Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-17-00254-CR

JOSE CESAR SANCHEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 358th District Court
Ector County, Texas
Trial Court Cause No. D-16-1836-CR

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

The trial court convicted Jose Cesar Sanchez of the offense of continuous sexual abuse of a child and assessed his punishment at confinement for life and a fine of $5,000. Appellant raises four issues on appeal. First, Appellant asserts that his jury waiver was invalid. Second, Appellant argues that the trial court erred when it denied his request to withdraw his jury waiver. Third, Appellant contends that the trial court erred when it denied his motion for new trial. Fourth, Appellant claims that he received ineffective assistance of counsel. We affirm.

During the time over which this offense occurred, Appellant was in a romantic relationship with A.R., who was the mother of A.S., the child victim in this case. The relationship had been ongoing for nine years. During that time, Appellant lived with A.R. and three of her children, one of whom was A.S. A.S. was eleven years old when she initially reported that Appellant had sexually assaulted her. Because Appellant has not challenged the sufficiency of the evidence, we will limit any further presentation of the facts to the relevant procedural issues involved in this appeal.

Appellant was originally indicted for the offense on November 22, 2016. The record shows that Appellant's initial pretrial hearings had been continued from the original March settings until April 2017. Before his April 13, 2017 pretrial hearing, Appellant's counsel had filed a motion to withdraw. At that pretrial hearing, counsel informed the trial court that Appellant "feels more comfortable in Spanish if he has an interpreter" and requested that one be present at trial. After communicating with Appellant, the trial court concluded that, "if we are going to address anything of significance, [we] need to have an interpreter present."

On June 29, 2017, approximately two months after the trial court had granted original counsel's motion to withdraw and had appointed new counsel, Appellant was scheduled for a guilty plea hearing. During the morning of June 29, Appellant met with his attorney to review a plea offer that the State had made. Apparently while in a holding cell, and with only his attorney present, Appellant signed a jury waiver in connection with the plea agreement.

At the plea hearing scheduled for that afternoon, Appellant informed the trial court that he had signed the waiver. However, Appellant also told the trial court that he did not understand that he was giving up his right to a jury trial. Because Appellant could neither read nor write English, he spoke through an interpreter.

The trial court questioned Appellant's counsel at length about whether and to what extent he had explained the jury waiver to Appellant. Also, again in great detail, counsel told the trial court about the extensive explanation that he had given to Appellant. Although an interpreter was not present when counsel advised Appellant as to the jury waiver, counsel was fluent in Spanish and explained the waiver in Spanish. Counsel told the trial court: "But I am bilingual and I speak English and Spanish adequately -- I mean, both as well." In response to questioning by the trial court, Appellant's counsel told the trial court that he was "[o]ne hundred percent" certain that Appellant understood and that there was "no question that [Appellant] understood."

The trial court told Appellant that, if he rejected the State's plea offer, his case would proceed to a bench trial because he had signed a jury waiver. The trial court announced that the trial would take place on July 11.

The day after the failed plea hearing, the State filed a motion to amend the indictment. On July 10, the State filed its second motion to amend the indictment, and the trial court granted that motion on July 12. On July 19, the trial court set Appellant's case for a bench trial on August 7. On August 2, Appellant filed a motion to place his case back on the jury docket. In his motion, Appellant asserted that he had not understood the jury waiver. On August 7, the day set for the bench trial, the trial court overruled the motion and proceeded to trial.

In his first issue, Appellant argues that his jury waiver was not executed in accordance with Article 1.13 of the Texas Code of Criminal Procedure because it was not executed in open court. That point is not disputed by the State. And, as in *Johnson*, the parties have assumed error, and we will proceed to examine harm. *See Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002).

Failure to observe the requirements of Article 1.13 results in statutory, nonconstitutional error and must be disregarded unless the error affected

Appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b); *Johnson*, 72 S.W.3d at 348. Appellant claims that, as a result of the error, his substantial rights were affected because he did not knowingly, expressly, and intelligently waive his right to a jury trial.

Unlike *Johnson*, there is no question here as to whether Appellant executed a written jury waiver. It is also readily apparent that Appellant was aware of his right to a jury trial because he sought to withdraw his waiver of that right. *See Hutchinson v. State*, No. 11-12-00124-CR, 2014 WL 2957398, at *9 (Tex. App.—Eastland June 26, 2014, pet. ref'd) (mem. op., not designated for publication).

Because he could contest neither whether a written waiver existed nor whether he signed it, Appellant maintains that, when he signed the plea documents, he did not understand that he was waiving his right to trial by jury. Therefore, Appellant contends that he did not knowingly and intelligently waive that right. The information available to the trial court suggests otherwise.

The trial court asked Appellant's trial counsel to comment on counsel's discussions about the waiver. As an officer of the court, Appellant's counsel explained the circumstances surrounding his discussions with Appellant about his right, among other things, to a jury trial. We have read the record of those representations, and it is difficult to imagine how the explanation given to Appellant could have been any more thorough. Perhaps most telling is counsel's representation to the trial court that, in the afternoon just before the time set for the plea hearing—after Appellant had signed the jury waiver that morning—Appellant apologized to counsel and told him that he had changed his mind. Against those representations, Appellant simply told the trial court that he did not understand that he was waiving his right to a jury trial.

Both the United States Constitution and the Texas Constitution guarantee the right to a trial by jury. U.S. CONST. amend. VI; TEX. CONST. art. I, § 15; *see also*

TEX. CODE CRIM. PROC. ANN. art. 1.12 (West 2005). "As a matter of federal constitutional law, the State must establish, on the record, a defendant's express, knowing, and intelligent waiver of jury trial." *Hobbs v. State*, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009). Upon the record before us, we hold that the State established that Appellant expressly, knowingly, and intelligently waived his right to a trial by jury. We overrule Appellant's first issue on appeal.

In Appellant's second issue on appeal, he argues that the trial court should have permitted him to withdraw his jury waiver. Appellant effectively asked to withdraw his waiver on the day of the plea hearing. Later, five days before his bench trial started, Appellant filed a written motion to withdraw his jury waiver.

A defendant who has validly waived his right to a jury trial does not have an unfettered right to withdraw that waiver. *Id.* at 197. Rather, the decision as to whether to permit a defendant to withdraw a jury waiver is within the discretion of the trial court. *Id.* at 198.

When a defendant seeks to withdraw his jury waiver, he bears the burden to show "an 'absence of adverse consequences'" if the withdrawal were granted. *Id.* at 197 (quoting *Marquez v. State*, 921 S.W.2d 217, 223 (Tex. Crim. App. 1996)). To meet this burden to show the absence of adverse consequences, a defendant must establish, on the record, that his request to withdraw the waiver has been made sufficiently in advance of trial such that granting his request will not (1) interfere with the orderly administration of the business of the court, (2) result in unnecessary delay or inconvenience to witnesses, or (3) prejudice the State. *Id.* at 197–98. If the State, the trial court, or the record rebuts the defendant's claims, the trial court's refusal to permit the withdrawal does not constitute an abuse of discretion. *Id.* at 198.

On the day of the bench trial, Appellant re-urged his request to withdraw his jury waiver. The trial court initially stated that Appellant would have the right to

withdraw the waiver with the consent of the State. The prosecutor responded that the State would not consent to a withdrawal of the jury waiver. Appellant maintained that no adverse consequences would result if the trial court were to grant the withdrawal. The trial court announced that it was going to enforce the jury waiver based on its view that Appellant had understood the waiver when he signed it.

After both sides rested and closed, but before closing arguments, the trial court announced that it wanted to "revisit briefly the request that was submitted earlier today by the defendant to allow the defendant to withdraw his jury waiver." The trial court then found that the request was "submitted sufficiently in advance of trial." The trial court followed that statement with the proviso that there were three other elements to be considered.

Although the trial court found that the request to withdraw was made "sufficiently in advance of trial," it also found that Appellant had failed to meet his burden to show that the withdrawal would not interfere with the orderly administration of the business of the court. The trial court referred to the number of times that the case had been set previously. The case had been set for trial on four separate occasions prior to the time that Appellant executed the jury waiver.

A week before the second trial setting, April 26, 2017, Appellant had filed a motion to replace his appointed attorney because she did not speak Spanish. Appellant filed the request in April 2017 even though counsel had been appointed since December 2016. The trial court granted that motion, appointed new counsel, and delayed the setting.

Appellant argues that at least a part of the delay was due to the State's filing of two amended indictments. The State counters that the amendments did nothing more than eliminate some of the dates that had been alleged as the beginning dates of the continuous sexual assaults. Nevertheless, Appellant objected to proceeding because he had not had proper notice. Under the circumstances of this case, we

cannot say that the trial court abused its discretion when it denied Appellant's request to withdraw his jury waiver for the reason that it interfered with the orderly administration of the business of the court.

Although that ground alone would be sufficient to affirm the trial court's action, the trial court asked the State to comment as to "whether or not the granting of the request would result in unnecessary delay or inconvenience to witnesses." The State responded by referring to the fact that it had had to meet with A.S. at least six times and had had to meet with the other witnesses many times as a result of the delays. The State explained that A.S. "[is] very nervous, she is very skittish. She is scared. She is scared of the process. She is scared of the defendant." The State also referred to the potential that people might get to the point that they "just don't care anymore." The State argued that the danger is even more difficult in cases involving young sexual assault victims.

After the State had concluded its response to the trial court, the trial court stated: "I think that would -- what you have just presented to the Court would address the element which is prejudice to the State or potential prejudice to the State. When I consider everything that has been presented by counsel, I cannot find that the defendant has met the burden that would justify the granting of a request to withdraw the jury waiver."

Although the trial court apparently viewed "submitted sufficiently in advance of trial" as a separate element to be considered, it went on to address the appropriate elements as to whether Appellant had met his burden to show the absence of adverse consequences. Even though the trial court's reconsideration of the waiver came after the close of the evidence in the bench trial, it stated that it had considered "everything" that had been offered by counsel. We believe that the record supports the trial court's findings and its ruling. We overrule Appellant's second issue on appeal.

In Appellant's third issue on appeal, Appellant maintains that the trial court abused its discretion when it denied Appellant's motion for new trial. We review a denial of a motion for new trial for an abuse of discretion. We will reverse a trial court's ruling only if the ruling was clearly erroneous and arbitrary. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013). A trial court abuses its discretion in this regard only when no reasonable view of the record could support the trial court's ruling. *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012).

Appellant argues that the trial court should have granted his motion because Appellant had newly discovered that A.S. had viewed "sexually explicit tapes/pictures/texts" on her sister's cell phone immediately prior to the time that she made her outcry. Further, Appellant contends that he did not know before trial about body-cam footage of law enforcement's first interviews with A.S. and her sibling when the incidents were first reported. It is Appellant's position that this new evidence would have impacted his defensive theories and the trial court's ultimate rulings.

The State argues that the motion for new trial was not supported by an affidavit and that the trial court should have summarily overruled it. The State also maintains that the evidence was, at best, impeachment evidence. Even if we were to hold that the trial court should have summarily overruled the motion for new trial—which we do not hold—Appellant still could not prevail.

Article 40.001 of the Texas Code of Criminal Procedure provides: "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." CRIM. PROC. art. 40.001 (West 2018). Before a defendant is entitled to relief under Article 40.001, he must satisfy the following four-prong test: (1) the newly discovered evidence was unknown or unavailable to the defendant at the time of trial; (2) the defendant's failure to discover or obtain the

new evidence was not due to the defendant's 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 will probably bring about a different result in a new trial. *State v. Arizmendi*, 519 S.W.3d 143, 148–49 (Tex. Crim. App. 2017).

Appellant has not shown the content of the purported "sexually explicit tapes/pictures/texts." Even if A.S. had watched some sort of "sexually explicit tapes/pictures/texts" before her outcry, that evidence would amount to no more than possible impeachment. Further, the issue of the sexually explicit material first came up in testimony during trial, and Appellant had ample opportunity to explore the subject matter. The evidence was not newly discovered. And even if it were newly discovered, the evidence is no more than possible impeachment evidence. The trial court did not abuse its discretion when it denied the motion for new trial on this ground.

The record of the hearing on the motion for new trial indicates that the complained-of body-cam footage no longer existed. In the trial court, Appellant's counsel took great pains to make it clear that he was not claiming that the State intentionally destroyed the footage nor was he asserting a claim under *Brady*. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The only claim presented to the trial court was the claim based upon newly discovered evidence.

Deputy Matthew McCrury, the first officer to respond to A.R.'s call, testified at the hearing on Appellant's motion for new trial that he turned his body cam on when he arrived at A.S.'s home. He testified that his contact with A.S. lasted "[m]aybe 30 seconds." A.S. was crying, stuttering, and hysterical, and

Deputy McCrury "stopped her to have her interviewed by Harmony Home." He stopped her because he did not want to "re-victimize" or "harm" A.S. Deputy McCrury also testified that the contents of the body cam would be reflected in his written report and that there was nothing material on the body cam that was not reflected in his written report. Appellant has not shown that the body-cam footage contained newly discovered evidence that was anything more than possible impeachment evidence or that such evidence was probably true and would probably bring about a different result in a new trial. The trial court did not abuse its discretion when it overruled the motion for new trial on this ground.

Because Appellant has not shown his entitlement to a new trial, we overrule Appellant's third issue on appeal.

In his fourth issue on appeal, Appellant contends that he "received ineffective assistance of counsel because his defense attorneys failed to assert a timely TEX. R. EVID. Rule 403 objection to evidence proffered under TEX. CODE CRIM. PROC. art. 38.37." Appellant refers to trial testimony from A.S.'s sister that Appellant had also sexually abused her when she was fifteen and sixteen years old. Appellant's trial counsel did not offer a Rule 403 objection to that testimony.

Appellant concedes that the testimony was relevant under Article 38.37. However, he maintains that the evidence was nevertheless subject to the balancing test contained in Rule 403 and that trial counsel was ineffective when he failed to make a Rule 403 objection.

In order to establish that trial counsel rendered ineffective assistance at trial, Appellant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that the result would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005); *Thompson v. State*, 9 S.W.3d 808, 812–13 (Tex. Crim. App. 1999). Courts must

indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

"[A]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 814 (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). Under normal circumstances, the record on direct appeal is generally undeveloped and rarely sufficient to overcome the presumption that trial counsel rendered effective assistance. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). The Court of Criminal Appeals has said that "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). If trial counsel did not have an opportunity to explain his actions, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

Even though the trial court conducted a hearing on Appellant's motion for new trial, Appellant did not allege in his motion for new trial that trial counsel rendered ineffective assistance. Therefore, the appellate record does not contain an explanation from trial counsel concerning his actions at trial or his trial strategy.

Simply because an objection is available does not mean that it ought in every case be made. This was a bench trial. Whether to object to testimony is one of those areas that is inherently a matter of trial strategy. *See Thompson*, 9 S.W.3d at 814

(explaining that, when the record is silent as to why trial counsel failed to make an objection, the presumption that the decision not to object to the admission of evidence was a reasonable one has not been rebutted). Here, the record is silent as to trial counsel's decision not to object, and the reasonableness of that decision has not been rebutted. We overrule Appellant's fourth issue on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

May 29, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.