Affirmed and Opinion filed April 26, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00662-CR

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PAUL EDWARD BROUSSARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 795,654

O P I N I O N

Appellant was found guilty after a jury trial of aggravated sexual assault of a child. *See* TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2000). The jury assessed punishment at life in prison. We affirm.

I. Background

The evidence showed that over a period of several years, appellant sexually assaulted a young male relative. The complainant testified the assaults began when he was about five years old and continued until he was about eight. When the complainant was about thirteen,

he tested positive for the human immunodeficiency virus, or HIV. It was only then that the complainant's mother learned of the assaults and notified authorities. Appellant, who declined to take an HIV test, denied the allegations.

II. Discussion

A. Voir Dire

In his first point of error, appellant complains the trial court abused its discretion by restricting the time for voir dire[1] and by failing to allow the defendant to ask proper questions of panel members to show bias or inability to follow the law. Appellant complains that the trial court prevented the defense from directly questioning at least one juror and that as a result venireperson No. 9, who had responded that she could not consider probation in the context of an aggravated sexual assault, was seated on the jury.

The trial court, in its sound discretion, can and should control the voir dire examination. *Ratliff v. State*, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985). A trial court may impose reasonable restrictions on the exercise of voir dire examination. *Id.* In determining whether the trial court abused its discretion by imposing time limits on voir dire, we must determine whether (1) the party attempted to prolong the voir dire; (2) the questions that the party was not permitted to ask were proper voir dire questions; and (3) the party was not permitted to examine prospective jurors who actually served on the jury. *McCarter v. State*, 837 S.W.2d

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[1] We view appellant's complaint being less about the amount of time per se than about the court's barring certain questions. To the extent that appellant complains about the trial court's time limits on voir dire, the trial court did not abuse its discretion by limiting the examination to fifty-five minutes. *See Barrett v. State*, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974)(thirty minutes); *Whitaker v. State*, 653 S.W.2d 781, 782 (Tex. Crim. App. 1983) (fifty minutes). *But see Tobar v. State*, 874 S.W.2d 87, 90 (Tex. App.—Corpus Christi 1992, pet. ref'd)(forty-five minutes unreasonably short in aggravated sexual assault case); *Ratliff*, 690 S.W.2d 597 (eighty-one minutes not enough in aggravated robbery case). *See also* 42 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE §35.22 (1995).

117, 119 (Tex. Crim. App. 1992).

The record shows that when the defense questioned a group of venire members about their attitudes, venireperson No. 9 raised her hand to indicate she could not consider probation in an aggravated sexual assault case. Under questioning by the court later, however, venireperson No. 9 stated she could in the proper case consider the full range of punishment, from probation to life. Appellant complains, however, the trial court prevented defense counsel from questioning the venire member directly.

The trial court had covered the substance of the defense's proposed question. Although the court must allow the defense some latitude in covering the same topics previously covered by the State or by the court, *see McCarter*, 837 S.W.2d at 837, here appellant has failed to demonstrate that the court abused that discretion. The juror in question stated that she could consider the full range of punishment, including probation. The trial court's actions fell within the range of its discretion. We overrule appellant's first point of error.

B. Closing Argument

In his second and third points of error, appellant complains the State used improper jury argument during the guilt-innocence phase of trial and that such argument denied appellant due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and due course of law guaranteed by article I, sections 13 and 19 of the state Constitution.

Appellant complains about the following remarks by the State:

> [STATE:] And [complainant] has been absolutely on the nail consistent ever since he finally was able to tell. You didn't see the video, and you know why.
>
> [DEFENSE]: Objection, Your Honor, it's outside the record. We haven't seen the video. They have the video. It's not even in evidence.
>
> THE COURT: That's sustained.

The court properly sustained the objection after the State referred to matters outside

the record. Nevertheless, to preserve an error for appellate review in connection with improper jury argument, appellant must pursue his requested relief until his request is denied. Appellant first must object. If the trial court sustains the objection, appellant must ask for a curative instruction. If the trial court grants the instruction, appellant must move for a mistrial. *See Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993). Here, after appellant objected, the trial court sustained the objection. Appellant received all the relief he sought. He has failed to preserve his complain for appellate review. We overrule appellant's second and third points of error.

C. Ineffective Assistance

In his fourth and fifth points of error, appellant complains that trial counsel provided constitutionally ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and in violation of article I, section 10, of the state Constitution.

When appellant complains of ineffective assistance of counsel under the federal constitution, appellant must show that counsel's performance fell outside the range of reasonably effective assistance and that but for such failure the trial result would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Texas courts apply the *Strickland* standard when reviewing ineffective-assistance claims under the state Constitution. *See Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). Isolated failures to object to certain procedural mistakes or improper evidence or argument do not constitute ineffective assistance of counsel. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App.1984). The reviewing court must examine the totality of counsel's representation. *Ex parte Carillo*, 687 S.W.2d 320, 324 (Tex. Crim. App. 1985). Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be grounded in the record, and the record must affirmatively demonstrate the alleged

ineffectiveness. *Id*. Appellant must overcome the strong presumption that the counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

Appellant argues that trial counsel (1) failed to conduct voir dire properly on the subject of whether jurors could consider probation; (2) failed to develop an alternative possible suspect, a friend of the complainant's grandmother; (3) failed to put on evidence regarding appellant's deficient mental condition; (4) called no witnesses to testify; and (5) failed to discuss with appellant the risk being tried as a habitual offender after not agreeing to the State's offer of six years. Appellant failed to file a motion for a new trial. The only record before us is the trial record, which contains no direct evidence of trial counsel's reasoning regarding representation decisions.

The record does, however, show that during voir dire counsel examined panel members in connection with probation. Although appellant argues that one juror stated that she could not consider probation, the record, discussed above, shows the juror told the court she could consider the full range of punishment. In reference to a possible alternative suspect, counsel presented evidence that complainant's grandmother, with whom complainant occasionally vacationed, had a male visitor who was HIV positive. In connection with evidence of appellant's mental condition, although counsel did not introduce evidence of appellant's mental state, nothing in the record shows that this failure was due to counsel error rather than counsel strategy. As for the purported failure to call witnesses, the record shows, to the contrary, that counsel called several witnesses. In connection with counsel's purported failure to consult with appellant regarding any plea offer, the record shows the state offered appellant twenty-five years. Appellant sought probation. The record is silent as to any advice counsel may have given appellant regarding the plea offer. We cannot second-guess counsel in the face of a silent record. Finally, as to appellant's "habitual offender" argument, nothing in the record suggests that appellant was tried as a habitual offender. In fact, in moving for probation, appellant attested that he had never before been convicted of a felony. Nor is there any suggestion in the trial record that appellant had previously been convicted of either a felony

or misdemeanor. Appellant has failed to carry his burden of demonstrating that trial counsel was constitutionally ineffective. We overrule appellant's fourth and fifth points of error.

III. Conclusion

Having overruled all of appellant's points of error, we affirm the judgment of the court below.

PER CURIAM

Judgment rendered and Opinion filed April 26, 2001.
Panel consists of Justices Yates, Fowler, and Wittig.
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