Opinion issued August 17, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00506-CR

SAAD M. MIRZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1434626

MEMORANDUM OPINION

A jury convicted appellant, Saad M. Mirza, of evading arrest or detention and, after finding enhancement paragraphs true, assessed his punishment at ten years' confinement. In three issues, appellant argues that: (1) the trial court erred in denying him counsel of his choice; (2) the trial court erred in denying his motion for new trial

asserting that he received ineffective assistance of counsel; and (3) he was entitled to a limiting instruction and jury charge instruction based on the admission of evidence of an extraneous offense.

We conclude that the trial court's denial of appellant's request to retain new counsel on the morning that his trial began was not an abuse of discretion; that appellant failed to present adequate evidence of a conflict of interest with his counsel and thus the trial court did not err in denying his motion for new trial; and the purported extraneous offense evidence was properly admitted as same-transaction contextual evidence and appellant was therefore not entitled to a limiting instruction.

We affirm.

Background

In the early morning hours of July 11, 2014, a complainant in a suspected robbery called 9-1-1 to report that he was chasing a suspect who had just robbed him. Police were dispatched to respond to the 9-1-1 call and observed two vehicles—one driven by the robbery complainant and one driven by appellant. Police attempted to pull appellant over, but he increased his speed and continued driving for over a mile, refusing to pull to the shoulder or exit the freeway where he was driving at a high rate of speed. He eventually came to a stop, was arrested, and was charged with evading arrest or detention.

The trial court appointed an attorney to represent appellant on July 14, 2014. This attorney eventually withdrew in November 2014, when appellant retained counsel. However, his retained counsel moved to withdraw in May 2015, asserting that "[t]here is a conflict of interest between client and attorney. Defendant wants a public defender." The trial court then appointed attorney Bill Gifford to represent appellant. Gifford filed several motions, adopted the motions filed by appellant's two previous attorneys, and appeared for several trial settings that were subsequently reset.

After his case had been reset multiple times, appellant appeared for trial on June 6, 2016. The proceedings began with the trial court stating on the record that it had spoken with appellant and informed him that he would be going to trial that day, at which time appellant expressed a desire to obtain a new lawyer. The trial court observed that appellant had court-appointed counsel, Gifford. The following exchange occurred:

> [Court]: We're going to trial today, and we have a jury outside waiting. Jury selection will commence in a few minutes. Where have you been?
>
> [Appellant]: I was outside. I was speaking to my mother. She said she will be able to give me a new counselor.
>
> [Court]: No, sir. You've had two years to hire counsel, and you have not done it.
>
> [Appellant]: Yes, Your Honor.

[Court]: And you have—

[Appellant]: He threw me on the floor.

[Court]: We are not going to continue this case any further.

[Appellant]: He pressed the table against my chest, Judge.

[Court]: This is two years—have a seat. We're going to select the jury today.

[Appellant]: I understand, but—

[Court]: Sit down right now. Unless your lawyer is here and ready to go to trial, you will go to trial with your court-appointed counsel—

[Appellant]: He pressed the table against my chest today, sir.

[Court]: Sir, I'm talking. You don't interfere with a judge while he's talking. And I'm telling you right now, that is what we are going to do. Have a seat, and let's go to trial.

Giffords then stated on the record that he had been representing appellant for over a year, that appellant's prior retained counsel had withdrawn due to nonpayment, and that appellant had also had another attorney appointed to represent him early on in his case. Gifford summarized the work that he had completed on the case, including filing motions, adopting motions filed by appellant's previous counsel, and advising appellant regarding the State's plea deals. Gifford stated that he was ready to represent appellant at trial.

The jury panel was then admitted to the courtroom and jury selection commenced. After the jury was selected but before the trial court had sworn the jurors appellant interjected:

> [Appellant]: I would like to say this—
>
> [Court]: Be quiet.
>
> [Appellant]: I would—
>
> [Court]: I said be quiet.
>
> [Appellant]: He put the table against my chest today. And I promise—I told him—
>
> [the State]: Judge, I object to the defendant—
>
> [Court]: Take him back to the back, Mr. Bailiff.
>
> [Appellant]: He pressed the table against my chest. I have two new attorneys. And he told me—this is a court-appointed attorney, and he's saying racial slurs to me. I can hire my own attorney. The family said they could hire my own attorney for me.

The trial court then dismissed the jury and addressed appellant's "outburst" with counsel outside the presence of the jury, deciding, "For right now, let's let it go."

The following day, outside the hearing of the jury, Gifford, on appellant's behalf, moved for a mistrial on the ground that "with all the commotion and confusion and everything that happened yesterday, the jury has been so contaminated as to not be able to render a fair and impartial verdict." Gifford also asserted that appellant "is entitled to hire his own lawyer and his mom is here with

money to hire a lawyer. And the case has been going on for two years, and a slight suspension of time for [appellant] to be able to hire a lawyer to get the justice he feels he deserves, he ought to be allowed to do that." The State objected to the motion for mistrial, and the trial court denied the motion, stating:

> [Court]: This case has been pending for a long time. When you were appointed, we gave him the opportunity to hire a lawyer. He has not hired a lawyer. And when he did hire one, it's my understanding that they had not been paid and filed a motion to withdraw.
>
> Now you come before this Court on the day of trial, almost two years later, and he wants to hire a lawyer at this time. He's had ample opportunity to talk to you about the case, get ready for the case, and for nearly two years, we have not. So let the record reflect that, and your motion is denied.
>
> [Appellant]: Your Honor, I asked you yesterday if I can—
>
> . . . .
>
> [Court]: No, sir. You be quiet. You understand? We appointed a lawyer to represent you, and you've had ample opportunity—
>
> . . . .
>
> [Appellant]: And he threw a table against my chest. He took—
>
> [Court]: Take him back to the back and put him up.
>
> [Appellant]: He put a table against my chest.
>
> ([Appellant] removed from the courtroom)
>
> [Gifford]: Your Honor, for the record, I don't blame Mr. Mirza for doing whatever he can do to get the trial dismissed,

> prolonged, or whatever. While he and I don't see eye-to-eye on some things, and he won't necessarily take my advice, I have done nothing to hurt him or whatever.
>
> [Court]: Your comments are well taken. The motion is denied.

The jury and appellant were brought into the courtroom, and the trial commenced.

Prior to questioning its first witness, the State sought to admit a copy of the 9-1-1 call that led police to attempt to detain appellant. Appellant asked "for a cautionary instruction of why it's being offered, as to not the truth of the matter asserted for a certain portion of it, but merely that it's said." The trial court admitted the recording "over any objection." The State played the recording—in which the robbery complainant reported that he was in his car chasing a person who had just robbed him—for the jury.

Officer A. Bowie testified that he received information from dispatch that "[a] complainant was actually chasing someone who had just robbed them." Dispatch provided him and his partner with the caller's current location and driving direction. When Officer Bowie arrived in his patrol car in the described location, he was quickly able to identify the two vehicles because traffic was light and both vehicles—the complainant's Lincoln and appellant's Honda—were driving at a "high rate of speed." After confirming that the Honda was the suspect's vehicle, Officer Bowie attempted to complete a traffic stop. However, appellant did not slow down or otherwise indicate an intention to pull over; rather, appellant "actually

increased speed to . . . maybe about 85 miles per hour." Officer Bowie testified that the section of road where he attempted to pull appellant over had a shoulder and that appellant passed at least one exit that he could have used to come to a safe stop. Other patrol vehicles joined in his pursuit of appellant. Appellant eventually came to a stop near a ramp off of Highway 288 to the 610 Loop, and appellant was arrested. Officer Bowie testified that he pursued appellant for "a little bit over a mile" and that the pursuit lasted for "[r]oughly about a minute."

At the charge conference, Gifford, acting on appellant's behalf, requested an instruction stating: "During your deliberation in this case, you must not consider, discuss, nor relate any matter concerning an alleged robbery or robbery by theft that might have occurred." The trial court clarified, "What's in the evidence is just the reason for the police officer's [attempt to detain appellant]." The State agreed, and the trial court stated, "You cannot withdraw that from evidence at this time[.]" The State then objected to appellant's requested instruction, arguing in part that "[t]here is no instruction on robbery, but the jury is allowed to consider the evidence that was given in this case," which went to the motive for the subsequent actions in evading arrest or detention. The trial court denied appellant's request and charged the jury on the law of evading arrest. Nothing in the charge referenced the robbery reported by the 9-1-1 caller. The jury found appellant guilty of evading arrest and, after

finding an enhancement paragraph true, assessed his punishment at ten years' confinement.

Appellant, now represented by appointed appellate counsel, moved for a new trial, asserting that he received ineffective assistance of counsel. He attached the affidavit of Cynthia Patterson, an investigator with the Public Defender's Office. Patterson averred, "According to [appellant], his trial attorney, [Gifford], demonstrated a racial bias early on in his representation." Appellant also told Patterson that, on the day of trial while he was waiting in the witness room, Gifford "physically assaulted him by pushing him up against a wall with a desk," that Gifford "was trying to pressure [appellant] to enter a guilty plea," and that Gifford made other threats to appellant. Finally, Patterson averred that, "[a]ccording to [appellant], [Gifford] was unwilling to discuss the case and possible defenses prior to trial. They only spoke during resets in the courtroom and never prepared or investigated the case outside of court. [Appellant] was unaware that he was even going to trial on June 6, 2016, until the trial court informed him of the nature of the setting."

The trial court held a hearing on appellant's motion for new trial. No testimony was given, but Patterson's affidavit was admitted into evidence. The State also introduced several reset forms, including one showing that the case was set for trial on June 6, 2016, that was signed by both appellant and Gifford. The State also introduced Gifford's affidavit, in which Gifford averred that he represented

appellant "for over one calendar year . . . [at] eight total court settings," including "two disposition settings, a pretrial motions setting, and four trial settings." He averred that "[a]t no time during my year-long representation of [appellant] did [he] ask for a different lawyer to be appointed, until the day of trial on June 6, 2016, when trial was imminent and [appellant] learned the case would not be reset." Finally, Gifford denied using any violence or racial slurs against appellant: "At no time did I call [appellant] racial slurs or physically assault him. I upheld my duties as his appointed attorney as required under the law—I prepared for trial, offered a defense, and conveyed all plea bargain offers from the State."

The trial court denied appellant's motion for new trial. This appeal followed.

Complaints About Trial Counsel

In his first issue, appellant asserts that the trial court abused its discretion by denying him the right to select new counsel. In his second issue, appellant contends that he received ineffective assistance of counsel due to the conflict of interest created by his trial counsel's alleged mistreatment of him and, thus, the trial court erred in denying his motion for new trial complaining of his counsel's representation. Both of these issues rest on appellant's allegations that his trial counsel mistreated him, creating a conflict of interest and depriving him of his right to conflict-free, adequate representation from an attorney of his choosing.

A. Right to Counsel of Choice

Appellant argues that the trial court erred in denying his right to retain counsel of his choice. The United States and the Texas Constitution guarantee that a defendant in a criminal proceeding has the right to have assistance of counsel, including the right to obtain counsel of the defendant's choosing. *Gonzalez v. State*, 117 S.W.3d 831, 836 (Tex. Crim. App. 2003); *see* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. This right, however, is not absolute and must be balanced with "other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice." *Gonzalez*, 117 S.W.3d at 837; *Brink v. State*, 78 S.W.3d 478, 483 (Tex. App.–Houston [14th Dist.] 2001, pet. ref'd); *see also United States v. Gonzalez–Lopez*, 548 U.S. 140, 152, 126 S. Ct. 2557, 2565–66 (2006) (noting that trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness and against demands of its calendar") (internal citations omitted). A defendant may not manipulate the right to counsel "so as to obstruct the judicial process or interfere with the administration of justice." *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000). "[A]n accused may not wait until the day of trial to demand different counsel or to request that counsel be dismissed so that he may retain other counsel." *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976).

Here, Gifford began representing appellant in May 2015. Over the course of the year between Gifford's appointment to represent appellant and the day appellant's trial commenced, appellant and Gifford had appeared before the trial court on multiple occasions. Appellant did not raise any complaints regarding Gifford's performance during that time. On the morning that appellant's case proceeded to trial, appellant complained about Gifford and asked that the trial court allow him to retain a different attorney. Although appellant stated that his mother was at the court with money to pay another attorney, appellant did not identify any attorney as being prepared to take his case and defend him at trial. The trial court observed that appellant had had two years to hire the counsel of his choice, and it stated, "[U]nless your counsel is here and ready to go to trial, you will go to trial with your appointed counsel." Gifford stated on the record that he was ready to represent appellant at trial.

We conclude that the trial court did not abuse its discretion in denying appellant's request to fire Gifford and proceed with new, unidentified counsel on the morning that his trial was set to commence. *See Webb*, 533 S.W.2d at 784 ("[A]n accused may not wait until the day of trial to demand different counsel or to request that counsel be dismissed so that he may retain other counsel."). Appellant contends that the record reflects his complaints that Gifford assaulted him, and, thus, he was not requesting new counsel in an attempt to manipulate the judicial process.

However, the trial court was entitled to consider all of the information before it in making its ruling, and we will not disturb the trial court's determination absent an abuse of discretion. *See King*, 29 S.W.3d at 566. The trial court could have properly considered the delay implicit in appellant's desire to retain a fourth attorney on the morning of his trial setting and appellant's outbursts on the topic as unduly disruptive to the fair and orderly administration of justice, and it could have concluded that appellant's request was an attempt to manipulate the right to counsel "so as to obstruct the judicial process or interfere with the administration of justice." *See Gonzalez*, 117 S.W.3d at 837; *King*, 29 S.W.3d at 566.

We overrule appellant's first issue.

B. Ineffective Assistance of Counsel

Appellant argues that the trial court erred in denying his motion for new trial, in which he argued that he received ineffective assistance of counsel. He asserts that he had a conflict of interest with Gifford, created by Gifford's alleged assault of him, and that this conflict deprived him of the right to constitutionally effective counsel.

We review a trial court's ruling on a motion for new trial for an abuse of discretion, "reversing only if the judge's opinion was clearly erroneous and arbitrary." *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). We view the evidence in the light most favorable to the court's ruling, must not substitute our

judgment for that of the trial court, and must uphold the ruling if it was within the zone of reasonable disagreement. *Id.*

"A denial of a defendant's right to effective assistance of counsel may result from an attorney's conflict of interest." *Petetan v. State*, —S.W.3d—, 2017 WL 915530, at *42 (Tex. Crim. App. Mar. 8, 2017) (citing *Routier v. State*, 112 S.W.3d 554, 581 (Tex. Crim. App. 2003)). When a defendant asserts ineffective assistance based on an actual conflict of interest, the defendant must establish that his counsel "actively represented conflicting interests" and that the conflict adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S. Ct. 1708, 1719 (1989); *Acosta v. State*, 233 S.W.3d 349, 352–53 (Tex. Crim. App. 2007). "An 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest." *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997); *see Acosta*, 233 S.W.3d at 356 (holding that "trial counsel's self-interest could conceivably be an 'actual conflict of interest' under *Cuyler*"). Until the defendant shows "counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *See Cuyler*, 446 U.S. at 350, 100 S. Ct. at 1719.

Here, appellant asserted in his motion for new trial that he received ineffective assistance of counsel because Gifford had an actual conflict of interest in

representing him. Appellant argues that Gifford assaulted him and directed racial epithets to him, thus creating an "actual and prejudicial conflict of interest" when Gifford later discussed his conduct with the trial court, denied appellant's allegations, and proceeded to represent appellant at trial. In support of his motion for new trial, appellant provided Patterson's affidavit, averring that appellant related to her instances in which Gifford used racial slurs and physically assaulted appellant. At the hearing on the motion for new trial, appellant offered Patterson's affidavit into evidence. The State introduced Gifford's affidavit, in which he denied appellant's allegations and detailed the work he had done in his efforts to represent appellant. The State also presented three certified copies of jury trial reset forms that were signed by both appellant and Gifford. No other evidence was admitted.

The only evidence presented by appellant to support his claim that his personal grievances against Gifford could rise to the level of an actual conflict of interest as contemplated in *Cuyler* was Patterson's affidavit, in which she stated that appellant related to her allegations of abuse that occurred prior to jury selection. Patterson's statements were not based on her own personal knowledge regarding any conflict between Gifford and appellant. In light of Gifford's affidavit, which contradicted the allegations in Patterson's affidavit, the trial court was within its discretion to determine that appellant failed to show that Gifford "actively represented conflicting interests." *See Cuyler*, 446 U.S. at 350, 100 S. Ct. at 1719 (holding that until

defendant has shown that counsel actively represented conflicting interests, he has not established constitutional predicate for his claim of ineffective assistance); *see also Riley*, 378 S.W.3d at 457 (in determining whether trial court abused its discretion in denying motion for new trial, we view evidence in light most favorable to court's ruling, must not substitute our judgment for that of trial court, and must uphold ruling if it was within zone of reasonable disagreement).

Appellant also relies on the portions of the trial transcripts that relate his allegations that Gifford assaulted him, made on the day his trial commenced and again on the following day. These statements were not made as part of appellant's sworn testimony. And even if we were to consider appellant's statements to the trial court as evidence, the record demonstrates that the trial court rejected appellant's account of Gifford's conduct. The record further demonstrates that Gifford worked on appellant's case for over year, adopting the motions of appellant's prior attorneys, filing motions of his own, attending multiple hearings with appellant, discussing plea offers from the State, and representing appellant at trial by, among other things, seeking a mistrial, objecting to evidence, and conducting a vigorous cross-examination of witnesses.

We conclude that appellant failed to demonstrate the existence of an actual conflict of interest. *See Cuyler*, 446 U.S. at 349–50, 100 S. Ct. at 1719; *Acosta*, 233

S.W.3d at 352–53, 356. Accordingly, the trial court did not err in denying his motion for new trial. *See Riley*, 378 S.W.3d at 457.

We overrule appellant's second issue.

Extraneous Offense Instruction

In his third issue, appellant argues that he "suffered some or egregious harm due to the trial court's failure to include a burden of proof instruction and a limiting instruction regarding the extraneous offense of robbery."

During trial, the State offered a recording of the 9-1-1 call in which a complainant asserted that he was chasing someone who had just robbed him. Appellant requested a limiting instruction, which the trial court denied, and the evidence was admitted for all purposes. The State argues that evidence of the robbery call was same-transaction contextual evidence that was required for the jurors to make sense of the charged offense, evading arrest, and we agree.

"Evidence of another crime, wrong, or act . . . may be admissible as same-transaction contextual evidence where 'several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony . . . of any one of them cannot be given without showing the others.'" *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011) (quoting *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000)). "[S]ame-transaction

contextual evidence is admissible only when the [charged] offense would make little or no sense without also bringing in [the same-transaction contextual] evidence." *Id.*

The 9-1-1 call explained why the police attempted to stop appellant, thus resulting in the subsequent actions underlying the charge of evading arrest or detention. Thus, this evidence was admissible because the evading arrest offense would make little or no sense without explaining the 9-1-1 call that resulted in police's attempt to detain appellant. *See id.* No limiting instruction is required when evidence is admitted as same-transaction contextual evidence. *Id.* And when no limiting instruction is given, the jury considers the evidence for all purposes and no instruction is needed in the charge. *See id.*; *Hammock v. State*, 46 S.W.3d 889, 895 (Tex. Crim. App. 2001) ("Because the evidence in question was admitted for all purposes, a limiting instruction on the evidence was not 'within the law applicable to the case,' and the trial court was not required to include a limiting instruction in the charge to the jury.").

The trial court did not err in refusing to grant a limiting instruction when the recording of the 9-1-1 call was admitted, and because the evidence was admitted for all purposes, the trial court was not required to include any kind of limiting instruction in the charge to the jury. *See Devoe*, 354 S.W.3d at 469; *Hammock*, 46 S.W.3d at 895.

We overrule appellant's third issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.

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