Affirmed and Memorandum Opinion filed December 23, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00599-CR

RONALD JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1193521

MEMORANDUM OPINION

Appellant Ronald Jones appeals his conviction for possession of cocaine with intent to deliver, claiming he received ineffective assistance of counsel at trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by indictment with the possession of cocaine, weighing more than four grams and less than two hundred grams, with intent to deliver. The charge was enhanced by two prior felony convictions. Appellant pleaded "not guilty" to the charged offense.

At a jury trial, Deputy Guillen testified that he stopped appellant's vehicle for speeding and noticed appellant's slurred speech, glassy eyes, and slow responses. He believed appellant was intoxicated and asked appellant to exit the vehicle. As appellant exited the vehicle, the officer observed a white, powdery substance on the seat where appellant had been sitting. The white powdery substance later tested positive for cocaine. The deputy suspected that the substance was cocaine and detained appellant in the back of his patrol vehicle. The deputy performed a check for any outstanding warrants and discovered appellant had an outstanding arrest warrant for assault on a family member. The deputy placed appellant in custody based on the warrant.

The deputy claimed to have searched appellant, finding $3,855 in small denominations wadded up in appellant's pocket. According to the deputy, appellant explained that the money belonged to his wife, who was a passenger in appellant's vehicle. In response to the deputy's inquiry about the cash, appellant's wife denied knowing anything about the money. The deputy claimed that appellant's wife was unable to produce identification upon his request, and she was detained in a second patrol vehicle that had arrived on the scene.

Although the deputy indicated that, at the time, he did not need appellant's consent to search the vehicle, the deputy testified that appellant gave consent to search the vehicle. The deputy searched appellant's vehicle and discovered a clear, plastic bag containing thirty-nine smaller "dime bags" of cocaine in the armrest of the driver's side door of the vehicle, amounting to about 5.25 grams of cocaine. When the deputy again asked appellant about the money, appellant stated that not all of the money was from the sale of narcotics. Following a search of the vehicle, the deputy claimed to have released the vehicle to appellant's wife because she had a driver's license and insurance.

Outside of the jury's presence, the trial court held a hearing on appellant's motion to suppress based on Deputy Guillen's testimony. As relevant to this appeal, the trial court expressly found the deputy credible in his reason for stopping appellant's vehicle

for the traffic violation. The court found that appellant had been speeding, appeared to be under the influence of alcohol or narcotics at the time of the stop, had what appeared to be narcotics in the officer's plain view, and gave consent to search the vehicle. The trial court denied appellant's motion to suppress.

At trial and in the jury's presence, Officer Shaver testified that as part of his work on the case, he received the money that Deputy Guillen seized in his search of appellant. Officer Shaver testified that he donned latex gloves, counted the bills, and hid it for a police narcotics dog to detect and find. The narcotics dog found the hidden money and gave a "positive alert," indicating that the dog detected narcotics on the bills. On cross-examination, Officer Shaver confirmed that the narcotics dog "hit on the money" in a search conducted at Officer Shaver's office; Officer Shaver indicated that he was not at the scene of appellant's arrest.

Appellant called his wife to testify. When asked whether appellant had ever gotten "into any trouble" since 2005, during the time that they have been a couple, the wife responded that she learned of appellant's warrant on the night Deputy Guillen stopped appellant's vehicle. The trial court asked the parties to approach the bench, where the following exchange, in pertinent part, occurred:

> [TRIAL COURT]: Unless you clear this up, you have really left a huge, huge opening for them to bring in—that would appear to me to leave a false impression to the jury that this guy is absolutely clean as a whistle and I don't know if he is or not, but I do know that he's been indicted with two prior convictions.
>
> [DEFENSE COUNSEL]: The case was dismissed.
>
> [STATE]: Your Honor, Counsel has opened the door for the assault [on a] family member.

After further conversation, the State confirmed that since 2005, appellant had only the warrant for assault on a family member.

In the State's cross-examination, appellant's wife testified that the appellant had an outstanding warrant related to a charge for assault on a family member pertaining to another woman and gave the other woman's name. When appellant objected on relevance grounds, the trial court ruled the State could ask about the warrant, but that the State could not seek details. The wife confirmed that appellant had an outstanding warrant for assault on a family member, but that she was not involved in that incident.

The jury found appellant guilty of the charged offense. Appellant pleaded "true" to two enhancement paragraphs. The trial court assessed punishment at sixty years' confinement.

ISSUE AND ANALYSIS

In a single issue, appellant claims he received ineffective assistance of counsel at trial. According to appellant, his trial counsel committed the following acts that amounted to deficient representation: failed to inform the trial court about credibility problems with Deputy Guillen's testimony in closing arguments at the suppression hearing, failed to object to Deputy Guillen's testimony about appellant's open warrant for assault on a family member, and failed to cross-examine Deputy Shaver about the narcotics dog's positive alert on the money seized during the stop.

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. art. 1.051 (West 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). When, as in this case, no proper evidentiary record is developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). If there is no hearing or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. *Stults v. State*, 23 S.W.3d 198, 208–09 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The Court of Criminal Appeals has stated that it should be a rare case in which an appellate court finds ineffective assistance on a record that is silent as to counsel's trial strategy. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). On such a silent record, this court can find ineffective assistance of counsel only if the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). There was no motion for new trial filed in this case.

Failure to Inform Trial Court of the Witness's Contradictory Testimony

Appellant first argues that his trial counsel's representation was deficient during the suppression hearing because his trial counsel failed to inform the trial court in closing arguments at the suppression hearing that Deputy Guillen was not credible. Appellant points to the deputy's testimony that he released the vehicle to appellant's wife after she produced a driver's license, which contradicted the deputy's earlier testimony that the wife was detained for being unable to produce identification.

The substance of an attorney's closing argument is inherently a product of trial strategy. *See Ortiz v. State*, 866 S.W.2d 312, 315 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Trial strategy will be reviewed only if the record reflects that the argument was without any plausible basis. *Id.* Perhaps appellant's trial counsel believed that a stronger or more persuasive argument at the suppression hearing was to question whether probable cause existed for the stop and search. Applying strategy in closing argument does not constitute ineffective assistance of counsel. *Jenkins v. State*, 870 S.W.2d 626, 631 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

Failure to Object to Extraneous-Offense Evidence

Appellant also claims his trial counsel was deficient in failing to object to Deputy Guillen's testimony about the outstanding warrant for domestic violence. To succeed on his claim of ineffective assistance for failure to object, appellant must demonstrate that the trial court would have erred in overruling the objection if his trial counsel had objected. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). If the evidence at issue was admissible, then appellant cannot show that his trial counsel was deficient for failing to object. *See Oliva v. State*, 942 S.W.2d 727, 732 (Tex. App.—Houston [14th Dist.] 1997), *pet. dism'd*, 991 S.W.2d 803 (Tex. Crim. App. 1998); *Cooper v. State*, 707 S.W.2d 686, 689 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd).

According to appellant, this extraneous-offense information was inadmissible under Texas Rule of Evidence 404(b). Although this rule renders evidence of "other crimes, wrongs, or acts" inadmissible to show an accused's character in conformity therewith, this evidence may be admissible for other purposes, such as contextual evidence, as an exception to the rule if the evidence is relevant apart from character conformity. *See* TEX. R. EVID. 404(b); *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000); *Swarb v. State*, 125 S.W.3d 672, 681 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd). Evidence of extraneous offenses that are indivisibly connected as a continuous transaction to the charged offense or are closely interwoven with the case on

trial may be admitted for the purpose of illuminating the nature of the crime alleged or for providing context for the offense. *Camacho v. State*, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993); *Mayes v. State*, 816 S.W.2d 79, 86–87 n.4 (Tex. Crim. App. 1991). Contextual evidence may be admissible as an exception under Rule 404(b) only to the extent that the evidence provides the jury with information essential to understanding the context and circumstances of the events. *See Mayes*, 816 S.W.2d at 86; *Swarb*, 125 S.W.3d at 681 (determining that evidence of an arrest warrant unrelated to the charged offense was admissible).

To be admissible, contextual evidence also must satisfy Texas Rule of Evidence 403. *See* TEX. R. EVID. 403; *Swarb*, 125 S.W.3d at 681 (providing that under a Rule 403 balancing test, contextual evidence is rarely inadmissible if it sets the stage for the jury's understanding of the whole criminal transaction). In considering the evidence under Rule 403, we consider (1) the strength of the evidence in making a fact more or less probable, (2) the potential for the extraneous evidence to irrationally but indelibly impress the jury, (3) the trial time expended developing the extraneous evidence, and (4) the strength of other evidence available to prove a fact of consequence. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). Rarely will prejudicial value render contextual evidence inadmissible. *Mann v. State*, 718 S.W.2d 741, 744 (Tex. Crim. App. 1986).

In this case, evidence of appellant's outstanding warrant for assault on a family member could be characterized as helpful to the jury's understanding of the facts in dispute because it provided the context to show why Deputy Guillen placed appellant in custody and searched appellant and how Deputy Guillen found the money in appellant's pocket. *See Swarb*, 125 S.W.3d at 682 (involving evidence of an unrelated arrest warrant as evidence so intertwined with the charged offense, it was helpful to the jury's understanding of the charged offense of narcotics possession). Therefore, the testimony about appellant's outstanding warrant was admissible as an exception to Rule 404(b). *See id.*

Under a Rule 403 balancing test, we also conclude that the prejudicial effect of the outstanding warrant did not substantially outweigh its probative value. *See* TEX. R. EVID. 403; *Swarb*, 125 S.W.2d at 682 (indicating that limited details of the arrest warrant were introduced in the State's case-in-chief and trial court offered limiting instruction to jury to consider the evidence only for informational purposes). When appellant's trial counsel objected on relevance grounds to the wife's testimony about the warrant on cross-examination, the trial court cautioned the State not to elicit details about the outstanding warrant. Very few details about the warrant or the facts involved in the offense were introduced. Neither party expended much time developing facts associated with the warrant.

Because the testimony about appellant's outstanding warrant was proper as contextual evidence, the trial court would not have erred in overruling an objection. *See Swarb*, 125 S.W.2d at 682. Therefore, appellant's trial counsel was not deficient for failing to object to this evidence. *See Oliva*, 942 S.W.2d at 732.

Failure to Effectively Cross-Examine a Witness

Finally, appellant claims his trial counsel should have cross-examined Officer Shaver more effectively about the narcotics dog's "positive alert." Appellant cites *$43,7740.00 U.S. Currency v. State*, 266 S.W.3d 178, 184 (Tex. App.—Texarkana 2008, pet. denied), a civil case involving forfeiture, and claims the jury should have been apprised that the dog's positive alert, standing alone, does not constitute evidence that the money was used in connection with a narcotics transaction.

The State presented evidence that 39 small bags of cocaine, weighing in aggregate 5.25 grams, were discovered in the armrest of appellant's vehicle. The white, powdery substance inside appellant's vehicle and in Deputy Guillen's plain view tested positive for cocaine. Deputy Guillen testified that appellant tacitly acknowledged that at least some of this money was related to illegal narcotics activity when appellant stated that not all of the money in his pocket was associated with the sale of narcotics. The State,

therefore, was not relying solely on the dog's detection of narcotics on the money to connect appellant to the charged offense.

Even presuming that appellant satisfied the first prong of *Strickland*, appellant has not shown how the results of his trial would have differed had his trial counsel elicited the desired testimony, especially in light of the overwhelming evidence in support of the conviction. A small amount of cross-examination does not prove ineffective assistance, particularly when the appellant fails to show what would have been achieved by further cross-examination. *See Matthews v. State*, 830 S.W.2d 342, 347 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (providing that a reviewing court should not "second guess" trial strategy in counselor's failure to cross-examine a witness through "appellate hindsight"). Even the complete absence of cross-examination can be considered sound trial strategy. *See Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). Therefore, appellant has failed to satisfy the second prong of *Strickland.* *See generally Strickland*, 466 U.S. at 694.

For the reasons stated above, we overrule appellant's sole appellate issue, and we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Brown.
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