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

No. 06-19-00146-CR

AUSTIN BLAKE JUNELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 392nd District Court
Henderson County, Texas
Trial Court No. CR 18-0309-392

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

OPINION

Following a jury trial, Austin Blake Junell was convicted of two counts of intoxication manslaughter resulting from a traffic accident in Henderson County.[1] Junell was sentenced to fifteen years' incarceration and was fined $10,000.00 on each count, with the sentences to run consecutively. On appeal, Junell complains that (1) his trial counsel was ineffective in failing to object to testimony regarding his alleged affiliation with the Aryan Brotherhood during the punishment hearing and (2) the trial court erred in imposing attorney fees as reflected in the judgment on count one. Although we find that the judgment on count one should be modified to delete the assessment of attorney fees, we further find that Junell has failed to establish his ineffective assistance of counsel claim. We, therefore, affirm the judgment, as modified.

I. Ineffective Assistance of Counsel

A. Standard of Review

"Our case law states that it is the defendant's burden to prove by a preponderance of the evidence that trial counsel's performance was deficient or not 'reasonably effective' by showing that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms." *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006) (citing *Rylander v. State*, 101 S.W.3d 107, 109–10) (Tex. Crim. App. 2003)). Thus, to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *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) (orig. proceeding). The first prong requires a showing that

[1]Originally appealed to the Twelfth Court of Appeals in Tyler, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We are unaware of any conflict between precedent of the Twelfth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

counsel's performance fell below an objective standard of reasonableness. *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 689. "If this Court 'can conceive potential reasonable trial strategies that counsel could have been pursuing,' then we cannot conclude that counsel's performance was deficient." *Turner v. State*, 528 S.W.3d 569, 577 (Tex. App.—Texarkana 2016, no pet.) (quoting *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005)).

The second *Strickland* prong, sometimes called "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. *Strickland*, 466 U.S. at 694. "A reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* Thus, to establish prejudice,

> an applicant must show "that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result was reliable." [*Strickland*, 466 U.S.] at 687 . . . . It is not sufficient for Applicant to show "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693 . . . . Rather, [he] must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695 . . . .

Ex parte Martinez, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011) (orig. proceeding).

A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). "Thus, we need not examine both *Strickland* prongs if one cannot be met." *Turner*, 528 S.W.3d at 577 (citing *Strickland*, 466 U.S. at 697).

B. Analysis

Junell, who was twenty years old at the time of the accident in which he drove through a stop sign and collided with an eighteen-wheeler, had a blood alcohol content of 0.124 when he arrived at the hospital after the accident. Both passengers in the back seat of Junell's vehicle were killed in the crash, and the front-seat passenger was injured, as was Junell.

Junell's ineffective-assistance claim stems from the punishment trial at which Josh Rickman, an investigator for the Henderson County District Attorney's Office, testified. Rickman became a certified police officer in 2007 and previously worked for the Henderson County Sheriff's Office. While at the Henderson County Sheriff's Office, Rickman spent several years on patrol as a deputy sheriff until he was promoted to the Criminal Investigation Division (CID) where he investigated numerous crimes.

Rickman testified that he was familiar with the gangs that operate in the Henderson County area. He became familiar with the Aryan Brotherhood when he worked in the jail and kept track of gang members to ensure that they were confirmed when they arrived at the Texas Department of Corrections. According to Rickman, people who are jailed "click up . . . with a jailhouse gang." Rickman then testified that lightning bolts are a sign of the Aryan Brotherhood or the Aryan Circle. Rickman further testified on questioning by the State:

> Q. . . . . So if someone comes in with gang tattoos, because of that need to know what affiliation they're with, are they documented by photographs and in writing?
>
> A. Yes, ma'am.
>
> Q. And if someone affixes gang tattoos to themselves while they're in jail, has that been also noted in the -- in their records?

A. It should be.

Q. All right. And so you've sat behind Austin, and you've been able to see the gang -- the lightening [sic] bolts on his neck; is that right?

A. Yes, ma'am, I have.

Q. In your opinion, what are those affiliation of?

A. I believe he's affiliated with the Aryan Brotherhood or a clan of Peckerwood.

On cross-examination, Hickman testified that he did not know for a fact that Junell was a gang member.

Junell contends that his trial counsel was ineffective because he failed to object to Rickman's lack of expert qualification and because he failed to object to questions by the State regarding alleged gang affiliations under Rule 403 of the Texas Rules of Evidence.

1. Failure to Object to Rickman's Qualifications Was Not Deficient Performance

Before it admits evidence under Rule 702,[2] the trial court must be satisfied that "(1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case." *Rodgers v. State*, 205 S.W.3d 525, 527 (Tex. Crim. App. 2006). "If the expert evidence is close to the jury's common understanding, the witness's qualifications are less important than when the evidence is well outside the jury's own experience." *Id.* at 528. Moreover, "[t]he behavior of gangs and gang

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[2]Rule 702 of the Texas Rules of Evidence states,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

TEX. R. EVID. 702.

members is a generally accepted area of expert testimony which involves the gaining of specialized knowledge through experience or personal research." *Washington v. State*, 485 S.W.3d 633, 638 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *see also Morris v. State*, 361 S.W.3d 649, 656 (Tex. Crim. App. 2011) (noting that behavior of gangs constitutes generally accepted area of expert testimony).

Expert qualification requires that the witness have "a sufficient background in a particular field and a trial judge must then determine whether that background goes to the matter on which the witness is to give an opinion." *Davis v. State*, 329 S.W.3d 798, 813 (Tex. Crim. App. 2010) (citing *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006)). "The focus is on the fit between the subject matter at issue and the expert's familiarity with it." *Id.* "Because the spectrum of education, skill, and training is so wide, a trial court has great discretion in determining whether a witness possesses appropriate qualifications as an expert on a specific topic in a particular case." *Id.*

Rickman's testimony that he became familiar with the Aryan Brotherhood when he worked in the jail, where he was required to keep track of gang members by documenting gang tattoos, and that he was a long-time law enforcement officer with CID experience is some evidence that he is familiar with the subject matter. Counsel's decision not to object to Rickman's qualifications is a reasonable trial strategy given the great discretion imbued in the trial court to determine expert qualifications. *See id.* We cannot conclude that the failure to do so was deficient performance. *See Turner*, 528 S.W.3d at 577.

2. Failure to Object to Rickman's Testimony and Aryan Brotherhood Questioning under Rule 403 Did Not Prejudice Junell

Junell contends that counsel was ineffective in failing to object to Rickman's testimony and related questioning regarding Junell's alleged membership[3] in the Aryan Brotherhood under Rule 403 of the Texas Rules of Evidence. *See* TEX. R. EVID. 403.[4]

"[G]ang-related evidence tends to be irrelevant and prejudicial if not accompanied by testimony that puts the evidence into context." *Martinez*, 330 S.W.3d at 902 (citing *Dawson v. Delaware*, 503 U.S. 159 (1992)).

> In *Dawson*, the Supreme Court held that the First Amendment prohibited evidence of the defendant's membership in the Aryan Brotherhood during the penalty hearing because merely belonging to a group proved nothing more than the defendant's abstract beliefs. [*Dawson v. Delaware*, 503 U.S. 159,] 166, 112 S. Ct. 1093 [(1992)]. Had the prosecution, as it originally indicated it would, called an expert to testify that the Aryan Brotherhood was a prison gang "associated with drugs and violent escape attempts" that advocated "the murder of fellow inmates," the result might have been different. *Id*. at 165 . . . . Without such evidence, however, the defendant's membership was irrelevant, and it was likely "employed simply because the jury would find these beliefs morally reprehensible." *Id*. at 167 . . . .

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[3]On cross-examination by the State at the punishment trial, Junell testified:

> Q. All right. And, now, you have tattoos on your hand and tattoos on your neck that you didn't have when this -- when you were interviewed in December of 2017; isn't that true?
>
> A. Yes, it is.
>
> Q. And you have two lightening [sic] bolts on the back of your neck, right?
>
> A. Yes, I do.
>
> Q. And that is a symbol for Aryan Brothers. Are you an Aryan Brother?
>
> A. No, it's actually not. It's not at all what it is.
>
> Q. What is it then?
>
> A. It's just some lightening [sic] bolts. Don't have anything to do with any kind of gang organization at all.

[4]Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403.

Id. at 902–03. In *Martinez*, as in *Dawson*, "the State presented the evidence of group membership without any such accompanying testimony of the violent activities of the gang." *Id.* at 903. As a result, "the jury heard evidence of group association without any context in which to place it," thus making it irrelevant and prejudicial. *Id.* at 902–03 (failing to find prejudice under *Strickland*). The same is true in this case.

Although Rickman testified that he believed Junell was affiliated with the Aryan Brotherhood, there was no evidence of any violent or illegal activities associated with that group. The jury merely heard evidence of group association.[5] Moreover, the offense of which Junell was convicted had no relationship to his alleged membership in the Aryan Brotherhood. Even so, we cannot conclude that Junell established that he was prejudiced by counsel's failure to object to evidence of his tattoos and that he was a likely member of the Aryan Brotherhood.

"[U]nder Texas' discretionary non-capital punishment scheme, in order for an appellant to prevail on an ineffective assistance of counsel argument resulting from professional errors applicable to the sentencing phase where the jury determined the sentence, the record must demonstrate *Strickland* prejudice beyond mere conjecture and speculation." *Lampkin v. State*, 470 S.W.3d 876, 918–19 (Tex. App.—Texarkana 2015, pet. ref'd). Factors to be considered in this analysis are receipt of a maximum sentence and any disparity "between the sentence imposed and the sentence(s) requested by the respective parties." *Id.* at 919.

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[5]"It is still the law that when the State intends to put on evidence of a defendant's membership in an organization or group, it must make some showing of the group's violent or illegal activities for the evidence to remain relevant to sentencing." *Beham v. State*, 559 S.W.3d 474, 484 (Tex. Crim. App. 2018). In *Beham*, testimony established that aggravated robbery, the offense of which Beham was convicted, was "commonly associated with the kinds of criminal street gangs Beham was mimicking." *Id.* at 482–83.

The punishment range for the second-degree-felony offense of intoxication manslaughter is imprisonment for any term of not more than twenty years or less than two years and a fine not to exceed $10,000.00. *See* TEX. PENAL CODE ANN. §§ 12.33, 49.08(b). The State requested a minimum fifteen-year sentence, stating, "He is a danger to society[, and] [h]e will not be successful on probation. He was on bond when this offense occurred." Junell requested a sentence of between two to ten years and further requested suspension of the sentence in favor of community supervision. The jury sentenced Junell to fifteen years' incarceration and imposed a $10,000.00 fine on each count. Although Junell did not receive the maximum sentence, the jury's sentence complied with the State's request.

In determining the existence of *Strickland* prejudice, we also consider "the nature of the offense charged and the strength of the evidence presented at the guilt/innocence phase of trial." *Lampkin*, 470 S.W.3d at 922. The evidence at trial showed that Junell was operating the accident vehicle and was intoxicated at the time of the accident resulting in the death of two teenage girls. Iris Anderson was killed in the accident. She was seventeen years old, had graduated from high school, and had enrolled in college. Her mother testified that she last saw her daughter the day before the accident. The two shared a cup of coffee, and Iris dropped her mother off at work. The next time her mother saw her was at the funeral home. Morgan Carroll was also killed in the accident. She was eighteen years old at the time of the accident, had graduated from high school, and had a young daughter. The jury was shown a heart-breaking photograph of the little girl at her mother's gravesite.

The accident happened when Junell ran the stop sign at the intersection of Highway 175 and County Road 2938 in Mabank. Kyle Poole testified that, on the evening of the accident, he,

Junell, Anderson, and Carroll were going out for food. Junell was driving, the girls were in the backseat, and Poole was in the passenger seat. Poole recalled that, as the car approached the stop sign at Highway 175, the girls both started to scream. About that time, Junell swerved in an attempt to miss the eighteen-wheeler, but it was too late. The testimony from the driver of the truck with whom Junell collided established that the impact was of such force that it caused the truck to roll onto its side.

Wayne Coffey witnessed the accident from Highway 175. He saw the accident vehicle drive through the intersection and hit the eighteen-wheeler broadside. Coffey spoke to Junell at the accident scene and Junell told him that he had been driving the car. Melanie Cowan and her daughter were driving on Highway 175 on the night of the accident when they noticed a downed truck and stopped to help. When she spoke to Junell, he admitted that he had been driving. The emergency room nurse who treated Junell testified that Junell told him that he had been drinking that night and that he was driving the car. Throughout the trial, though, Junell's primary defense was that Poole was driving the accident vehicle and that he was the passenger. The jury viewed a recording of Junell's interview with the police in which he denied operating the vehicle and in which he stated that Poole was driving. During his punishment-phase testimony, Junell agreed that he was the driver. In its final closing, the State emphasized the fact that Junell had never taken responsibility for the accident, which resulted in hostility directed at Poole because some in the community believed he was the driver.

The jury also heard evidence during the punishment trial that Junell had been written up while in jail awaiting trial for not following the rules, had been in two fights, and had been placed in segregation. Punishment-phase evidence further revealed that, at the time of the accident, Junell

had been charged with felony possession of marihuana and was out on bond awaiting trial in that case. Conversely, the amount of evidence regarding Junell's alleged membership in the Aryan Brotherhood was minimal, and the State did not mention it in its punishment-phase closing.

Given the strength of the evidence presented at the guilt/innocence phase of the trial, other punishment-phase evidence considered by the jury, and the fact that Junell did not receive the maximum sentence, we cannot conclude that there is a reasonable probability that the result of the proceeding would have been different in the absence of the complained-of evidence. *See Strickland*, 466 U.S. at 694. The record does not "demonstrate *Strickland* prejudice beyond mere conjecture and speculation." *Lampkin*, 470 S.W.3d at 919. We overrule this point of error.

II. Modification of the Judgment

The trial court found Junell indigent and appointed counsel to represent him in the trial court. Because the trial court found Junell indigent, he was presumed to remain indigent absent proof of a material change in his circumstances. *See* TEX. CODE CRIM. PROC. ANN. arts. 26.04(p), 26.05(g) (Supp.); *Walker v. State*, 557 S.W.3d 678, 689 (Tex. App.—Texarkana 2018, pet. ref'd). Even so, the trial court, which also found Junell indigent after trial for purposes of appeal, assessed $5,250.00 in attorney fees against him, as reflected in the judgment on count one.

Under Article 26.05(g) of the Texas Code of Criminal Procedure, a trial court has the authority to order the reimbursement of court-appointed attorney fees only if "the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided . . . including any expenses and costs." TEX. CODE CRIM. PROC. ANN. art. 26.05(g). "[T]he defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees" of

legal services provided. *Armstrong v. State*, 340 S.W.3d 759, 765–66 (Tex. Crim. App. 2011) (quoting *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010)). Since there is no finding of Junell's ability to pay them, the assessment of the attorney fees was erroneous. *See Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013); *see also Mayer v. State*, 309 S.W.3d 552 (Tex. Crim. App. 2010); *Martin v. State*, 405 S.W.3d 944, 946–47 (Tex. App.—Texarkana 2013, no pet.).

"Appellate courts 'have the authority to reform judgments and affirm as modified in cases where there is non reversible error.'" *Walker*, 557 S.W.3d at 690 (quoting *Ferguson v. State*, 435 S.W.3d 291, 294 (Tex. App.—Waco 2014, pet. struck) ("comprehensively discussing appellate cases that have modified judgments")). We sustain this point of error and modify the trial court's judgment by deleting the assessment of $5,250.00 in attorney fees assessed in the judgment on count one.

III. Conclusion

We modify the trial court's judgment by deleting the assessment of attorney fees in the judgment on count one. As modified, we affirm the trial court's judgment on count one and affirm the trial court's judgment on count two without modification.

Ralph K. Burgess
Justice

Date Submitted: July 1, 2020
Date Decided: July 2, 2020

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