel and unusual punishment. "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." ***Kim v. State***, 283 S.W.3d 473, 475 (Tex. App.—Fort Worth 2009, pet. ref'd); *see also* ***Rhoades v. State***, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (waiver of complaint of cruel and unusual punishment under the Texas Constitution because defendant presented his argument for first time on appeal); ***Curry v. State***, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (defendant waived complaint that statute violated his rights under the United States Constitution when raised for first time on appeal); ***Mays v. State***, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009). ("Preservation of error is a systemic requirement that a first-level appellate court should ordinarily review on its own motion[;] ... it [is] incumbent upon the [c]ourt itself to take up error preservation as a threshold issue."); TEX. R. APP. P. 33.1. A review of the record shows that Appellant lodged no objection to the constitutionality of his sentence at the trial court level, and has, therefore, failed to preserve error for appellate review. *See* ***Kim***, 283 S.W.3d at 475; *see also* ***Rhoades***, 934 S.W.2d at 120; ***Curry***, 910 S.W.2d at 497; ***Mays***, 285 S.W.3d at 889; TEX. R. APP. P. 33.1.

However, despite Appellant's failure to preserve error, we conclude his sentence does not constitute cruel and unusual punishment. The Eighth Amendment to the Constitution of the United States provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. AMEND. VIII. This provision was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. ***Meadoux v. State***, 325 S.W.3d 189, 193 (Tex. Crim. App. 2010) (citing ***Robinson v. California***, 370 U.S. 660, 666-667, 82 S. Ct. 1417, 1420-21, 8 L. Ed. 2d 758 (1962)).

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than ninety-nine years or life imprisonment and that he was sentenced to thirty years confinement by the trial court on the jury's recommendation. A review of the record shows that Appellant's indictment, including the enhancement allegation, subjected him to a maximum possible sentencing range of not less than five years but not more than ninety-nine years or life imprisonment. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 12.33(a), 12.42(b), 22.02 (a)-(b) (West 2011 and West Supp. 2016). The record further indicates that the trial court imposed the jury recommended sentence of thirty years confinement in this case.

The legislature is vested with the power to define crimes and prescribe penalties. *See* ***Davis v. State***, 905 S.W.2d 655, 664 (Tex. App.–Texarkana 1995, pet. ref d); *see also* ***Simmons v. State***, 944 S.W.2d 11, 15 (Tex. App.–Tyler 1996, pet. ref d). Courts have repeatedly held that punishment which falls within the limits prescribed by a valid statute is not excessive, cruel, or unusual. *See* ***Harris v. State***, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); ***Jordan v. State***, 495 S.W.2d 949, 952 (Tex. Crim. App.1973); ***Davis***, 905 S.W.2d at 664. In this case, Appellant was convicted of aggravated assault with a deadly weapon, the punishment range for which, considering enhancements, is five to ninety-nine years, or life imprisonment. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 12.33(a), 12.42(b), 22.02 (a)-(b). Thus, the sentence recommended by the jury and imposed by the trial court falls within the range set forth by the legislature. Therefore, the punishment is not prohibited as cruel, unusual, or excessive per se. *See* ***Harris***, 656 S.W.2d at 486; ***Jordan***, 495 S.W.2d at 952; ***Davis***, 905 S.W.2d at 664.

Nevertheless, Appellant urges the court to perform the three part test originally set forth in ***Solem v. Helm***, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). Under this test, the proportionality of a sentence is evaluated by considering (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. ***Id.***, 463 U.S. at 292, 103 S. Ct. at 3011. The application of the ***Solem*** test has been modified by Texas courts and the Fifth Circuit Court of Appeals in light of the Supreme Court's decision in ***Harmelin v. Michigan***, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) to require a threshold determination that the sentence is grossly disproportionate to the crime before addressing the remaining elements. *See, e.g.*, ***McGruder v. Puckett***, 954 F.2d 313, 316 (5th Cir.1992), *cert. denied*, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992); *see also* ***Jackson v. State***, 989 S.W.2d 842, 845-46 (Tex. App.–Texarkana 1999, no pet.).

We are guided by the holding in ***Rummel v. Estelle*** in making the threshold determination of whether Appellant's sentence is grossly disproportionate to his crime. 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In ***Rummel***, the Supreme Court considered the proportionality claim of an appellant who had received a mandatory life sentence under a prior version of the Texas habitual offender statute for a conviction of obtaining $120.75 by false pretenses. *See* ***id.***, 445 U.S. at 266, 100 S. Ct. at 1135. In that case, the appellant received a life sentence because he had two prior felony convictions—one for fraudulent use of a credit card to

obtain $80 worth of goods or services and the other for passing a forged check in the amount of $28.36. ***Id.***, 445 U.S. at 265-66, 100 S. Ct. at 1134–35. After recognizing the legislative prerogative to classify offenses as felonies and, further, considering the purpose of the habitual offender statute, the court determined that the appellant's mandatory life sentence did not constitute cruel and unusual punishment. ***Id.***, 445 U.S. at 284-285, 100 S. Ct. at 1144-45.

In this case, the offense committed by Appellant—aggravated assault with a deadly weapon—is far more serious than the combination of offenses committed by the appellant in ***Rummel***, while Appellant's thirty year sentence is far less severe than the life sentence upheld by the Supreme Court in ***Rummell***. Thus, it is reasonable to conclude that if the sentence in ***Rummell*** is not constitutionally disproportionate, neither is the sentence assessed against Appellant in this case. In his brief, Appellant makes a conclusory statement that his thirty year sentence is grossly disproportionate, but cites to no authority to support this contention. *See* TEX. R. APP. P. 38.1(i) ("[t]he brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities…"). Because we do not conclude that Appellant's sentence is disproportionate to his crime, we need not apply the remaining elements of the ***Solem*** test. Appellant's sole issue is overruled.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered August 31, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

AUGUST 31, 2017

NO. 12-16-00321-CR

ALOYISUS WAYNE MURRAY, SR.,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 87th District Court
of Anderson County, Texas (Tr.Ct.No. 87CR-16-32737)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.