In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00200-CR

LADAVION WHITE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 202nd District Court
Bowie County, Texas
Trial Court No. 18F0926-202

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

About two weeks after Shakayla Scott and her two-year-old daughter moved into their new residence in Wake Village, Texas, LaDavion White broke into their house and sexually assaulted Scott multiple times at gunpoint. As a result, a Bowie County jury convicted White of two counts of aggravated sexual assault[1] and assessed punishment of ninety-nine years' imprisonment on each count. On appeal, White complains that the trial court erred in dismissing a juror without giving White an opportunity to examine the juror and that he was denied effective assistance of counsel because of his trial counsel's alleged errors during the guilt/innocence phase and during the punishment phase. Because (1) White's complaint was not preserved regarding the dismissal of the juror and (2) White has not shown deficient performance by his trial counsel, we affirm the trial court's judgment.

(1) White's Complaint Was Not Preserved Regarding the Dismissal of the Juror

White argues that the trial court abused its discretion in dismissing a juror without giving him an opportunity to examine the juror regarding his disability. In this case, the jury had been seated and sworn, and several witnesses had testified before the lunch recess. After lunch, the trial court advised counsel that one of the jurors had lost his cell phone at lunch, and when the court spoke with him, the juror was sweating profusely and having a panic attack. The court concluded that the juror would be unable to listen to the evidence and advised counsel that it had dismissed the juror from the jury and that an alternate would take his place. The court then inquired whether

[1]*See* TEX. PENAL CODE ANN. § 22.021(a).

there was "any objection or questions from the State or defense," to which defense counsel answered, "No, Your Honor."

A trial court may discharge a juror who it determines has become "disabled from sitting at any time before the charge of the court is read to the jury." TEX. CODE CRIM. PROC. ANN. art. 36.29(a); *Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000); *Holloway v. State*, 446 S.W.3d 847, 853 (Tex. App.—Texarkana 2014, no pet.). "The decision to excuse a juror, once the jury has been empaneled and sworn, is reviewed under an abuse-of-discretion standard." *Holloway*, 446 S.W.3d at 853 (citing *Routier v. State*, 112 S.W.3d 554, 588 (Tex. Crim. App. 2003); *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999)). However, a complaint that a trial court improperly dismissed a juror under Article 36.29(a) must be preserved in the trial court. *See Fernandez v. State*, No. 08-17-00217-CR, 2020 WL 831907, at *16 (Tex. App.—El Paso Feb. 20, 2020, pet. filed); *Reese v. State*, No. 10-15-00175-CR, 2016 WL 7477930, at *3–4 (Tex. App.—Waco Dec. 28, 2016, pet ref'd) (mem. op., not designated for publication).[2]

"To preserve a complaint for our review, a party must first present to the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling if not apparent from the context." *Sharper v. State*, 485 S.W.3d 612, 615 (Tex. App.—Texarkana 2016, pet. ref'd) (quoting *Lee v. State*, No. 06-15-00004-CR, 2015 WL 5120243, at *1 (Tex. App.—Texarkana Sept. 1, 2015, pet. ref'd) (mem. op., not designated for publication) (citing TEX. R. APP. P. 33.1(a)(1))). "Further, the trial court must have ruled on the request, objection, or motion, either

[2]"Although unpublished opinions have no precedential value, we may take guidance from them 'as an aid in developing reasoning that may be employed.'" *Rhymes v. State*, 536 S.W.3d 85, 99 n.9 (Tex. App.—Texarkana 2017, pet. ref'd) (quoting *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd)).

expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule." *Id*. (quoting *West v. State*, 121 S.W.3d 95, 114 (Tex. App.—Fort Worth 2003, pet. ref'd) (citing TEX. R. APP. P. 33.1(a)(2))).

In this case, White was given the opportunity to object or ask questions, but affirmatively declined to do so. On appeal, he asserts that an objection or question would have been fruitless since the trial court announced it had already dismissed the juror. However, the court's announcement did not excuse White from the obligation to voice any objection he may have had to the dismissal of the juror. In addition, there is nothing in the record that indicates that the juror was not available to answer any questions White may have had or even be recalled, if White objected and the court reconsidered its ruling. Since White declined the opportunity to object to the trial court's action, and to question the juror, he did not preserve this complaint. We overrule this issue.

(2) White Has Not Shown Deficient Performance by His Trial Counsel

In his two other issues, White complains that he was denied effective assistance of counsel because of his trial counsel's alleged errors during the guilt/innocence and punishment phases of his trial.[3] White asserts that, during the guilt/innocence stage, his trial counsel's performance was

[3]"As many cases have noted, the right to counsel does not mean the right to errorless counsel." *Lampkin v. State*, 470 S.W.3d 876, 896 (Tex. App.—Texarkana 2015, pet. ref'd) (citing *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006)). "In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*." *Id*. (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)); *see also Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009)). "The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness." *Id*. at 896–97 (citing *Strickland*, 466 U.S. at 688). "This requirement can be difficult to meet since there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* at 897 (quoting *Strickland*, 466 U.S. at 689). "This measure of deference, however, must not be watered down into a disguised form of acquiescence." *Id*. (quoting *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (finding ineffective assistance where counsel failed to request

deficient because he failed to object to the State's questions related to certain extraneous offenses and testimony regarding statements White made about rape when he was a juvenile and because he failed to request a limiting instruction regarding the extraneous offenses in the jury charge. In order to put the complained-of testimony in context, we briefly set forth the testimony at trial.

Scott testified that, a few days after she moved into the house in Wake Village, she heard a knock on the front door at 2:00 a.m. When she inquired who it was, she thought she heard "Davie," the name of a man with whom she had worked. On slightly opening the door, she faced a man there that she did not know, who claimed he had left a flashlight in the shed in her backyard. She gave him permission to retrieve it.

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medical records and relied on court-appointed competency examination when he knew client had escaped from mental institution)).

"The second *Strickland* prong, sometimes referred to as 'the prejudice prong,' requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694). "'A reasonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.'" *Id*. (quoting *Strickland*, 466 U.S. at 694).

"A failure to make a showing under either prong defeats a claim for ineffective assistance." *Id*. (citing *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003)). "Allegations of ineffectiveness 'must "be firmly founded in the record."'" *Id*. (quoting *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) (quoting *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999))). "The *Strickland* test '"of necessity requires a case-by-case examination of the evidence."'" *Id*. (quoting *Williams v. Taylor*, 529 U.S. 362, 382 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring))).

"Trial counsel should generally be given an opportunity to explain his actions before being found ineffective." *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017) (citing *Rylander*, 101 S.W.3d at 111). "When a claim of ineffective assistance of counsel is raised for the first time on direct appeal, the record 'is in almost all cases inadequate to show that counsel's conduct fell below an objectively reasonable standard of performance.'" *Lampkin*, 470 S.W.3d at 898 (quoting *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005)). "Nevertheless, 'when no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as she did.'" *Id*. at 898 (quoting *Andrews*, 159 S.W.3d at 102). "Moreover, where the reviewing court 'can conceive potential reasonable trial strategies that counsel could have been pursuing,' the court 'simply cannot conclude that counsel has performed deficiently.'" *Id*. (quoting *Andrews*, 159 S.W.3d at 103). "Essentially, when a party raises an ineffective assistance of counsel claim for the first time on direct appeal, the defendant must show that 'under prevailing professional norms,' *Strickland*, 466 U.S. at 690, no competent attorney would do what trial counsel did or no competent attorney would fail to do what trial counsel failed to do." *Lampkin*, 470 S.W.3d at 898 (quoting *Andrews*, 159 S.W.3d at 102).

She also testified that, on the stormy Sunday night before the Wednesday-morning assaults, she went to her daughter's room to check on her. She discovered that the window in her room had been broken and called the police. During the police investigation, the officers found that a side doorknob looked like somebody had tried to pry it open. They also found a handwritten note placed inside the front door that was addressed "Dear Beautiful," expressed the author's desire to "get with her," and was signed, "Your Admirer." Scott and her daughter left the house and stayed with her mother until the window was fixed the following day.

Very early on Wednesday, August 16, 2017, Scott was home alone in her undergarments sitting on a living room couch. Around 3:00 a.m., she felt somebody standing over her, looked, and saw a man holding a gun to her head. When she started screaming, he told her to stop or he would make her child an orphan. He had her turn off the television, took her to her bedroom, and made her lie on the bed. She then described how he talked about wanting to get to know her and asked questions that indicated he had been watching her. Scott also testified that he made her perform oral sex on him and that he had vaginal sex with her. During intercourse, he told her that he had left the note and that he had been in her daughter's room since 5:00 p.m. Tuesday evening. The gun remained beside him on the bed.

He made her clean him, he dressed, and they went to the living room. There, he directed her to lie on the couch with him and watch a movie. Scott described how he held her like they were on a date. After the movie, he again had her perform oral sex, again assaulted her vaginally, and again had her clean him. He then put the towel in a plastic bag and had her write down her telephone number on a piece of paper. After her assailant left around 5:00 a.m., Scott put on her

clothes and drove to her parent's house to tell them what had happened. On the way, she called the police and told them what had happened. Scott denied that she knew White at the time she moved to Wake Village, at the time the assaults took place, or at the time she identified him in a photographic lineup.

Testimony from Scott's mother and an officer responding to the call recounted that Scott arrived at her mother's house around 5:30 that morning and that she had told her mother that "he" raped her, who her mother understood to be the person that had been stalking her. Both Scott and her mother were described as hysterical and screaming, and the officer was informed that the assault had just occurred. The officer instructed Scott to go to the hospital for a sexual assault examination, then went to Scott's house to secure the crime scene. The officer also testified that he had had contact with White on July 8 at 1:30 a.m. White drew his attention because, even though it was hot outside, he was wearing a heavy jacket and a hoodie. He explained that there had been a rash of vehicle and home burglaries in Wake Village and Nash and that sometimes burglars wore extra clothing to hide their contraband. White was stopped for not having a headlight on his bicycle but was not given a ticket.

Brian Burns, a patrol officer with the Wake Village Police Department (WVPD), contacted Scott at the hospital and took her statement. His testimony regarding her statement recounting the assaults and her description of the assailant's gun was consistent with Scott's trial testimony. Krystal Tyl, an emergency room nurse at Christus St. Michael hospital, performed a sexual assault examination on Scott. In addition to describing the examination, Tyl read into the record the

patient history that included a description of the sexual assaults, which was also consistent with Scott's trial testimony.

The day after the assaults, Sergeant Jody Stubbs of the WVPD met with Scott and showed her a photographic lineup. Scott identified the photograph of White as her assailant and claimed not to know his name. Todd Aultman, with the WVPD, was the lead detective investigating the assaults. He affirmed that White had been included in the photographic lineup because his name had come up in their investigation of the vehicle and home burglaries that had been occurring in Wake Village. After White's photograph was identified, Aultman attempted to talk with him at his house, which was in Scott's immediate neighborhood. About one month later, officers obtained a search warrant and obtained a buccal swab from the inside of White's cheeks. After the DNA from these swabs was compared with the unknown male DNA contained on swabs taken from Scott's vagina and breast during her sexual assault examination, it was determined with a high degree of confidence that White was the source of that DNA.[4] Based on these results and Scott's photographic identification, White was arrested for the sexual assaults.

After the State rested, White testified in his own defense. White testified that he had been arrested and charged for some burglaries of a habitation and of vehicles, that he had pled guilty, and that he had received "shock probation" and ten years' community supervision for the burglary of a habitation offense. White claimed that he had been introduced to Scott at the mall by his cousin, Devonte Cannon, and that they had exchanged names and telephone numbers. He testified that they texted with each other and that one night she texted him and said that she was lonely. He

[4]The swabs were analyzed at the UNT Center for Human Identification.

offered to come over, and she consented. According to White, after he arrived, Scott took him into the bedroom and seduced him. Afterwards, she cleaned both of them and they went into the living room where they again had sex at Scott's instigation. He maintained that the encounter was consensual and that Scott never tried to stop him or push him away. He said that he did not use a condom, so his DNA would have been found in her body.

White denied that he had a gun that night, and he testified that he has never had a gun. He also denied that he knocked on Scott's door at 2:00 a.m., that he left the secret-admirer note, and that the note was in his handwriting. He surmised that Scott accused him of rape, because he did not call her back right away, and that she thought he used her. White also denied that he would ever rape anyone and testified that he "can't even consider it," because he had been raised by a woman, and, after seeing her struggle, he "would not want to put a woman through that ever."

White also testified that he had had a juvenile misdemeanor charge. He said that, while on juvenile probation, he got mad, broke a principal's window, and was placed in an all boys' facility. He acknowledged acting out in his teenage years to get attention and getting mad in court one time. He maintained that that occurred behind the courtroom. White also acknowledged having anger issue during that time but maintained that he received counseling at the boys' facility that helped him deal with those issues.

On cross-examination, the State questioned White about the six burglary offenses to which he had pled guilty. The State asked if White remembered taking two firearms in one of the vehicle burglaries to which he had pled guilty. White denied that. The State also asked if his burglary of a habitation was to a house solely occupied by a woman who was at the house at the time. White

acknowledged that. The State then questioned White about whether, when he was on juvenile probation, he made statements at school to a girl that he wanted to rape her, put her in the trunk, and keep her there until she stopped screaming. White denied that. The State also questioned him about the juvenile probation officer searching his cell phone and finding granny pornography, hard-core pornography, rape videos, and anime pornography. Although White admitted to having anime pornography, he denied having rape videos and the other pornography.

White also called Devonte Cannon, who testified that he had briefly introduced White to Scott at the mall after White got out of prison. On cross-examination, Cannon acknowledged that he had not introduced them until sometime after May 2018 and that he did not introduce them before August 16, 2017.

In its rebuttal, the State called Leah Miller, who had been White's community supervision officer. Miller testified that, while White was on community supervision, she had been called out to a Liberty-Eylau school, where it was reported to her that White had made statements to students about forcible rape and putting them into a vehicle's trunk. She also testified that, as part of her supervision, she had, at one point, looked at the contents of White's cell phone and found granny pornography, hard-core pornography, rape videos, and anime pornography. She also testified that White had admitted making searches for videos that depicted rape and non-consensual sexual activity.

White faults his trial counsel for failing to object to certain testimony and certain lines of questioning by the State. Initially, White contends that his trial counsel should have objected to Aultman affirming that White's name had come up in the WVPD investigation of a series of

burglaries. However, this testimony was in the context of Aultman explaining why White's photograph was included in the photographic lineup. The testimony was therefore admissible, as it explained how White became a suspect. *See Lee v. State*, 29 S.W.3d 570, 577 (Tex. App.—Dallas 2000, no pet.).

White also complains that his trial counsel failed to object when the State questioned him regarding his having pled guilty to burglary of a vehicle in which two firearms were stolen and to burglary of a habitation in which a woman who lived alone was present. However, this line of questioning came in the cross-examination of White after he had testified that he had pled guilty to six burglaries and that he had served his sentences, or was on community supervision, for those offenses. In addition, White testified that he had never had a gun and would never harm a woman. Therefore, these lines of questioning would have been permissible to impeach his testimony that he had never had a gun and could not even consider harming a woman. *See* TEX. R. EVID. 607.

In addition, White complains that his trial counsel failed to object to the State questioning him about the statements regarding rape that he made while on juvenile probation and about the contents of his cell phone during that time that included rape videos. White also complains that his trial counsel should have objected to Miller's testimony regarding these matters solicited after White denied them. However, this line of questioning was proffered to impeach White's direct testimony that he could never consider raping a woman, to impeach his denials of his prior statements and cell phone contents, and to refute his defensive theory of consent. Consequently, trial counsel could have reasonably concluded that no useful purpose would have been served by objecting to these lines of questioning or to evidence that would be permissible and admissible.

Finally, White complains that his trial counsel failed to request a limiting instruction regarding any extraneous crimes or other bad acts. However, as part of his trial strategy, trial counsel may have concluded that requesting a limiting instruction would have been more harmful by drawing the jury's attention to those extraneous acts. *See, e.g.*, *Garcia v. State*, 887 S.W.2d 862, 881 (Tex. Crim. App. 1994), *abrogated on other grounds by Hammock v. State*, 46 S.W.3d 889 (Tex. Crim. App. 2001) (failure to request limiting instruction strategically valid decision to avoid calling further attention to extraneous acts); *McNeil v. State*, 452 S.W.3d 408, 415 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (reasonable trial strategy to omit request for extraneous-offense instructions "because [counsel] did not want any further attention to be drawn to potential extraneous offenses or misconduct committed by the defendant").

We cannot say that no competent attorney would have made the same decision to not object to the complained-of lines of questioning and testimony and to forego a request for a limiting instruction regarding the extraneous acts. *See Lampkin*, 470 S.W.3d at 898.

White's third issue asserts that his trial counsel rendered ineffective assistance during the punishment phase of his trial. White first complains that his trial counsel failed to object during the State's opening statement when the State said, "He breaks in homes, and now you've convicted him of raping women."

White complains that this statement was false. A review of the record shows that this statement was made at the end of the State's rendition of the anticipated testimony that would show that White's history demonstrated that he had no ability to control himself. While the last part of the statement mischaracterizes the jury's guilty verdict, the jury would surely have

understood that they had just convicted White of sexually assaulting one woman, not "women." Consequently, even assuming his trial counsel's performance was deficient in not objecting to this mischaracterization, we cannot say that there is a reasonable probability that the outcome of the punishment verdict would have been different. *See id.*

White also complains that his trial counsel failed to object on several occasions to testimony that included hearsay statements. Our review of the record shows that some of the alleged hearsay statements were statements that White made that would expose him to criminal liability,[5] some may not have been hearsay based on the record before us, some would have been admissible through another witness identified by the State,[6] and some of the complained-of testimony was subsequently admitted through a person with knowledge. Trial counsel may have concluded that an objection to testimony that was either admissible, or that would be admissible through another witness, would have unnecessarily emphasized the testimony. We cannot say that any competent attorney would not have done likewise.

Based on this record, we cannot say that White's trial counsel's performance was "so outrageous that no competent attorney would have engaged in it." *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). Therefore, White has not shown that he was denied the effective assistance of counsel. We overrule these issues.

[5]*See* TEX. R. EVID. 803(24).

[6]The State identified Melissa Simpson, another juvenile probation officer, as a witness who could have testified without hearsay to some of the statements and actions of White.

For the reasons stated, we affirm the judgment of the trial court.

Josh R Morriss III
Chief Justice

Date Submitted: May 8, 2020
Date Decided: June 12, 2020

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