

**NO. 12-17-00133-CR**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

***ELIZABETH BREWER,  
APPELLANT***

§ ***APPEAL FROM THE 349TH***

***V.***

§ ***JUDICIAL DISTRICT COURT***

***THE STATE OF TEXAS,  
APPELLEE***

§ ***HOUSTON COUNTY, TEXAS***

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***MEMORANDUM OPINION***

Elizabeth Brewer appeals her sentence following the revocation of her community supervision. In one issue, Appellant argues that her sentence is disproportionate to the crime for which she was convicted. We affirm.

**BACKGROUND**

Appellant was charged by indictment with manufacture or delivery of a controlled substance in an amount of four grams or more but less than 200 grams, a first degree felony,<sup>1</sup> and pleaded “guilty.” Pursuant to a plea agreement, the trial court placed Appellant on deferred adjudication community supervision for ten years.

On June 28, 2016, the State filed a motion to proceed with adjudication of guilt and sentence, which included a request to revoke Appellant’s community supervision. Appellant pleaded “true” to the allegations in the State’s motion. Following a hearing, the trial court found the allegations to be “true,” revoked Appellant’s community supervision, and sentenced her to imprisonment for thirty-five years. This appeal followed.

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<sup>1</sup> See TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2017).

## CRUEL AND UNUSUAL PUNISHMENT

In her sole issue, Appellant argues that the thirty-five year sentence imposed by the trial court amounts to cruel and unusual punishment. However, Appellant made no timely objection to the trial court raising the issue of cruel and unusual punishment and has, therefore, failed to preserve any such error. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (waiver with regard to rights under the Texas Constitution); *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (waiver with regard to rights under the United States Constitution); *see also* TEX R. APP. P. 33.1; *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[.]”). But even despite Appellant’s failure to preserve error, we conclude that the sentence about which she complains 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, 666–67, 82 S. Ct. 1417, 1420–21, 8 L. Ed. 2d 758 (1962)).

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 the case at hand, Appellant was convicted of manufacture or delivery of a controlled substance in an amount of four grams or more but less than 200 grams, the punishment range for which is five to ninety-nine years, or life. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112 (a), (d) (West 2017); TEX. PENAL CODE ANN. § 12.32 (West 2011). Thus, the sentence 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.

Nonetheless, Appellant contends that her sentence is “grossly disproportionate.” Under 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), 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 first must determine whether Appellant’s sentence is grossly disproportionate. In so doing, we are guided by the holding in *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In *Rummel*, the Supreme Court addressed 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 265-66, 100 S. Ct. at 1135. A life sentence was imposed because the appellant also had two prior felony convictions—one for fraudulent use of a credit card to obtain \$80.00 worth of goods or services and the other for passing a forged check in the amount of \$28.36. *Id.*, 445 U.S. at 266, 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 284-85, 100 S. Ct. at 1144-45.

In the case at hand, the offense committed by Appellant—manufacture or delivery of a controlled substance—is more serious than the combination of offenses committed by the appellant in *Rummel*, while Appellant’s thirty-five year sentence is less severe than the life sentence upheld by the Supreme Court in *Rummel*. Thus, it is reasonable to conclude that if the sentence in *Rummel* was not unconstitutionally disproportionate, neither is the sentence assessed against Appellant in the present case. Therefore, since the threshold test has not been satisfied,

we need not apply the remaining elements of the *Solem* test. See *McGruder*, 954 F.2d at 316; see also *Jackson*, 989 S.W.2d at 845–46. Appellant’s sole issue is overruled.

**DISPOSITION**

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

**BRIAN HOYLE**

Justice

Opinion delivered August 23, 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 23, 2017

NO. 12-17-00133-CR

**ELIZABETH BREWER,**  
Appellant  
V.  
**THE STATE OF TEXAS,**  
Appellee

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Appeal from the 349th District Court  
of Houston County, Texas (Tr.Ct.No. 13CR-128)

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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.

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