Affirmed and Memorandum Opinion filed July 6, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00378-CR

MICHAEL COLE WALLACE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1068463

MEMORANDUM OPINION

Appellant Michael Cole Wallace pleaded "guilty" to the offense of aggravated kidnapping. On appeal, appellant claims that his election to have the trial judge assess his punishment was rendered involuntary by virtue of the trial judge's purported failure to disclose that he would not consider the full range of punishment. Appellant also asserts he was denied effective assistance of counsel at the punishment stage and that the trial court abused its discretion in denying his motion to recuse the judge from presiding at the punishment phase and in denying a hearing on appellant's motion for new trial. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant and two others were charged by indictment with the offense of aggravated kidnapping. The two other men pleaded "guilty" to the charges pursuant to plea agreements before Judge Mark Kent Ellis. Appellant entered a "guilty" plea before Judge Ellis without an agreed recommendation from the State as to punishment. Appellant elected to have the trial judge, Judge Ellis, assess punishment.

At a pre-sentence investigation ("PSI") hearing, Judge Ellis received a PSI report and took judicial notice of the information contained in appellant's file regarding the offense. Appellant's trial counsel urged the trial court to consider deferred adjudication because appellant had been cooperative with the State and investigators and had "turned his life around considerably." Judge Ellis acknowledged appellant's positive life changes and made the following comments to which appellant objects on appeal:

> *No matter how cooperative you are, you couldn't have possibly thought at the time that this happened that you were going to get probation, did you?* I mean, seriously, did you think this was a case where you were just going to walk out of the courtroom and nothing was going to happen to you? *If that's what you thought, you were completely delusional*.
>
> So, based on the paperwork, based on everything filed in this case, I'm going to find you guilty. I'm going to send you to prison for five years. That's the minimum. That's the benefit you get in this circumstance for cooperating, but *there's not a chance in the world that this is a probation case*. This is a violent crime. *All of you should have gotten life in prison, frankly, for what you did, but you didn't.*

(emphasis added). Judge Ellis found appellant guilty and assessed punishment at five years' confinement.

Appellant filed a motion for new trial in which he claimed that his election to have the trial judge assess his punishment was rendered involuntary by Judge Ellis's failure to disclose that he would not consider the full range of punishment. Appellant also asserted that he received ineffective assistance of counsel at the punishment phase as a result of his trial counsel's failure to investigate and present mitigating evidence.

Appellant filed a motion to recuse Judge Ellis, contending that the trial judge was a material fact witness as to whether he was able to consider the full range of punishment, as alleged in his motion for new trial. Appellant also asserted in his motion that Judge Ellis had predetermined that appellant deserved a prison sentence and therefore the judge's impartiality in determining whether appellant received ineffective assistance of counsel, as raised in his motion for new trial, should be questioned. Judge Ellis declined to recuse himself and referred the motion to recuse to an administrative judge, who assigned the case to Judge Debbie Stricklin.

At a recusal hearing before Judge Stricklin, appellant's trial counsel, Carl Pruett, testified that he sought to obtain deferred adjudication and that the State did not oppose it. Pruett testified that before appellant entered his "guilty" plea, the attorneys and Judge Ellis held a conversation off of the record. Based on this conversation, Pruett believed that the judge would consider the full range of punishment. He testified that he had no reason to believe that Judge Ellis would not consider the full range of punishment. Pruett, however, claimed to have been "flabbergasted" by Judge Ellis's "nasty" demeanor in sentencing appellant. Pruett testified that, based on Judge Ellis's comments, he believed Judge Ellis was biased and unable to consider deferred adjudication. Pruett indicated that had he known that the judge would not consider the full range of punishment, he would have advised appellant to forgo pleading "guilty" without an agreed sentencing recommendation and would have set the matter for a jury trial or moved to recuse Judge Ellis sooner. Judge Stricklin denied appellant's motion to recuse Judge Ellis.

At a hearing on appellant's motion for new trial, appellant introduced six exhibits into evidence. Judge Don Stricklin presided over the hearing in Judge Ellis's absence. Appellant's motion for new trial was denied by operation of law.

II. ISSUES AND ANALYSIS

A. Voluntariness of Election to Have Trial Judge Assess Punishment

Appellant claims in his third issue that Judge Ellis could not consider the full range of punishment. Basing his argument on this premise, appellant claims that Judge Ellis's failure to disclose that he could not consider the full range of punishment renders appellant's election to have Judge Ellis assess punishment involuntary, affecting his right to due process. Specifically, appellant contends that absent a disclosure of this alleged fact (that Judge Ellis would not consider the full range of punishment), he was precluded from making a knowing and voluntary punishment election, and, consequently, he was denied the right to have his punishment assessed by an impartial sentencer.

Due process requires a neutral and detached hearing officer. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). A trial court denies an accused due process when it arbitrarily refuses to consider the entire range of punishment or imposes a predetermined punishment. *Jaenicke v. State*, 109 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Absent a clear showing to the contrary, a reviewing court presumes that the trial court was neutral and detached. *Brumit*, 206 S.W.3d at 645; *Jaenicke*, 109 S.W.3d at 796.

Prior to accepting a plea of "guilty" or "no contest," a trial court shall admonish an accused as to the range of punishment, in addition to other consequences of his plea. TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (Vernon 2001). However, there is no mandatory duty for the trial court to admonish an accused as to eligibility for probation. *See Harrison v. State*, 688 S.W.2d 497, 499 (Tex. Crim. App. 1985). If a trial court volunteers an admonishment as to the availability of probation, the trial court has a duty to accurately admonish the accused. *See Ex Parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986). An accused's plea is involuntarily induced if the record shows (1) the trial court volunteered an admonishment that included information on the availability of probation, which creates an affirmative duty for the trial judge to provide accurate

information on the availability of probation; (2) the trial court provided inaccurate information on the availability of probation, leaving the accused unaware of the consequences of his plea; and (3) the accused was misled or harmed by the inaccurate admonishment. *Tabora v. State*, 14 S.W.3d 332, 334 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In determining whether a plea is involuntary, we consider the record as a whole. *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975).

Contrary to appellant's assertions that Judge Ellis failed to disclose that he would not consider the full range of punishment, the record reflects that Judge Ellis did consider the full range of punishment. According to the record of the hearing at which appellant elected to have the trial judge assess punishment, Judge Ellis explained that, at the time appellant entered his plea, Judge Ellis was unfamiliar with the facts of the case. Judge Ellis specifically explained that his mind was open to the possible punishment range from five to ten years' deferred adjudication to five to ninety-nine years' confinement. *See Roman*, 145 S.W.3d 316, 319 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (comparing as analogous a judge's comments that he would consider full punishment range without knowing the facts with a juror who considers the full range of punishment unless certain facts are shown). Judge Ellis then explained that he needed to consider the evidence of the case. Appellant acknowledged his understanding of what the judge had explained. Judge Ellis encouraged appellant to cooperate in the preparation of the PSI report so that the judge could make an informed decision as to punishment.

At the punishment hearing, when Judge Ellis found appellant guilty and sentenced appellant to five years' confinement, Judge Ellis grounded his decision "based on the paperwork, based on everything filed in this case." The PSI report contained a summarized version of the police offense report, appellant's own detailed account of the offense, among other things, and letters from appellant's friends and family in his

support. In reference to the violent nature of the crime,[1] Judge Ellis remarked, "[T]here's not a chance in the world that this is a probation case."

The record does not support appellant's allegation that Judge Ellis arbitrarily failed to consider the full range of punishment or that the judge assessed punishment based on a predetermination. *See Jaenicke*, 109 S.W.3d at 797; *Roman*, 145 S.W.3d at 320. It is clear from the judge's comments that he considered a sentence within the full range of punishment. *See Brumit*, 206 S.W.3d at 645 (distinguishing the cases of *Earley v. State*, 855 S.W.2d 260 (Tex. App.—Corpus Christi 1993, pet. dism'd), and *Jefferson v. State*, 803 S.W.2d 470 (Tex. App.—Dallas 1991, pet. ref'd), upon which appellant relies, on this basis). Likewise, the record is clear that the trial court grounded its decision on the evidence presented. *See id.* It was only after the PSI report was admitted into evidence that the trial court made the comments to which appellant now objects. *See id.* (providing that judge's statements were made after hearing all of the evidence). These comments are not sufficient to rebut the presumption of a neutral and detached court. *See Jaenicke*, 109 S.W.3d at 795; *Roman*, 145 S.W.3d at 320.

Because the judge clearly indicated that he would consider the full punishment range and grounded his decision on the evidence presented, appellant's assertions are without merit. There is no evidence that the trial court provided an erroneous admonishment to appellant or to his trial counsel. *See Tabora*, 14 S.W.3d at 335 (concluding trial court did not erroneously indicate that an accused was eligible for or would be granted deferred adjudication). Appellant's plea could not be involuntary on this basis. *See id.* (holding no affirmative showing in record demonstrates the trial court voluntarily or erroneously admonished appellant regarding deferred adjudication). Simply because appellant did not receive the sentence he and Pruett had hoped would be

[1] The record suggests that appellant and his co-defendants entered a hotel room and beat the complainant to the point of unconsciousness. Appellant and the co-defendants bound the complainant's hands, feet, and mouth with duct tape, carried the complainant to a vehicle, and drove the complainant to another county.

assessed does not mean that his punishment election was involuntary. *See Graves v. State*, 803 S.W.2d 342, 345 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (concluding that counsel's recommendation to plead guilty on anticipation of a lesser sentence than received, does not render a plea unknowing or involuntary). We overrule appellant's third issue.

B. Denial of Motion to Recuse Trial Court Judge

In his first issue, appellant contends that Judge Debbie Stricklin abused her discretion in denying his motion to recuse Judge Ellis. Texas Rules of Civil Procedure 18a and 18b govern motions to recuse a trial judge in both criminal and civil cases. TEX. R. CIV. P. 18a, 18b; *see Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (applying Rule 18a to criminal cases). Recusal is warranted when: (1) the trial judge's impartiality may be questioned, (2) the judge has a personal bias or prejudice concerning the subject matter of the case or party, and (3) the judge has been a material witness concerning the proceeding. TEX. R. CIV. P. 18b(2)(a), (b), (d). We review a trial court's denial of a motion to recuse under an abuse-of-discretion standard. *See* TEX. R. CIV. P. 18a(f); *Wesbrook v. State*, 29 S.W.3d 103, 120 (Tex. Crim. App. 2000). Under this standard, we will not reverse a ruling on the motion if it is within the zone of reasonable disagreement. *See Wesbrook*, 29 S.W.3d at 120; *Kemp v. State*, 846 S.W.2d 289, 306 (Tex. Crim. App. 1992). We consider the "totality of the evidence" elicited at the recusal hearing. *Kemp*, 846 S.W.2d at 306. The impartiality of a trial judge is presumed absent a clear showing to the contrary. *See Wesbrook*, 29 S.W.3d at 120–21.

Appellant argues that Judge Ellis was a material fact witness for appellant's motion for new trial regarding whether Judge Ellis considered the full range of punishment. Appellant asserts that Judge Ellis's knowledge of the case was not based solely on his knowledge from the testimony and events within his courtroom.[2] Generally,

[2] As reflected above in our disposition of appellant's third issue, the record does not support appellant's assertions that Judge Ellis failed to consider the full range of punishment.

to warrant recusal, partiality or bias must stem from an extra-judicial source and affect the judge's opinion on the merits of the case. *See Roman*, 145 S.W.3d at 321. A judge who possesses independent knowledge of a case may be subject to recusal; however, if a judge's knowledge is derived solely from the testimony and events witnessed by the judge in the courtroom, the judge does not become a witness and the judge's recollection of the proceedings is not considered testimony. *See Dickerson v. State*, 87 S.W.3d 632, 642 (Tex. App.—San Antonio 2002, no pet.); *George v. State*, 20 S.W.3d 130, 137–138 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd), *disagreed with on other grounds*, *Cooper v. State*, 45 S.W.3d 77 (Tex. Crim. App. 2001).

Evidence presented at the recusal hearing refutes appellant's claim that Judge Ellis's decision to sentence appellant to confinement was based on extrajudicial knowledge of the case. *See Roman*, 145 S.W.3d at 321. The transcript of Judge Ellis's comments at the sentencing hearing, which was admitted at the recusal hearing, reflects that Judge Ellis grounded his decision to find appellant guilty and assess punishment at five years' confinement "on the paperwork, based on everything filed in this case." At the recusal hearing, appellant's trial counsel, Pruett, agreed that the record reflects Judge Ellis stated that the decision for confinement was based on the paperwork, such as the PSI report, as filed in the case. *See id.*

Pruett testified that at the sentencing hearing Judge Ellis represented to the parties that he already was familiar with the facts of the case. Pruett did not have the impression that Judge Ellis knew the facts of the case from extra-judicial sources such as media reports or that Judge Ellis actually witnessed the facts related to the offense. Pruett confirmed that the tenor of Judge Ellis's comments stemmed from presiding over the cases of appellant and the co-defendants and that in the course of those proceedings, the judge had become aware of the facts of the offense. *See Roman*, 145 S.W.3d at 320–22 (concluding that based on the evidence gleaned from a co-defendant's trial, the judge's knowledge of such evidence did not stem from an extra-judicial source). Pruett

acknowledged as a fair reading of the record that the judge's decision to sentence appellant to five years' confinement was predicated on, among other things, information and facts gleaned from the PSI report. *See id.*

The record reflects that Judge Ellis's comments were based on his personal knowledge of the evidence; his comments suggested that the type of sentence was proportionate to the gravity of the offense. *See Jaenicke*, 109 S.W.3d at 796; *Roman*, 145 S.W.3d at 320. The evidence, as presented at the recusal hearing, reflects that Judge Ellis's comments implicitly were based on the judge's personal knowledge of the evidence as witnessed by him in the course of the proceedings and that he would assess a punishment commensurate with the evidence of the crime. *See Roman*, 145 S.W.3d at 320. Under the prevailing standard, the record of the recusal hearing does not support the assertion that Judge Ellis's knowledge of the case stemmed from extra-judicial sources, but rather that Judge Ellis formed an opinion as to punishment based on the specific facts of the case. *See id.* at 321. On this basis, Judge Ellis was not a material witness to the events. *See Dickerson*, 87 S.W.3d at 642; *George*, 20 S.W.3d at 138. Therefore, the decision to deny Judge Ellis's recusal on these grounds was not arbitrary, capricious, unreasonable, or based on an uninformed opinion. *See Roman*, 145 S.W.3d at 320. Judge Debbie Stricklin did not abuse her discretion in denying appellant's motion to recuse on these grounds. *See id.* at 321.

Appellant also asserts that recusal was warranted because Judge Ellis's comments at the sentencing hearing indicate Judge Ellis's inability to fairly and impartially resolve whether appellant received ineffective assistance of counsel, as alleged in his motion for new trial. Absent proof of an extra-judicial source, the only proper basis for the recusal on grounds of partiality or bias is an indication of a high degree of favoritism or antagonism. *Roman*, 145 S.W.3d at 322. Partiality or bias may be a ground for recusal only when it is of such a nature and extent as to deny the movant due process of law. *See Kemp*, 846 S.W.2d at 305. The test is whether a reasonable person, knowing all the

circumstances involved, would have a reasonable doubt as to the impartiality of the judge. *Id.*; *see Mosley v. State*, 141 S.W.3d 816, 834 (Tex. App.—Texarkana 2004, pet. ref'd). An adverse ruling, alone, is not indicative of the high degree of favoritism or antagonism that would impart the perception of impartiality or bias. *See Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994) (providing that judicial remarks that are critical, disapproving of, or hostile to counsel, parties, or cases do not support a challenge to bias or partiality); *Roman*, 145 S.W.3d at 322 (involving judge who expressed belief that an accused did not deserve probation, which was not deemed the type of antagonism to warrant recusal when the judge's opinion was based on the evidence and facts of the case).

Given the facts of this case, Judge Ellis's comments were not enough to create doubt as to Judge Ellis's impartiality. *See Jaenicke*, 109 S.W.3d at 795. As reflected by the record, Judge Ellis assessed appellant's sentence at five years' confinement, which was the minimum of the statutory range of confinement, and based his decision on the paperwork filed in the case. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 20.04 (Vernon 2003); TEX. CODE CRIM. PROC. ANN. art. 42.12. § 5(b) (Vernon 2006). A judge's case-specific opinion within the statutory range of punishment is not arbitrary. *Roman*, 145 S.W.3d at 321. Accordingly, the comments were not sufficient to rebut the presumption of a neutral and detached trial court. *See Jaenicke*, 109 S.W.3d at 797. Therefore, Judge Debbie Stricklin did not abuse her discretion in denying appellant's motion to recuse. We overrule appellant's first issue.

C. Ineffective Assistance of Counsel Claim

In his fourth issue, appellant asserts he received ineffective assistance of counsel in the punishment phase of trial. Appellant argues that his counsel was ineffective in the following ways: (1) generally failing to investigate and present mitigating evidence, (2) failing to call a mental health expert regarding appellant's substance abuse and mental health history, (3) failing to correct false information within the PSI report and present mitigating evidence, and (4) failing to advise appellant to change his punishment election.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.051 (Vernon 2005). This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92. Moreover, appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Alleged Failure to Investigate and Present Mitigating Evidence

Appellant contends in general that his trial counsel failed to investigate or present mitigating evidence, although he does not specify what mitigating evidence his trial counsel would have discovered had he investigated. Appellant refers to Pruett's failure to interview and call available, albeit unidentified, witnesses whose testimony appellant claims would have been beneficial. The record reflects that Pruett procured numerous positive letters from appellant's friends and relatives on appellant's behalf to encourage Judge Ellis to assess deferred adjudication as punishment. *See Jagaroo v. State*, 180 S.W.3d 793, 800 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (distinguishing the facts of *Milburn v. State*, 15 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd), upon which appellant relies, on the basis that the trial counsel in *Milburn* admitted

he neither investigated nor evaluated punishment evidence). These statements, as well as a statement from appellant, were either included in the PSI report or added as an addendum to the report, which the trial court considered in assessing appellant's sentence. *See id.* Appellant has not shown how testimony by live witnesses would have differed from the statements and letters attached to the PSI report. *See id*. Appellant has not shown that his trial counsel's performance was deficient or that he was prejudiced by his counsel's performance in this regard. *See id.* (concluding an appellant failed to establish either prong of the analysis for ineffective assistance of counsel); *see also Jaenicke*, 109 S.W.3d at 800 (concluding an appellant failed to establish reasonable probability that outcome of sentencing proceeding would have been different).

Alleged Failure to Contact a Mental Health Professional and Present Evidence of Mental Health

Appellant also claims that his trial counsel was defective for failing to discuss his mental health or substance-abuse history with him, failing to ask about appellant's physicians, failing to ask appellant to authorize his physicians to release his medical files and discuss his treatment, and failing to have appellant examined by a mental health professional prior to sentencing.

With respect to appellant's complaint that Pruett failed to discuss his mental health with him, the record affirmatively contradicts this allegation. By affidavit admitted at the hearing on appellant's motion for new trial, Pruett indicated that he discussed appellant's mental health with him before sentencing. Pruett knew, and the PSI report reflects, appellant was "borderline bi-polar" and had been prescribed medications before the offense, which appellant had discontinued. Pruett knew, and the PSI report reflects, that appellant had received prescription medication for anxiety at the time the report was prepared.

Pruett indicated that appellant had offered information about his mental health and substance-abuse history for compilation of the PSI report. Pruett confirmed that he read a copy of the report. According to the report, although appellant was diagnosed with "bi-

polar mania," appellant claimed that he was not bi-polar. In the report, appellant admitted suffering from depression in the past. Appellant reported smoking marijuana occasionally, using cocaine once, using methamphetamine, which resulted in his participation in the charged offense, and suffering from untreated alcoholism from the age of thirteen.

By affidavit, Pruett claimed that appellant's substance-abuse history was apparent from the information contained in the PSI report. Pruett stated that he did not obtain copies of appellant's medical records and did not discuss appellant's treatment with appellant's physicians. Pruett did not believe that appellant suffered from mental health problems. Because Pruett believed appellant was sane, competent to stand trial, fully understood the consequences of his plea, and was able to assist in the preparation of his defense, Pruett did not have appellant examined by a mental health examiner.

Although appellant points to affidavits from two psychiatrists who treated appellant for depression and anxiety prior to the offense and an affidavit from a psychologist who evaluated appellant after the offense, none of the doctors' affidavits suggest appellant was not competent to stand trial. The fact that a defendant has been treated by a psychiatrist does not constitute evidence of a defendant's present incompetency to stand trial. *Valderas v. State*, 134 S.W.3d 330, 337 (Tex. App.—Amarillo 2003, no pet.) (involving counsel's failure to obtain medical records relating to mental health history and failure to seek a mental competency exam). Although there is some evidence in the record that appellant suffered from depression or bi-polar disorder, or both, when entering his "guilty" plea, appellant confirmed that he had never been declared insane, mentally incompetent, or mentally ill. Appellant's own statements in the PSI report indicate that appellant knew his conduct was dangerous and wrong, and he attributed his participation in the offense to methamphetamine. Appellant took full responsibility for his actions.

Appellant has not pointed to any evidence in the record that he suffered from a mental illness rendering him legally incompetent or insane and justifying the need for a mental health examination. Even if we were to conclude Pruett failed to conduct a full investigation and failed to develop appellant's mental-health history, appellant has failed to provide any explanation as to how development of his mental-health history and substance-abuse history might have changed the result of the sentencing, especially given that the PSI report made the trial court aware of appellant's untreated alcohol abuse, his abuse of controlled substances, and some of appellant's history of depression, anxiety, and bi-polar diagnosis for which he received treatment and prescription medication. *See Rivera v. State*, 123 S.W.3d 21, 32 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). In weighing the evidence against the totality of available mitigating evidence, we must assess prejudice by determining whether the additional mitigation evidence as a whole was sufficient to influence the trial court's appraisal of the accused's culpability and punishment. *See Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *see, e.g.*, *Ex parte Gonzalez*, 204 S.W.3d 391, 393 (Tex. Crim. App. 2006) (indicating that additional evidence at habeas hearing, including psychiatrist testimony, would have been effective in reducing an accused's moral culpability and leading to a reduced sentence).

Appellant has not demonstrated that there is a reasonable probability the trial court would have sentenced appellant to deferred adjudication. Appellant was sentenced to five years' confinement, which was the minimum of the statutory range of confinement. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 20.04; TEX. CODE CRIM. PROC. ANN. art. 42.12. § 5(b). Judge Ellis made it clear in citing the violent nature of the offense that the facts of this case did not warrant probation even though appellant was eligible for probation. Appellant has not shown that the result of any mental competency examination or admission of appellant's medical records regarding his mental-health history or substance-abuse history would have changed the outcome of the case. *See Valderas*, 134

S.W.3d at 337. Consequently, appellant has not demonstrated that he was prejudiced. *See id.*; *see generally Strickland*, 466 U.S. at 694.

Alleged Failure to Correct Misinformation in the PSI Report and Present Mitigating Evidence from the State's File

Appellant complains that Pruett did not correct false information in the PSI report by presenting evidence that the incident occurred in the context of a "drug deal gone bad" and that the complainant was involved in dealing narcotics. Contrary to appellant's arguments on appeal, the PSI report contains appellant's own statements that he arranged to meet the complainant to "buy some meth."

Appellant also complains that Pruett failed to present mitigating evidence of the following facts taken from the State's file:

- Appellant protected the complainant and the complainant's girlfriend from his co-defendants.
- Appellant prevented a co-defendant from sexually assaulting the complainant's girlfriend.
- Appellant prevented a co-defendant from accessing a firearm during the offense.
- Appellant "looked confused" and "took orders" from a co-defendant.
- The complainant admitted his connection to drug dealers and the existence of a dispute between the complainant's family and a co-defendant's family. The complainant also indicated that appellant apologized to him and offered the complainant a ride back to Houston. The complainant knew the defendants for several months before the offense and threatened revenge on them.
- The complainant had a prior criminal record.

Although appellant asserts that Pruett did not present this mitigating evidence, all of these facts are either referenced directly or suggested indirectly throughout the PSI report or are reflected in appellant's own statement describing the offense, also included in the PSI report. *See Jagaroo*, 180 S.W.3d at 800 (involving a complaint that counsel failed to present mitigating evidence). Consequently, appellant has not shown that his counsel's performance was deficient or that he was prejudiced by his counsel's

performance. *See id.* (concluding an appellant failed to establish either prong of an analysis for ineffective assistance of counsel).

Failure to Advise Appellant to Change his Punishment Election

Appellant claims he received ineffective assistance because Pruett failed to advise him to change his punishment election. Appellant asserted by affidavit in support of his motion for new trial that he followed Pruett's advice in pleading "guilty" without an agreed recommendation on punishment in the hope that he would receive deferred adjudication. According to appellant, reasonably competent counsel would have known that Judge Ellis's remarks demonstrated that the judge would not consider the full punishment range. Consequently, appellant claims, Pruett should have advised him to have his punishment assessed by a jury. Appellant has not demonstrated that there is a reasonable probability that the jury would have assessed a more lenient punishment had appellant changed his punishment election. *See Rivera*, 123 S.W.3d at 31–32. Even presuming that the first prong of the *Strickland* test were satisfied as to Pruett's failure to advise appellant to change his punishment election, appellant has failed to satisfy the second prong of the *Strickland* test.

For the reasons stated above, we overrule appellant's fourth issue.

D. Denial of Hearing on Motion for New Trial

In his second issue, appellant contends that the trial court erred in denying appellant a hearing on his motion for new trial. Contrary to appellant's assertions, the record reflects that Judge Don Stricklin, in Judge Ellis's absence, conducted a hearing on appellant's motion for new trial on the 75th day after appellant's sentence was imposed. At this hearing, appellant offered and the trial court admitted six exhibits into evidence including affidavits from appellant, Pruett, appellant's appellate counsel, and psychiatrists and psychologists who treated or evaluated appellant. The State did not object to these exhibits. Appellant did not endeavor to present live testimony nor did appellant object to presenting the evidence by affidavit. After the trial court admitted the

exhibits, appellant stated, "Your Honor, we would rest for purposes of this proceeding." The motion was subsequently overruled by operation of law.

Because the record shows appellant actually received a hearing on his motion for new trial as he requested, we can find neither error nor harm. *See* TEX. R. APP. P. 33.1(a)(1) (requiring record to reflect that the complaining party obtained a ruling from the trial court on a timely, specific request, motion, or objection); *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008) (requiring a party to obtain adverse ruling by trial court in order to preserve error for appellate review). To the extent appellant's argument encompasses a complaint that he was only permitted to present evidence via affidavit, he has waived this complaint. *See* TEX. R. APP. P. 33.1(a)(1); *Lee v. State*, 186 S.W.3d 649, 657–58 (Tex. App.—Dallas 2006, pet. ref'd) (providing that an accused's failure to object to trial court's requirement that evidence be submitted by affidavit waives error). We therefore overrule appellant's second issue.

Having overruled appellant's four issues on appeal, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
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