Affirmed and Opinion filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00404-CR

ISAAC ZUNIGA GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 1514075

MAJORITY OPINION

Appellant Isaac Zuniga Gutierrez challenges his conviction for aggravated sexual assault of a child under six years of age. *See* Tex. Penal Code Ann. § 22.021. Appellant raises a single issue on appeal asserting that the trial court abused its discretion when it denied his motion for new trial without first conducting a hearing. We overrule appellant's issue because, even if his motion for new trial raised matters not determinable from the record, we conclude that he did not establish reasonable grounds that he could be entitled to relief. We

therefore affirm the trial court's judgment.

BACKGROUND

The complainant was five years old at the time of the events at issue in this appeal. She and her family lived across the street from appellant's family. The two families were close, appellant was even the complainant's godfather. The complainant, her father, and two of her siblings were visiting appellant's house one evening. The children were playing while the complainant's father and appellant were drinking beer in the garage.

The complainant was using the bathroom next to appellant's garage when the rest of the children ran over to the complainant's house. Complainant's father also departed appellant's garage. The complainant was still in the bathroom when appellant entered. According to the complainant, appellant pulled down his pants, used the bathroom, and then put his penis in the complainant's mouth. The complainant eventually left the bathroom and returned to her house where she told appellant's daughter and her sister about the incident. According to the complainant, her mother was the first adult that she told about the incident. The complainant told her mother the next morning. Complainant's mother described the complainant as really scared and panicking that morning. After attempting to confront appellant, the complainant's mother called the police.

Appellant gave a voluntary statement to the police. The interview was done in Spanish and the officer conducting the interview testified about the translation of the interview during appellant's trial. Appellant provided a different version of the incident during his interview. Appellant admitted that he was drinking beer with the complainant's father that evening in the garage. According to appellant, he eventually needed to use the bathroom. Appellant explained that as a result of having diabetes, the urge to urinate frequently comes on very fast, and he is

worried that he might have leaks. So, appellant hurried into the bathroom next to the garage, but he forgot to lock the door. Appellant then began urinating in the bathroom sink. According to appellant, he regularly urinated in the sink because his wife, who was meticulous about cleaning, became angry if he made a mess on the toilet. While he was urinating, he suddenly heard the complainant say "Daddy, wee-wee or weenie, or something like that."[1] Startled, appellant turned and told the complainant to get out. Appellant admitted during his interview that his penis may have touched the complainant's face when he turned, but if it did, it was not intentional.

At the conclusion of the State's case, appellant did not present any witnesses. The jury subsequently found appellant guilty as charged. The punishment phase of appellant's trial was to the trial judge. The State did not present additional evidence during the punishment phase of appellant's trial.

Appellant presented three witnesses. The first was Maria Gutierrez, appellant's wife. She testified appellant was a good father and grandfather. She also testified that she had never known appellant to be "overly familiar with a child." During cross-examination, she denied seeing appellant previously strike one of his daughters. She also denied telling the police that appellant had struck one of his daughters.

Appellant next called Leo Reynaga, his son-in-law. Reynaga had been married to Ester Gutierrez for sixteen years at the time of appellant's trial and they had five children. Reynaga testified that he and his family had lived with appellant many times over the years and he had even left his family in appellant's care for six months while Reynaga completed the immigration process. According to

[1] According to appellant, the complainant and her siblings called him "daddy" and his wife "mommy" because his wife "practically raised those kids."

Reynaga, he never had any concerns about leaving his family with appellant. Finally, Reynaga testified that appellant had helped many children over the years.

Appellant's final witness was his oldest daughter, Daisy Iglesias. Iglesias testified that she did not "have any problems of this sort" while living with appellant. She also testified that they were asking the trial court to assess the minimum 25-year sentence as appellant's punishment. On cross-examination, Iglesias admitted she had previously called the police on her father because her daughter, appellant's granddaughter, had told her appellant had "put his hand down her pants."

At the conclusion of the punishment phase evidence, the trial court assessed appellant's punishment at forty years in prison. Appellant filed a motion for new trial, which was denied by operation of law. This appeal followed.

ANALYSIS

In a single issue on appeal, appellant argues that the trial court abused its discretion when it did not conduct a hearing on his motion for new trial.

I. Standard of review and applicable law

The purpose of a hearing on a motion for new trial is to decide whether the cause shall be re-tried and to prepare a record for presenting issues on appeal in the event the motion is denied. *Smith v. State*, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009). Although the hearing is often critical to the development of the record for appeal, the defendant does not have an absolute right to a hearing. *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). To be entitled to a hearing on a motion for new trial, the movant must (1) raise one or more matters not determinable from the record and (2) establish the existence of reasonable grounds showing that he could be entitled to relief. *Smith*, 286 S.W.3d at 339; *Reyes*, 849

S.W.2d at 816 (explaining that to obtain hearing, motion for new trial must be supported by evidence "specifically showing the truth of the grounds of attack," and must also "reflect that reasonable grounds exist for holding that such relief could be granted").

We review a trial court's denial of a hearing on a motion for new trial for an abuse of discretion. *Smith*, 286 S.W.3d at 339. The denial will be reversed only when the trial judge's decision was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *State v. Gonzalez*, 855 S.W.2d 692, 695 n. 4 (Tex. Crim. App. 1993). Abuse of discretion exists when the movant meets the criteria but the trial court fails to hold a hearing. *Smith*, 286 S.W.3d at 340.

II. The trial court did not abuse its discretion when it did not hold a hearing on appellant's motion for new trial.

Appellant argues on appeal that the trial court abused its discretion when it failed to hold a hearing on his motion for new trial. In that motion, appellant raised two grounds for relief. In his first ground, appellant asserted that the affidavits attached to his motion were from witnesses "who would have testified at the defendant's trial and would have offered both exculpatory and mitigating information." Appellant continued that the affidavits demonstrated "that material defense witnesses were kept from the defendant's trial by force, threats and fraud and that evidence, tending to establish the defendant's innocence has been intentionally withheld, thus preventing its production at trial." Appellant's second ground conclusorily asserted that he "did not receive effective assistance of counsel and therefore that [he] did not receive his right to due process and a fair trial as guaranteed by the United States Constitution and the Texas Constitution." On appeal, appellant combines the two grounds. Appellant argues that his motion

for new trial and attached affidavits "raised matters not determinable from the record and contain reasonable grounds that support [his] claims that he received ineffective assistance of counsel and that material defense witnesses were kept from trial." While we agree appellant's motion raised matters not determinable from the record, we disagree that his motion and attached affidavits contained reasonable grounds showing that he could be entitled to relief.

A. Newly discovered evidence

Appellant attached eighteen documents to his motion purporting to be affidavits. Assuming for purposes of this appeal that each of the documents qualifies as an affidavit, we conclude they do not establish the trial court abused its discretion when it did not conduct a hearing on appellant's motion because none establish a reasonable basis that appellant could be entitled to relief.

Under article 40.001, a trial court must grant a defendant's motion for new trial if material evidence favorable to the accused has been discovered since trial. Tex. Code Crim. Proc. art. 40.001. A new trial is never allowed to obtain evidence that was known or accessible to the defendant at the time of trial, even if the defendant had knowledge of the evidence but failed to communicate that knowledge to his attorney. *Drew v. State*, 743 S.W.2d 207, 227, n. 14 (Tex. Crim. App. 1987); *Marines v. State*, 292 S.W.3d 103, 110 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). This showing requires proof that (1) the defendant did not know about the newly discovered evidence until after trial; (2) the defendant's failure to discover the new evidence before then did not result from a lack of due diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and probably will bring about a different result in a new trial. *Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003). If a defendant knew of and had

access to the allegedly new evidence at the time of trial, then he could not have been entitled to a new trial and the trial court could have reasonably denied him a hearing on his motion. *Id.*

The eighteen affidavits are all from family and friends of appellant. One of the eighteen is from his wife, who did testify during the punishment phase of his trial. Having reviewed the remaining affidavits, we conclude that none show how or why the affiants, who all knew appellant, and the information they purported to possess, were unknown or unavailable to appellant at the time of trial. *See Wallace*, 106 S.W.3d at 108 (stating that a defendant must show that the newly discovered evidence was unknown to the defendant and also that the failure to discover the evidence was not the result of a lack of due diligence). This fact alone supports the trial court's decision to not conduct a hearing on appellant's motion for new trial based on newly discovered evidence. *See Hamilton v. State*, 563 S.W.3d 442, 448–49 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) (holding trial court did not abuse discretion when it did not conduct hearing on motion for new trial because the motion did "not suggest that the evidence provided in its support was unknown or unavailable to Hamilton at the time of trial."); *Jones v. State*, 234 S.W.3d 151, 157 (Tex. App.—San Antonio 2007, no pet.) ("If the appellant fails to establish any one of these elements, the trial court does not abuse its discretion by denying the motion for new trial.").

B. Ineffective assistance of counsel

A complaint of ineffective assistance of counsel may be raised in a motion for new trial. *Reyes*, 849 S.W.2d at 815. Under the two-pronged standard of *Strickland v. Washington*, appellant must first establish that counsel's performance was deficient. 466 U.S. 668, 687 (1984). This prong requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel"

the Sixth Amendment guarantees. *Id*. Second, appellant must show that the deficient performance prejudiced the defense. *Id*. To meet this prong, there must be a reasonable probability that, but for counsel's errors, the result would have been different. *Id*. at 694. For a defendant to be entitled to a hearing on his motion for new trial alleging ineffective assistance of counsel, he must allege sufficient facts from which a trial court could reasonably conclude that both *Strickland* prongs have been met. *See Buerger v. State*, 60 S.W.3d 358, 363 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (holding trial court did not abuse discretion when it did not hold a hearing on appellant's motion for new trial because appellant failed to explain or demonstrate how [his attorney's] actions, if true, were deficient or how they harmed him").

In both his motion for new trial and in his appellate brief appellant has not made a specific allegation of why his trial attorney's performance was ineffective. Based on the content of some of the affidavits attached to his motion, we conclude appellant's contention is that his trial counsel's performance was deficient due to a failure to investigate appellant's case. *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990) (stating that a criminal defense lawyer has a duty to investigate the facts of a case, including seeking out and interviewing potential witnesses). While there are numerous affidavits from persons known or related to appellant who stated that they were not contacted by appellant's trial counsel and they would have testified if asked, there is no affidavit from appellant or any other witness, such as appellant's wife, stating that they notified appellant's trial counsel of these potential witnesses. *See Mallet v. State*, 9 S.W.3d 856, 866 (Tex. App.—Fort Worth 2000, no pet.) (stating that "the record is devoid of any evidence, that we may consider, that appellant supplied the names of any potential witnesses to counsel prior to trial"). Further, even if appellant's trial counsel did not seek out

all of the witnesses who provided affidavits, he would only be found to have rendered ineffective assistance if that failure precluded him from advancing a viable defense. *Id.* As set out above, that is not what happened here because appellant, as he admits in his appellate brief, was able to present his version of the facts to the jury through the State's own witnesses. This includes his contention that any contact between his penis and the complainant's face was inadvertent and unintentional. As a result, we conclude appellant did not demonstrate a reasonable basis that he was entitled to relief based on his ineffective assistance of counsel allegation and the trial court did not abuse its discretion when it did not conduct a hearing on his motion for new trial.

Having rejected both arguments raised in his single issue on appeal, we overrule that issue.

CONCLUSION

Having overruled appellant's single issue on appeal, we affirm the trial court's judgment.

/s/ Jerry Zimmerer
Jerry Zimmerer
Justice

Panel consists of Justices Christopher, Bourliot, and Zimmerer (Bourliot, J., dissenting opinion to follow).

Publish — TEX. R. APP. P. 47.2(b).