Opinion filed July 9, 2020

In The

Eleventh Court of Appeals

No. 11-18-00183-CR

LOGAN DOUGLAS SCREWS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 441st District Court
Midland County, Texas
Trial Court Cause No. CR49920

O P I N I O N

On the third day of his trial, Appellant, Logan Douglas Screws, pleaded guilty to one count of intoxication manslaughter with a deadly weapon. *See* TEX. PENAL CODE ANN. § 49.08(b) (West 2011). The jury later assessed Appellant's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of fifteen years. The trial court sentenced Appellant accordingly.

In four issues, Appellant requests that we reverse the punishment judgment in his case and order a new trial as to punishment. We affirm.

Background Facts

On May 5, 2017, after consuming numerous alcoholic beverages, Appellant drove his vehicle and collided with a vehicle occupied by Dallas Keel. Keel died as a result of the collision. In a two-count indictment, Appellant was indicted for the offenses of intoxication manslaughter and manslaughter.

During voir dire, the State asked the venire panel whether they could consider the full punishment range in an intoxication manslaughter case. Twenty-one venirepersons answered that they could not consider the minimum punishment range in such a case. The State then proceeded to ask several scaled questions. During voir dire, Appellant's counsel asked questions concerning scientific evidence and how human error can corrupt the scientific process. The parties then proceeded to strike venirepersons from the panel. The parties agreed to strike several venirepersons for cause, and Appellant's counsel used six of his ten peremptory challenges on venirepersons who had answered that they could not consider the full range of punishment. Two of the venirepersons that answered they could not consider the full range of punishment—Victoria Gonzalez and Sergio Gonzales—were eventually seated on Appellant's jury. Absent Victoria Gonzalez and Sergio Gonzales, all venirepersons who answered that they could not consider the full range of punishment were challenged for cause, struck by the parties, or mathematically excluded.

After the jury was seated, Appellant pleaded not guilty. The guilt/innocence phase of the trial lasted two days. At the beginning of the third day, after the State had presented its case-in-chief for two days, Appellant changed his plea regarding the intoxication manslaughter offense to guilty.

The trial then proceeded to the punishment phase. Afterwards, the jury assessed Appellant's punishment at fifteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice, and the trial court sentenced Appellant accordingly.

Analysis

In his first issue, Appellant argues that Appellant's counsel was ineffective for failing to use challenges for cause to remove jurors that Appellant urges were biased against him.

In order to establish that trial counsel rendered ineffective assistance at trial, Appellant must first show that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Specifically, appellant must prove, by a preponderance of the evidence, that his counsel's representation fell below the objective standard of professional norms." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Second, Appellant must show that his defense was prejudiced, meaning that there is a reasonable probability that the result would have been different but for counsel's errors. *Strickland*, 466 U.S. at 687–88; *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). "A 'reasonable probability' is one sufficient to undermine confidence in the outcome." *Bone*, 77 S.W.3d at 833.

"Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Id.* 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). Under *Strickland*, a criminal defendant must prove that there is, in fact, no plausible professional reason for a specific act or omission. *Bone*, 77 S.W.3d at 836.

"A vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent." *Id.*

Generally, the record on direct appeal will not be sufficient to show that trial counsel's representation was so lacking as to overcome the presumption of reasonable conduct. *Id.* at 833. We ordinarily need to hear from counsel as to whether there was a legitimate trial strategy for a certain act or omission. *Id.* This is because, "[u]nder our system of justice, [a] criminal defendant is entitled to an opportunity to explain himself and present evidence on his behalf." *Id.* at 836. Similarly, counsel should typically be given an "opportunity to explain [their] actions before being condemned as unprofessional and incompetent." *Id.* Accordingly, post-conviction writ proceedings are generally a better forum for pursuing relief on a claim of ineffective assistance of counsel. *Andrews*, 159 S.W.3d at 103.

When the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude that counsel's performance was deficient. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). If trial counsel is not given the opportunity to explain the challenged actions, then we will not conclude that those actions constituted deficient performance unless they were so outrageous that no competent attorney would have engaged in them. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). We do not inquire into trial strategy unless no plausible basis exists for trial counsel's actions. *Johnson v. State*, 614 S.W.2d 148, 152 (Tex. Crim. App. [Panel Op.] 1981).

In this case, Appellant argues that his trial counsel was ineffective because trial counsel failed to challenge for cause jurors that Appellant claims were biased against him. Appellant urges that "there can be no strategy in failing to urge a

[challenge] for cause on a juror one intends to strike with a peremptory [strike]." Appellant contends that trial counsel's actions resulted in two biased jurors, Victoria Gonzalez and Sergio Gonzales, sitting on the jury.

But Appellant's argument fails to consider the possibility that Appellant's counsel may have wanted Victoria Gonzalez and Sergio Gonzales to sit on the jury, despite their answer to the prosecution's question. In *Delrio v. State*, trial counsel for the defendant did not challenge for cause, or exercise a peremptory strike against, a panel member who had stated during voir dire that he was a former narcotics officer, knew the defendant by way of his employment, and could not be fair and impartial. 840 S.W.2d 443, 443–45 (Tex. Crim. App. 1992). The admittedly biased panel member then served on Delrio's jury. *Id.* at 445. On appeal, Delrio asserted that he had received ineffective assistance of counsel because trial counsel had failed to challenge the panel member for cause. *See id.* at 444. The court recognized that a single partial juror will vitiate a conviction; however, the right to trial by an impartial jury is subject to waiver or forfeiture by the defendant in the interest of overall trial strategy. *Id.* at 445–47; *see also State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008). The *Delrio* court recognized that a "[w]aiver of [a] client's right to insist that every juror in the case be in all things fair and impartial may in counsel's best professional judgment have been an acceptable gamble." *Delrio*, 840 S.W.2d at 447. The court concluded that, on a record that did not reveal counsel's reasoning, it "must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that [counsel] 'made all significant decisions in the exercise of reasonable professional judgment.'" *Id.* (quoting *Strickland*, 466 U.S. at 690).

Here, Appellant's counsel has not been afforded the opportunity to respond to these allegations, and Appellant has not shown that there is, in fact, no plausible

professional reason for a specific act or omission. Accordingly, we will not inquire into counsel's trial strategy, and we cannot conclude that counsel's performance was deficient.

Moreover, even if trial counsel's performance could have been found to be deficient, Appellant must show that he was prejudiced by such deficient performance. *See, e.g.*, *Ladd v. State*, 3 S.W.3d 547, 570 (Tex. Crim. App. 1999) (defendant's failure to make any effort to prove prejudice from defense counsel's allegedly deficient performance during the punishment phase of a capital murder trial precluded relief on a claim of ineffective assistance); *Mitchell v. State*, 989 S.W.2d 747, 748 (Tex. Crim. App. 1999) (a defendant claiming ineffective assistance of counsel must affirmatively prove prejudice from counsel's deficient performance).

Here, Appellant has not done so. Appellant urges that the goal of Appellant's counsel was always to secure probation. Therefore, Appellant was prejudiced by his counsel allowing Victoria Gonzalez and Sergio Gonzales to sit on the jury. Instead, Appellant urges that counsel should have used more challenges for cause to strike these jurors. However, this argument presumes that probation was always counsel's goal. It is possible that Appellant's trial counsel could have believed that not striking Victoria Gonzalez and Sergio Gonzales was Appellant's best chance at securing a verdict of not guilty. "[T]he fact that [appellate counsel] might have pursued a different course of action at trial will not support a finding of ineffectiveness." *Hawkins v. State*, 660 S.W.2d 65, 75 (Tex. Crim. App. 1983). Therefore, we overrule Appellant's first issue.

In his second issue, Appellant argues that he suffered egregious harm from the trial court's failure to include some of the mandatory and discretionary probation conditions in the jury charge. In response, the State argues that Appellant was not

egregiously harmed by the omission from the jury charge of some mandatory requirements of community supervision.

A review of alleged jury-charge error involves a two-step analysis. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994). First, we must determine whether the charge contained any actual error; second, if there was actual error, we must determine whether the error resulted in sufficient harm to require reversal. *Ngo*, 175 S.W.3d at 743–44; *Abdnor*, 871 S.W.2d at 731–32. If the appellant preserved the error by timely objecting to the charge, an appellate court will reverse the judgment so long as the appellant demonstrates that he suffered some harm. *Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009). By contrast, if an appellant fails to object or to present a properly requested jury charge, any error in the charge "should be reviewed only for 'egregious harm' under *Almanza*." *Madden v. State*, 242 S.W.3d 504, 513 (Tex. Crim. App. 2007); *see Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

In this case, Appellant made no objection to the jury charge. Accordingly, any error must be reversed only upon a showing by Appellant that he suffered egregious harm: "To be reversible, any unpreserved jury-charge error must result in egregious harm which affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006) (citations omitted) (internal quotation marks omitted). Egregious harm is shown when the error "created such harm that [the appellant] 'has not had a fair and impartial trial.'" *Almanza*, 686 S.W.2d at 171. In *Almanza*, the Court of Criminal Appeals outlined four factors that reviewing courts should consider when determining whether a jury-charge error resulted in egregious harm: "1) the charge itself; 2) the state of the evidence including contested issues

and the weight of the probative evidence; 3) arguments of counsel; and 4) any other relevant information revealed by the record of the trial as a whole." *Olivas*, 202 S.W.3d at 144.

The punishment charge in this case listed many possible conditions of community supervision that the trial court "may include but are not limited to." However, the charge did not include any statement that, if community supervision was granted for this offense, the trial court must require Appellant to submit to "a term of confinement of not less than 120 days," submit to all necessary rehabilitation, and only drive with an ignition interlock device installed on any vehicle he operates. *See* TEX. CODE CRIM. PROC. ANN. arts. 42A.401, .402, .408 (West 2018 & Supp. 2019).

Appellant urges that the trial court was required to include every mandatory condition of probation and certain other discretionary conditions. To support his position, Appellant relies on the Court of Criminal Appeals' decision in *Ellis v. State*, 723 S.W.2d 671, 672 (Tex. Crim. App. 1986). But in *Yarbrough v. State*, the Court of Criminal Appeals agreed with the Dallas court of appeals' holding that a trial court's refusal to include all of the statutory conditions of community supervision in a jury charge was not reversible error. *See Yarbrough v. State*, 742 S.W.2d 62, 64 (Tex. App.—Dallas 1987), *pet. dism'd, improvidently granted*, 779 S.W.2d 844, 845 (Tex. Crim. App. 1989). Moreover, in *Yarbrough*, 779 S.W.2d at 845, the Court of Criminal Appeals expressly overruled *Brass v. State*, which stood for the proposition that an accused is "entitled to have all of the allowable statutory terms and conditions of probation enumerated in the court's charge to the jury upon a proper objection or request." *Brass v. State*, 643 S.W.2d 443, 444 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd). Therefore, to the extent that *Ellis* stands for the proposition that trial courts must include all statutory terms of probation in the jury charge, it has

since been implicitly overruled. *See Murdock v. State*, 840 S.W.2d 558, 570 (Tex. App.—Texarkana 1992), *vacated on other grounds*, 845 S.W.2d 915 (Tex. Crim. App. 1993).

We hold that the trial court did not err in failing to include all possible conditions of community supervision in the jury charge. A trial court is not required to list all of the terms and conditions of community supervision in the punishment charge. *See, e.g.*, *Yarbrough*, 779 S.W.2d at 845; *Means v. State*, 955 S.W.2d 686, 692 (Tex. App.—Amarillo 1997, pet. ref'd); *Cortez v. State*, 955 S.W.2d 382, 383–84 (Tex. App.—San Antonio 1997, no pet.); *McNamara v. State*, 900 S.W.2d 466, 468 (Tex. App.—Fort Worth 1995, no pet.).

Furthermore, even if the court did commit some error by the omissions and alleged misstatements listed above, which we do not believe it did, the error was not so egregious that it impacted the fairness or impartiality of the trial. In applying the individual factors to a review of this record, we conclude that Appellant has not shown that he suffered egregious harm. Appellant's second issue is overruled.

In his third issue, Appellant argues that the trial court reversibly erred when it failed to include a reasonable doubt instruction in the jury charge at the punishment phase of trial. Appellant insists that, "[b]ecause there were multiple prior bad acts admitted against [Appellant], the trial court was required to submit [a] beyond a reasonable doubt instruction, and the [trial court's] failure to do so constitutes jury charge error."

Article 36.14 of the Texas Code of Criminal Procedure provides in part that the trial court shall include in the jury charge "the law applicable to the case." CRIM. PROC. art. 36.14 (West 2007); *see Huizar v. State*, 12 S.W.3d 479, 483 (Tex. Crim. App. 2000). Article 37.07, section 3(a)(1) provides in relevant part:

> [E]vidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited

> to . . . evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible.

CRIM. PROC. art. 37.07, § 3(a)(1) (West Supp. 2019).

The plain language of Article 37.07, section 3(a)(1) requires that evidence of extraneous crimes or bad acts "may not be considered in assessing punishment until the fact-finder is satisfied beyond a reasonable doubt that [the extraneous bad acts and offenses] are attributable to the defendant." *Huizar*, 12 S.W.3d at 481 (alteration in original) (quoting *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999)); *see* CRIM. PROC. art. 37.07, § 3(a)(1). It is well settled that, if extraneous evidence is offered during the trial's punishment phase, the trial court must sua sponte provide a reasonable doubt instruction. *Brown v. State*, 243 S.W.3d 141, 151 (Tex. App.—Eastland 2007, pet. ref'd) (citing *Huizar*, 12 S.W.3d at 484–85). As stated previously, Appellant made no objection to the proposed jury charge; therefore, the error is reversible error only upon a showing by Appellant that he suffered egregious harm. *Olivas*, 202 S.W.3d at 144.

Appellant asserts that evidence of certain prior bad acts was introduced against Appellant at trial: that Appellant pulled on Keel's arm while Keel was still in the pickup; that Appellant jumped on the hood of Keel's pickup and attempted to pull out the front windshield; that Appellant tried to leave the scene of the accident with the help of a friend; and that a beer can was found in Appellant's pickup. Assuming these acts constituted offenses or bad acts, they were not extraneous; rather, they were same transaction contextual evidence. Thus, a beyond-a-reasonable-doubt instruction was not necessary.

Same transaction contextual evidence is evidence of another crime that is so "intermixed, blended, or connected with" the charged crime that it forms an indivisible criminal transaction. *Lamb v. State*, 186 S.W.3d 136, 141 (Tex. App.—

Houston [1st Dist.] 2005, no pet.). It is background evidence admitted to show the context in which the criminal act occurred. *See Prible v. State*, 175 S.W.3d 724, 731–32 (Tex. Crim. App. 2005); *Rogers v. State*, 853 S.W.2d 29, 32 (Tex. Crim. App. 1993). Such evidence gives the jury information "essential to understanding the context and circumstances of events which, although legally separate offenses, are blended or interwoven." *Camacho v. State*, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993); *see also Moreno v. State*, 721 S.W.2d 295, 301 (Tex. Crim. App. 1986) ("[T]he jury is entitled to know all the relevant surrounding facts and circumstances of the charged offense; an offense is not tried in a vacuum.").

Because same transaction contextual evidence serves to explain the circumstances surrounding the offense, it falls within the "circumstances of the offense" language of Article 37.07, section 3(a)(1) rather than the "other evidence of an extraneous crime or bad act" language. *See* CRIM. PROC. art. 37.07, § 3(a)(1); *see also Camacho*, 864 S.W.2d at 532; *Lamb*, 186 S.W.3d at 142. Thus, same transaction contextual evidence admitted or used during the punishment phase does not require a reasonable doubt instruction under Section 3(a)(1) of Article 37.07. *See Atkinson v. State*, 404 S.W.3d 567, 574 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd); *Garza v. State*, 2 S.W.3d 331, 335 (Tex. App.—San Antonio 1999, pet. ref'd).

Appellant also complains that the trial court should have included a beyond-a-reasonable-doubt instruction in the punishment charge regarding evidence of Appellant's prior DWI offense. However, this is incorrect. When an offense has been adjudicated, such an instruction is not necessary. *See Bluitt v. State*, 137 S.W.3d 51, 54 (Tex. Crim. App. 2004). Appellant's prior DWI conviction had been adjudicated, as shown by the judgment that was presented at trial. Thus, no beyond-a-reasonable-doubt instruction was required to be given.

Lastly, Appellant argues that, because evidence of his pending misdemeanor offense of unlawful possession of a handgun was introduced during punishment, the trial court should have included a beyond-a-reasonable-doubt instruction in the punishment charge. With this, we agree.

Because the State offered evidence of Appellant's unlawful possession of a handgun, which was an extraneous offense that could only be considered as part of the punishment evidence if the jury found beyond a reasonable doubt that Appellant had committed the offense, the trial court should have given the jury a reasonable doubt instruction. *See Huizar*, 12 S.W.3d at 484. But because Appellant did not object to the omission of the instruction, we review the error under the egregious harm standard. *Id.* at 484–85.

As explained above, egregious harm occurs, and reversal is required, only when the defendant has suffered such fundamental harm that he has been deprived of a fair and impartial trial. *Almanza*, 686 S.W.2d at 171. Jury charge error is egregiously harmful if "it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Martinez*, 313 S.W.3d at 367 (quoting *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007)).

We find that Appellant did not suffer egregious harm. We first note that Appellant's unlawful possession of a handgun was only briefly mentioned while Appellant was being cross-examined by the State. It was not mentioned during the rest of the trial or in either the State's or Appellant's closing argument. Additionally, the punishment assessed by the jury is below that which the State requested and the maximum sentence allowed by law. *See Johnson v. State*, 181 S.W.3d 760, 766 (Tex. App.—Waco 2005, pet. ref'd) ("Texas courts have concluded that egregious harm has not been shown because of the omission of a reasonable doubt instruction when . . . the punishment assessed is at the low end or in the middle of the available

punishment range and/or significantly less than sought by the prosecution." (citations omitted)); *Tabor v. State*, 88 S.W.3d 783, 788–89 (Tex. App.—Tyler 2002, no pet.) (court's failure to sua sponte give reasonable-doubt instruction about extraneous offenses offered during punishment phase was harmless error because sentence imposed was well within punishment range and State asked for a greater sentence). Here, although the State asked for the maximum punishment of twenty years, the jury only assessed fifteen years, and it did not impose a fine. *Cf.* TEX. PENAL CODE ANN. § 12.33 (West 2019).

After reviewing the record in this case in its totality, we conclude that the trial court's failure to provide the jury with an Article 37.07, section 3(a)(1) reasonable-doubt instruction did not deprive Appellant of a fair and impartial punishment hearing. We overrule Appellant's third issue.

In his fourth issue, Appellant argues that the cumulative effect of the errors in his case rendered his punishment proceeding fundamentally unfair.

This court recognizes that several errors, even if harmless when separately considered, may be harmful in their cumulative effect. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999) (citing *Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988)). Non-errors, however, may not produce harm in their cumulative effect. *Hughes v. State*, 24 S.W.3d 833, 844 (Tex. Crim. App. 2000); *Melancon v. State*, 66 S.W.3d 375, 385 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). This doctrine provides relief only if the cumulative effect rendered the punishment phase of the trial fundamentally unfair. *See Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010) (citing *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004)).

As explained above, to the extent we found the trial court committed error, we have held it harmless. Reviewing any error in light of the entire record, we conclude

that the cumulative effect of the harmless error did not render Appellant's trial fundamentally unfair. Appellant has not demonstrated that he was harmed in any other respects. Thus, Appellant has not demonstrated "cumulative harm" resulting in a fundamentally unfair trial. We overrule Appellant's fourth issue.

This Court's Ruling

We affirm the judgment of the trial court.

KEITH STRETCHER
JUSTICE

July 9, 2020

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.