Opinion issued July 16, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00367-CR

ROBERT BRITTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1515838

MEMORANDUM OPINION

A jury convicted appellant, Robert Britton, of the first-degree felony offense of aggravated assault against a public servant, and the trial court assessed his punishment at twenty-five years' confinement. In one point of error, appellant

contends that his trial counsel provided ineffective assistance because he failed to (1) object to the prosecutor's misstatement during voir dire regarding the applicable range of punishment and (2) properly instruct the venire as to the correct punishment range. We affirm.

Background

On July 2, 2016, while on patrol in north Houston, Harris County Sheriff's Deputy Rawltyn Hart observed a tan Chevy Tahoe strike another vehicle and flee the scene. The deputy activated his emergency lights and siren and followed the car.

Deputy Hart initiated a traffic stop and the driver of the Tahoe momentarily stopped. When Deputy Hart instructed the driver to exit the car, the driver refused and sped off. A high-speed chase ensued. The car eventually drove into the parking lot of a McDonald's restaurant where Deputy Hart's partner, Deputy Josea Herrera, had positioned his marked patrol car to block appellant's exit. Deputy Hart then witnessed the Tahoe drive directly into Deputy Herrera's patrol car.

After striking Deputy Herrera's vehicle, the driver sped away. The vehicle subsequently drove over spike strips but continued for another half a mile before stopping in a church parking lot. Appellant got out of the vehicle and was taken into custody. Deputy Hart testified that when he told appellant, "Man, what the F, you hit my partner," appellant replied, "I don't care, pigs die every day."

Deputy Herrera testified that appellant accelerated into his patrol car and used his Tahoe as a deadly weapon. Deputy Herrera further testified that the force of the impact caused the airbags in his vehicle to deploy and that he received medical treatment for his injuries.

At the conclusion of trial, the jury found appellant guilty of the charged offense of aggravated assault against a public servant. During the punishment phase, appellant pleaded true to one enhancement paragraph and stipulated that he had been previously convicted of six other offenses. The trial court assessed appellant's punishment at twenty-five years' confinement. This appeal followed.

Ineffective Assistance of Counsel

In his sole point of error, appellant contends that he received ineffective assistance because his trial counsel failed to (1) object to the State's misstatement during voir dire regarding the applicable range of punishment and (2) properly instruct the venire as to the correct punishment range.

A. Standard of Review and Applicable Law

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*. 466 U.S. 668, 687 (1984). Under the *Strickland* two-step analysis, a defendant must demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Id*. at 687–88, 694; *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Andrews*, 159 S.W.3d at 101.

An "appellant bears the burden of proving by a preponderance of the evidence that his counsel was ineffective." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "[A]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id*. at 814 (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). However, a reviewing court will rarely be able to fairly evaluate the merits of an ineffective assistance claim on direct appeal because the trial record is usually undeveloped and inadequate to reflect the motives behind trial counsel's actions. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). Trial counsel should have the opportunity to explain his or her actions before being found ineffective. *See Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). When the record is silent, we may not speculate to find trial counsel ineffective. *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance is within a wide range of reasonable professional assistance and trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006); *Thompson*, 9 S.W.3d at 813. If the reasons for counsel's conduct at trial do not appear in the record and it is possible that the conduct could have been grounded in legitimate trial strategy, an appellate court will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). To warrant reversal when trial counsel has not been afforded an opportunity to explain his reasons, the challenged conduct must be "so outrageous that no competent attorney would have engaged in it." *Roberts v. State*, 220 S.W.3d 521, 533 (Tex. Crim. App. 2007). "When handed the task of determining the validity of a defendant's claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight." *Thompson*, 9 S.W.3d at 813 (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)).

B. Applicable Penal Code Sections

A person commits aggravated assault if he "intentionally or knowingly threatens another with imminent bodily injury" and "uses or exhibits a deadly

weapon during the commission of the assault." TEX. PENAL CODE §§ 22.01(a)(2), 22.02(a)(2). The offense is a felony of the first degree if the offense is committed against someone the person knows is a public servant while the public servant is lawfully discharging an official duty. *See id.* § 22.02(b)(2)(B). The range of punishment for a first-degree felony is "imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years." *Id.* § 12.32(a). A defendant convicted of a first-degree felony who has been previously convicted of a felony other than a state jail felony punishable under Section 12.35(a) "shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 15 years." *Id.* § 12.42(c)(1).

C. Analysis

Appellant contends that his trial counsel rendered ineffective assistance when he failed to object to the State's alleged misstatement of the applicable range of punishment during voir dire and later failed to correct the misstatement. He asserts that based on the language of the indictment, which included an enhancement paragraph, the applicable range of punishment was a term of imprisonment not less than fifteen years or more than ninety-nine years or life, but the prosecutor misstated

the punishment range as a term not less than five years but not more than ninety-nine years.[1]

"[B]oth the State and the defense are entitled to question the jury panel on the applicable law relating to enhanced punishments." *Robinson v. State*, 817 S.W.2d 822, 826 (Tex. App.—Fort Worth 1991, writ ref'd) (citing *Martinez v. State*, 588 S.W.2d 954, 956 (Tex. Crim. App. 1979)). There are limits, however, on such an examination. Article 36.01 of the Texas Code of Criminal Procedure states that "[w]hen prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment. . . ." TEX. CODE CRIM. PROC. art. 36.01(a)(1). The purpose of article 36.01 is to prevent the extreme prejudice that would almost inevitably result from an announcement at the outset of the proceeding

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[1] The indictment in this case alleged, in relevant part:

> [Appellant], heretofore on or about July 02, 2016, did then and there unlawfully, intentionally and knowingly threaten with imminent bodily injury to J. HERRERA, hereafter called the Complainant, while the Complainant was lawfully discharging an official duty, by using and exhibiting a deadly weapon, namely MOTOR VEHICLE, knowing that the Complainant was a public servant.
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> Before the commission of the offense alleged above, on MAY 5, 2011, in Cause No. 1289483 in the 208TH District Court of HARRIS County, Texas, [appellant] was convicted of the felony offense of AGGRAVATED ASSAULT.

that the State believed the defendant had been previously convicted of an offense. *See Frausto v. State*, 642 S.W.2d 506, 508 (Tex. Crim. App. 1982).

"[A] prosecutor may inform the jury panel of the range of punishment applicable if the State were to prove a prior conviction for enhancement purposes, but it may not inform the jury of any of the specific allegations contained in the enhancement paragraph of a particular defendant's indictment." *Id.* at 509. If the prosecutor informs the jury panel of the facts of the defendant's prior convictions, it is the functional equivalent of reading the enhancement paragraphs to the jury and is error. *Id.* at 508 (concluding prosecutor's statements during voir dire in which he recounted virtually all allegations in enhancement paragraph of indictment to jury, including offense, cause number, date, and court of conviction, violated Code of Criminal Procedure article 36.01).

The record reflects that, during voir dire, the prosecutor told the venire:

> This particular case is a first degree felony so it's five to 99. In certain circumstances it could be a little bit different from that depending on his criminal history. Does everyone think that they would be able to look at the full range of punishment and if I prove – if I give you some facts, you're fine with five years? If I give you some facts, you're fine with 99 years? Would everybody be able to look at the full range of punishment? Would anybody not be able to?

In response to the prosecutor's questions, a venireperson asked, "So those are the only options, five to 99? There's no two? There's no three?" The prosecutor responded, "There's not. In certain circumstances, depending on criminal history,

that five might change. That five might go up to where the minimum might not be five, the minimum might be something else." Trial counsel did not object. Shortly thereafter, trial counsel told the venire, "So 12 of you are going to go back into the room and go through this first degree felony with a punishment range from five to 99 years."

Contrary to appellant's assertion, the prosecutor did not misstate the applicable range of punishment. Appellant was charged with the first-degree felony offense of aggravated assault of a public servant, *see* TEX. PENAL CODE § 22.02(a)(2), for which the range of punishment is five to ninety-nine years or life, *see id.* § 12.32(a). The prosecutor accurately informed the venire of the proper punishment range. Consistent with *Frausto*, the prosecutor was permitted to inform the venire of the range of punishment applicable if the State were to prove a prior conviction for enhancement purposes provided that she did not "inform the jury of any of the specific allegations contained in the enhancement paragraph of a particular defendant's indictment." *Frausto*, 642 S.W.2d at 509; *see also Hawkins v. State*, 792 S.W.2d 491, 497 (Tex. App.—Houston [1st Dist.] 1990, no writ) (concluding prosecutor did not violate *Frausto* rule in voir dire where statements were incidental to explanation of jury's responsibility of determining guilt or innocence and did not allude to defendant's criminal record). The prosecutor's comments were in general terms which informed the venire of nothing more than

that the applicable range of punishment could increase based on a defendant's criminal history but she did not inform the jury of the specific facts of the enhancement paragraph in the indictment, and appellant does not contend otherwise.

In order to succeed with an ineffective-assistance-of-counsel claim based on counsel's failure to object, a defendant "must show that the trial judge would have committed error in overruling such objection." *Ex parte Parra*, 420 S.W.3d 821, 824–25 (Tex. Crim. App. 2013); *Milum v. State*, 482 S.W.3d 261, 266 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (quoting *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996)). In this case, had trial counsel objected to the prosecutor's correct statement of the applicable punishment range, the trial court would not have erred in overruling the objection. *See Ex parte Parra*, 420 S.W.3d at 824–25; *Milum*, 482 S.W.3d at 266. Because trial counsel likely understood that the prosecutor's statement was accurate—and, in fact, reiterated the same range in his comments to the venire—and, therefore, an objection would have been futile, his failure to object to or correct the prosecutor's statement did not fall below the objective standard of professional norms. *See Andrews*, 159 S.W.3d at 101–02; *Duren v. State*, 87 S.W.3d 719, 735 (Tex. App.—Texarkana 2002, no pet.) (concluding that prosecutor's statements of law during opening statements regarding what State must prove to find that defendant knowingly inflicted injuries were not objectionable and, therefore, trial counsel did not err in failing to object). Moreover, when, as here, the record is

silent, we may not indulge in speculation to find trial counsel ineffective. *See Garcia*, 57 S.W.3d at 440. Because appellant has failed to meet the first prong of the *Strickland* test, we overrule his point of error. *See Williams*, 301 S.W.3d at 687; *Andrews*, 159 S.W.3d at 101.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

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