

NO. 12-20-00021-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***CORTNEY DEWON WHITAKER,
APPELLANT***

§ *APPEAL FROM THE 87TH*

V.

§ *JUDICIAL DISTRICT COURT*

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

§ *ANDERSON COUNTY, TEXAS*

MEMORANDUM OPINION

Cortney Dewon Whitaker appeals his sentence following the revocation of his community supervision. In one issue, Appellant argues that his sentence is 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.¹ Pursuant to a plea agreement, Appellant pleaded “guilty,” and the trial court placed Appellant on deferred adjudication community supervision for ten years.

In April 2019, the State filed a motion to revoke Appellant’s community supervision alleging that Appellant violated certain terms and conditions thereof. An amended motion to adjudicate guilt was filed in September 2019. At a hearing, Appellant pleaded “true” to all but one of the allegations in the State’s motion. Appellant pleaded “not true” to the allegation that he failed to report his July 25, 2019 arrest to his community supervision officer within forty-eight hours. Following a hearing, the trial court found the allegations to be “true,” revoked Appellant’s community supervision, and sentenced him to imprisonment for twelve years. This appeal followed.

¹ See TEX. PENAL CODE ANN. § 22.02(a)(2), (b) (West 2019).

CRUEL AND UNUSUAL PUNISHMENT

In his sole issue, Appellant argues that the twelve-year sentence 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)).

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. Appellant was convicted of aggravated assault with a deadly weapon, the punishment range for which is no less than two years but no more than twenty years. See TEX. PENAL CODE ANN. §§ 12.33(a) (West 2019); 22.02(a)(2), (b) (West 2019). 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. 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 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 284–85, 100 S. Ct. at 1144–45.

In this case, the offense committed by Appellant—aggravated assault with a deadly weapon—is even more serious than the combination of offenses committed by the appellant in *Rummel*, while Appellant’s twelve-year sentence is far 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* is not constitutionally disproportionate, neither is the sentence assessed against Appellant in this case. In his brief, Appellant makes a conclusory statement that his twelve-year sentence is grossly disproportionate, stating that other sentences for “more serious aggravated assault with a deadly weapon” convictions resulted in “significantly” less harsh sentences. However, he 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 the 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 judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered September 9, 2020.
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

SEPTEMBER 9, 2020

NO. 12-20-00021-CR

CORTNEY DEWON WHITAKER,

Appellant

V.

THE STATE OF TEXAS,

Appellee

Appeal from the 87th District Court
of Anderson County, Texas (Tr.Ct.No. 87CR-18-33676)

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.