Opinion filed June 11, 2020

In The

Eleventh Court of Appeals

No. 11-18-00137-CR

OTHA WAYNE THACKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 21037B

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

Appellant, Otha Wayne Thacker, pleaded guilty to aggravated robbery and true to two alleged enhancements without an agreed recommendation as to punishment. After the preparation of a presentence investigation (PSI) report and a punishment hearing, the trial court found Appellant guilty, found that the alleged enhancements were true, and assessed punishment at imprisonment for life. In two issues, Appellant argues that he is entitled to a new punishment hearing because the trial court improperly considered information about extraneous offenses that was

contained in the PSI report and because his trial counsel was ineffective when she failed to object to the trial court's consideration of the extraneous offenses. We affirm the trial court's judgment.

In this case (Cause No. 21037B), Appellant was charged with a first-degree felony, aggravated robbery of an Allsup's convenience store. *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2019). The State sought to enhance the punishment range based on two prior felony convictions. *See id.* § 12.42(d). Appellant also faced charges for the felony offenses of robbery (Cause No. 20570-B), assault family violence (Cause No. 20571-B), theft of property (Cause No. 20666-B), and burglary of a habitation (Cause No. 21038-B).

Appellant entered an open plea to the aggravated robbery charge. At the plea hearing, the State informed the trial court: "[W]hat we're doing here is just having an open plea to [Cause No. 21037B], and then we're going to take into consideration all the other cases, and at the conclusion of the sentences, we'll be dismissing those." Appellant did not object to the State's representation that "all the other cases" would be taken into consideration. Instead, Appellant's counsel indicated that Appellant intended to seek deferred adjudication and requested that the trial court order both the preparation of a PSI report and a psychological assessment of Appellant. The trial court granted both requests.

The PSI report contained information that Appellant had a number of prior convictions and that, in addition to the aggravated robbery, Appellant had robbed a Dollar Tree store and a 7-Eleven store, had threatened an individual with a hammer and stolen her car, and had broken into a house and stolen a cell phone from another individual. The PSI report also contained information about Appellant's family history, education, employment, personal background, physical and mental health, and problems with substance abuse.

At the punishment hearing, Appellant's counsel indicated that she had been provided an opportunity to review the PSI report with Appellant. Appellant's counsel noted that the punishment range stated in the PSI report was incorrect but made no other objections to the report. The State reiterated that, "[a]s part of the charge bargain, . . . once sentence is pronounced today -- we're gonna be dismissing four other cases, which are 20,571-B, 20,666-B, 20,570-B, and 21,038-B."

Detective Jeff Cowan testified about the aggravated robbery of the Allsup's store, and a video of the robbery was admitted into evidence. Dr. Samuel Brinkman testified that Appellant had been diagnosed with schizophrenia and anti-social personality disorder. According to Dr. Brinkman, Appellant needed structure to control the anti-social personality disorder and needed medication for the schizophrenia.

Appellant testified that his use of drugs and alcohol began in early childhood. When he was on parole, he had structure and received assistance for his mental health issues. When he completed parole, Appellant "lost his structure" and committed the aggravated robbery because of his heavy use of crack cocaine. Appellant denied that he had used a gun in any robbery and testified that he did not recall that he had threatened a woman with a hammer.

Appellant requested deferred adjudication and treatment for substance abuse. He indicated that, while he was on community supervision, he would take medication for his mental health issues.

In closing arguments, both the prosecutor and Appellant's counsel relied on portions of the PSI report. After it "carefully consider[ed] the PSI, and the evidence, argument of counsel and the applicable law," the trial court found Appellant guilty of aggravated robbery, found the two alleged enhancements were true, and assessed punishment of life imprisonment.

Appellant was allowed to speak before the trial court pronounced the sentence. Appellant professed remorse for his actions and stated that he never intended to hurt anyone. Appellant believed that he could be successful if he was provided structure and again requested that he be placed on probation and be provided with treatment for substance abuse. The trial court responded that its "decision was based on the - the evidence, and also the PSI"; that Appellant had "committed very, very serious offenses in the State of Texas"; that Appellant needed to be held accountable; and that society needed to be protected from Appellant. The trial court then sentenced Appellant to life in prison.

In his first issue, Appellant argues that the trial court erred when it considered evidence of extraneous offenses listed in the PSI report because those offenses were not proven beyond a reasonable doubt and the record does not reflect that Appellant requested that the trial court consider the offenses pursuant to Section 12.45 of the Penal Code.[1]

Although provided an opportunity to make objections to the PSI report, Appellant did not object to the trial court's consideration of the information about extraneous offenses listed in the PSI report. Generally, to preserve a complaint for appellate review, a party must make a contemporaneous objection in the trial court. *Burg v. State*, 592 S.W.3d 444, 448–49 (Tex. Crim. App. 2020) (citing TEX. R. APP. P. 33.1(a)(1)). A party, however, is not required to preserve a complaint about the violation of "rights which are waivable only" or of "absolute systemic

[1]Section 12.45(a) of the Penal Code provides:

> A person may, with the consent of the attorney for the state, admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account in determining sentence for the offense or offenses for which he stands adjudged guilty.

PENAL § 12.45(a). "If a court lawfully takes into account an admitted offense, prosecution is barred for that offense." *Id.* § 12.45(c).

requirements and prohibitions." *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993); *see also Burg*, 592 S.W.3d at 449.

A waivable-only right is one that the trial court has an independent duty to implement unless the record reflects that it has been "'plainly, freely, and intelligently' waived at trial." *Proenza v. State*, 541 S.W.3d 786, 792 (Tex. Crim. App. 2017) (quoting *Marin*, 851 S.W.2d at 280). Examples of waivable-only rights are the right to the assistance of counsel and the right to trial by jury. *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002). "Absolute requirements and prohibitions," such as personal jurisdiction, subject-matter jurisdiction, and a penal statute's compliance with the Texas Constitution's Separation of Powers provision, are "systemic" and "essentially independent of the litigants' wishes." *Proenza*, 541 S.W.2d at 792 (quoting *Marin*, 851 S.W.2d at 279); *Saldano*, 70 S.W.3d at 888. Absolute requirements and prohibitions cannot be forfeited or validly waived. *Proenza*, 541 S.W.3d at 792; *Marin*, 851 S.W.2d at 279.

A complaint that the trial court relied on a PSI report "that contained references and facts about an extraneous offense for which no evidence was received by the trial court during the guilty plea or sentencing hearing" involves neither an absolute requirement or prohibition nor a waivable-only right. *Herrera v. State*, No. 05-18-01149-CR, 2020 WL 1181486, at *2–3 (Tex. App.—Dallas Mar. 12, 2020, no pet.); *see also Reyes v. State*, 361 S.W.3d 222, 229–30 (Tex. App.—Fort Worth 2012, pet. ref'd). Therefore, Appellant was required to make a timely objection to the trial court's consideration of the information about extraneous offenses that was contained in the PSI report. *See Herrera*, 2020 WL 1181486, at *3. Because Appellant did not object in the trial court, he failed to preserve this complaint for our review. *See* TEX. R. APP. P. 33.1(a); *Herrera*, 2020 WL 1181486, at *3.

Further, even if Appellant had preserved this issue for appellate review, we would not hold that the trial court's consideration of the information about extraneous offenses listed in the PSI report was error.

Appellant contends that the trial court could not consider the information about extraneous offenses listed in the PSI report because the State failed to prove beyond a reasonable doubt that Appellant committed any of those extraneous offenses. Article 37.07 of the Code of Criminal Procedure provides that evidence of extraneous crimes or bad acts is admissible in the punishment phase of the trial to the extent that the trial court determines that the evidence is relevant to sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2019). The State is permitted to introduce evidence of an extraneous offense if it proves beyond a reasonable doubt that the defendant committed, or could be held criminally responsible for, the offense. *Id.*

However, the complained-of information about extraneous offenses in this case was not offered into evidence at the punishment hearing. Instead, it was contained in the PSI report. Unless certain exceptions not appliable in this case are present, or the requirement is waived by the defendant, the trial court is required to direct a supervision officer to prepare a PSI report in a felony case if the sentence is to be determined by the trial court. CRIM. PROC. art. 42A.252(a), (c) (West 2018); *Stringer v. State*, 309 S.W.3d 42, 45 (Tex. Crim. App. 2010). The PSI report contains "general punishment-phase evidence" and assists the trial court in its determination of the sentence to assess. *Stringer*, 309 S.W.3d at 45.

When it assesses punishment, the trial court may consider extraneous offense evidence in a PSI report even if it has not been shown beyond a reasonable doubt that the defendant committed the extraneous offense. *Smith v. State*, 227 S.W.3d 753, 763 (Tex. Crim. App. 2007); *see also* CRIM. PROC. art. 37.07, § 3(d); *Stringer*, 309 S.W.3d at 48 ("By statute, the Legislature has directed what is to be included in

a PSI, and the statute does not limit the criminal history to final convictions."). Rather, the trial court may consider extraneous offense evidence contained in a PSI report if there is some evidence from any source from which the trial court could rationally infer that the defendant had any criminal responsibility for the extraneous offense. *Smith*, 227 S.W.3d at 764.

The PSI report contained information provided by Detective Cowan that Appellant wore the same clothes when he robbed "several convenien[ce] stores"; that Appellant mentioned his name in one of the stores that he robbed; and that, in one store, Appellant "looked right at the camera as if he did not even care." Detective Cowan also stated that Appellant "walked to a lady's house, walked in uninvited[,] and threatened her with a hammer until she gave him the keys to the car outside." According to Detective Cowan, Appellant drove the car to Hawley, Texas; went into another house; threatened a woman in the house; and stole the woman's cell phone.

The PSI report also contained information provided by Sylvia Tamaz, an employee at a Dollar Tree store, and by Adam Leishman, an employee at a 7-Eleven store, about Appellant's conduct when he robbed those stores. The PSI report set out Sara Guerrero's recollection that Appellant hit her, threatened her with a hammer, and stole her car. Finally, the PSI report contained Wilma Dill's description of how Appellant broke into her house and stole her cell phone.

Although provided an opportunity to do so, Appellant did not object that any of the conduct ascribed to him in the PSI report was factually inaccurate and does not contend on appeal that any of the information in the report is factually inaccurate. *See* CRIM. PROC. art. 42A.255(b). Therefore, there was sufficient information contained in the PSI report to allow the trial court to rationally infer that Appellant had criminal responsibility for the described extraneous offenses. *See Smith*, 227 S.W.3d at 764 (noting that trial court could "consider any reasonably available

inference deriving from the PSI" report that the defendant was responsible for the extraneous offense set out in the report). Accordingly, the trial court did not err when it considered those extraneous offenses in its assessment of punishment.[2] We overrule Appellant's first issue.

In his second issue, Appellant contends that trial counsel was ineffective because she failed to object (1) to the State's request that the trial court consider the extraneous offenses, (2) to the information in the PSI report related to the extraneous offenses, and (3) to the trial court's statement that it had considered all of the cases together.

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, an appellant must establish (1) that his counsel's representation fell below an objective standard of reasonableness under the prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 689–90, 693–94.

When we evaluate a claim of ineffective assistance, we consider the totality of the representation and the circumstances of each case without the benefit of hindsight. *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). We indulge a strong presumption that counsel's actions fell within the wide range of reasonable professional behavior and were motivated by sound trial strategy. *Strickland*, 466 U.S. at 689; *Lopez*, 343 S.W.3d at 142. To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Lopez*, 343 S.W.3d

[2]Because the trial court properly considered the extraneous offenses set out in the PSI report when it assessed Appellant's punishment, we need not address Appellant's second argument that he did not agree pursuant to Section 12.45 of the Penal Code for the trial court to consider the extraneous offenses. *See* TEX. R. APP. P. 47.1.

at 142. In most cases, direct appeal is an inadequate vehicle for raising such a claim because the record is generally undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). When the record is silent about trial counsel's strategy, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

To establish deficient performance based on trial counsel's failure to object, Appellant must demonstrate that the trial court would have committed error if it overruled the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002). However, as discussed above, the trial court would have properly overruled any objection to its consideration of the information about extraneous offenses in the PSI report. *See Thompson*, 9 S.W.3d at 814 (noting that trial counsel did not provide ineffective assistance when counsel could have made a reasonable decision that testimony was not inadmissible and that an objection was not appropriate). Appellant, therefore, has failed to demonstrate that trial counsel's failure to object fell below an objective standard of reasonableness and constituted deficient performance. Because Appellant has not satisfied the first prong of *Strickland*, we need not consider whether he has satisfied the requirements of the second prong. *See Strickland*, 466 U.S. at 687; *Lopez*, 343 S.W.3d at 144. We overrule Appellant's second issue.

We affirm the trial court's judgment.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

June 11, 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.[3]

Willson, J., not participating.

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