Affirmed and Opinion filed January 24, 2002.

In The

Fourteenth Court of Appeals

NOS. 14-00-01105-CR
14-00-01106-CR

WALTER J. WILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause Nos. 828,427; 828,428

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

Appellant, Walter J. Wiley, was convicted in two separate causes tried jointly. Because all dispositive issues are clearly settled in law, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.1. The facts of these appeals are known to the parties, so we do not recite them here.

Appellant was indicted for robbery in trial cause number 828,428 and for aggravated kidnapping in trial cause number 828,427. The jury convicted the appellant of robbery and

of the lesser-included offense of kidnapping. After appellant pleaded true to an enhancement for a prior felony conviction of burglary of a habitation, the jury assessed punishment of twenty-five years for robbery and twenty years for kidnapping.

In his first point in each appeal, appellant argues his counsel was ineffective in failing to challenge a member of the venire who claimed he could not be fair and impartial. During voir dire, thirteen jurors responded they could not be fair and impartial in a case that might include evidence of a sexual assault. Of these thirteen, ten were dismissed by agreement and defense challenges for cause were granted as to two more. Defense counsel never challenged the last.

Appellant filed a motion for new trial, but did not assert ineffective assistance of counsel. Thus, the record is silent as to why his counsel might have declined to strike this last juror. Facts not shown in the record may have suggested a reason to take a gamble on him. *See Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992) (holding silent record did not show ineffectiveness in failure to strike juror who said he could not be impartial). We must presume counsel made all significant decisions in the exercise of reasonable professional judgment. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Without a sufficient record, appellant cannot overcome this presumption, and we cannot conclude his counsel was ineffective. *See Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000) (holding that "without some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic design"). We overrule appellant's first point of error directed at both the robbery and kidnapping convictions.

As to the robbery conviction alone, appellant argues the trial court should have instructed the jury on the lesser-included offense of theft. At trial, defense counsel requested an instruction on theft, and made the following remarks:

> [DEFENSE COUNSEL]: Your Honor, we assert that a lesser included offense of theft from a person should be included for the reason that it's not clear–or the issue was raised by the evidence that the jewelry

was taken and not necessarily taken from a person with force. It may have been taken from a –from the floor with force, or wherever the purse was, or wherever the property was.

THE COURT: The rings were—what I'm specifically thinking of–you're saying that you didn't hear testimony that the rings were taken by force or threat?

[DEFENSE COUNSEL]: There was– I'm saying that none of the property was taken by force of threat. It was all just taken. I think the evidence was clear it was taken. Not so clear that it was taken by force or threat, which would be an element of robbery . . . .

Appellant's trial objection was that there was no evidence he caused bodily injury at the time he stole the property. By pointing to the evidence regarding the jewelry, he suggested to the trial court that he was entitled to the theft instruction because there was evidence from which the jury could believe the appellant did not use force in the course of committing theft.[1] On appeal, however, the appellant argues that there was evidence that he did not cause bodily injury to the complainant *in the manner alleged in the indictment*—by striking her with his hand.

If appellant's trial objection does not comport with the issue raised on appeal, he has preserved nothing for review. TEX. R. APP. P. 33.1(a); *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999) (holding that trial objection on grounds of hearsay did not comport with relevancy objection on appeal). We find the trial court was never given an opportunity to correct this particular error, if any. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 1981) (requiring counsel to distinctly specify each ground of objection to the charge); *Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985) (affirming conviction where trial objection did not comport with grounds of objection on appeal).

[1] Counsel's trial objection is not supported by the record. Although appellant took the stand during the trial and denied striking the complainant, he nevertheless admitted shoving and "wrestling" her and did not deny forcing the complainant into a restroom and terrifying her. Since "bodily injury" requires only physical pain, there is no evidence that would entitle the jury to find appellant did *not* cause bodily injury to the complainant. *See* TEX. PEN. CODE ANN. § 1.07 (a)(8) (Vernon 1994) (defining "bodily injury").

Thus, the appellant has failed to preserve error. We overrule the appellant's second point of error and affirm the trial court's judgment in both causes.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed January 24, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).