In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00037-CR

DONNELL TRAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 08-02726

MEMORANDUM OPINION

A jury found Donnell Traylor guilty of the offense of aggravated robbery. He was sentenced to forty years confinement and assessed a $10,000 fine. Traylor asserts the trial court erred in allowing improper jury argument during punishment and in admitting into evidence a gun stolen during the robbery. He also claims his trial counsel was ineffective. Although the State's argument was improper, a complete review of the record establishes the error does not require reversal of the judgment. We also conclude no error occurred in admitting the evidence, and appellant has not demonstrated trial counsel's ineffectiveness. We therefore affirm the judgment.

ISSUE ONE

In Traylor's first issue, he complains the trial court erred in overruling his objection when the State argued matters outside the record during the punishment stage. Trial counsel must confine their arguments to the record. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). References to facts that are neither in evidence nor inferable from the evidence are improper. *Id.* Generally, proper jury argument involves summation of the evidence, reasonable deduction from the evidence, answers to argument of opposing counsel, and pleas for law enforcement. *Id.* "[E]rror exists when facts not supported by the record are interjected in the argument, but such error is not reversible unless, in light of the record, the argument is extreme or manifestly improper." *Id.*

During the punishment stage, the State cross-examined Traylor's mother regarding her knowledge of his tattoos:

> Q. . . . Do you know him to have a tattoo that says "G Unit, honor, loyalty, money" on his left inner forearm?
>
> A. I never paid it any attention.
>
> Q. Okay. Do you know him to have a tattoo on his left inner forearm that says "murder, hoodsta, naked female"?
>
> A. No.
>
> . . . .
>
> Q. Do you know him to have a tattoo on his left outer bicep that says "five dog, bitch killer, dank life"?
>
> A. No.
>
> . . . .
>
> Q. How about a tattoo on his mid to lower abdomen that says "money maker"?
>
> A. I've never seen any of those tattoos.

. . . .

Q. Tattoo on his mid abdomen with a gun with dollar signs?

A. Ma'am, I've never seen any of those tattoos. I know nothing about them.

During closing argument in the punishment phase of the trial, the prosecutor commented, "Money, murder, hoodsta, bitch killer, money maker, a gun with dollar signs. See that theme in [Traylor]'s life?" Other than Traylor's mother's testimony that she had no knowledge of those tattoos, no other witness testified regarding Traylor's tattoos or any involvement by Traylor in gang activity. Traylor's counsel objected to the argument and stated there was "no factual evidence those tattoos even exist." Without explanation, the trial court overruled the objection. As the State concedes, the argument was outside the record and was improper.

Non-constitutional error "that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b); *Brown*, 270 S.W.3d at 572, n.2; *Martinez v. State*, 17 S.W.3d 677, 692-93 (Tex. Crim. App. 2000). Traylor argues he was harmed by this argument because the State "injected gang tattoos into the evidence when there was no evidence of gang activity[.]" Determining harm under Rule 44.2(b) in improper argument cases requires balancing the severity of the misconduct, curative measures, and the certainty of the punishment assessed absent the misconduct. *Martinez,* 17 S.W.3d at 692-93 (citing *Mosley v. State,* 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)); *see also Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

In evaluating the severity of the misconduct, we must consider "whether [the] jury argument is extreme or manifestly improper [by] look[ing] at the entire record of final arguments to determine if there was a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial." *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997). Viewing the State's argument as a whole and after a review of the record, we question whether the State's argument was made in a willful or calculated effort to deprive Traylor of a fair and impartial trial. *See Brown*, 270 S.W.3d at 573; *Cantu*, 939 S.W.2d at 633. On this record, we cannot reach that conclusion.

Although the trial court adopted no curative measures, we must determine the likelihood of the same punishment absent the improper argument. *See Hawkins*, 135 S.W.3d at 77. During the guilt/innocence stage, the jury heard testimony from an owner of Nick's Grocery in Port Arthur and two employees of the store. The two employees testified that while closing the store on the night of the robbery, they followed their normal routine by placing the money from the registers in Ziploc bags and then placing the bags in a duffle bag along with a revolver kept at the store during store hours. The employees testified that after they closed the store, they went to the owner's car in the store's parking lot and dropped the duffel bag in the trunk of the car. A man with his face covered pulled a gun on them and demanded the money. The owner opened the trunk, the robber took the duffle bag, and after unsuccessfully attempting to get into one of the employee's vehicles, the robber ran to the alley behind the store.

A witness to the incident followed the robber and saw him getting into the passenger's side of a silver Pontiac. The witness wrote down the license plate number of the vehicle. The police transported the witness to a residence where the vehicle was located and the witness identified the vehicle and the vehicle's driver.

The identified man, Anthony Wilson, voluntarily told the police that "Dirty D" was the main actor in the robbery, and that "Dirty D" said he would give him around $1,000 of the proceeds for driving the get-away car. Wilson advised the police that his proceeds of the robbery were at his mother's house underneath a bed.

Wilson and his mother consented to a search of his mother's house. The police found $1,110 next to Wilson's wallet underneath the mattress at his mother's house. The officer conducting the search testified he knew from prior experience that "Dirty D" was Traylor's street name.

Wilson testified at trial that Traylor, who he knew as "Dirty D," had offered him $1000 to drive his car to a certain location so that he could rob a store. He drove the car to Nick's Grocery, let Traylor out on a side street, and waited. Traylor returned a few minutes later with a money bag and gave Wilson some of the money. He dropped Traylor off at Carver Terrace and then went to his mother's house and hid the proceeds underneath the guest mattress.

A confidential informant informed the police on the night of the robbery that a man known as "Dirty D" committed the robbery and was on his way to Affordable Auto

in a white Chevy Lumina. Officers set up surveillance at Affordable Auto and observed a white Chevy Lumina pull into the parking lot. After the vehicle left the premises, another officer stopped the vehicle because the driver initiated a turn without using a turn signal. Traylor fled in the vehicle, and then on foot.

An officer retrieved a revolver on the ground outside the driver's side door. The officer identified State's Exhibit No. 1 as the revolver. When Traylor was taken into custody, he had over five hundred dollars in cash.

During the punishment phase of the trial, the jury heard evidence of Traylor's threatening, disruptive, and violent behavior since his incarceration. They also heard evidence of his prior criminal history. The punishment assessed was not the maximum, and considering the State's evidence, would likely have been assessed without the improper argument. *See* TEX. PEN. CODE ANN. § 29.03(a)(2),(b) (Vernon 2003); *see also* § 12.32 (Vernon Supp. 2009). We conclude that the error does not support a reversal of the judgment. *See* TEX. R. APP. P. 44.2(b). Issue one is overruled.

ISSUE TWO

Traylor's second issue raises ineffective assistance of counsel. Appellate courts review claims of ineffective assistance of counsel under the standards set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The defendant must show his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id.*; *State v. Morales*, 253 S.W.3d 686, 696 (Tex.

Crim. App. 2008). "In evaluating the first component, reviewing courts must not second-guess legitimate strategic or tactical decisions made by trial counsel in the midst of trial, but instead 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Unless the record sufficiently demonstrates that counsel's conduct was not the product of a tactical or strategic decision, we should "presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *Id.* at 696-97 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). An appellate court's review of ineffective assistance claims is "highly deferential" to trial counsel as we presume "that counsel's actions fell within the wide range of reasonable and professional assistance." *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007) (citing *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); *Chambers v. State*, 903 S.W.2d 21, 33 (Tex. Crim. App. 1995)). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Traylor maintains his trial counsel rendered ineffective assistance by failing to (1) get a psychiatric evaluation of Traylor, (2) request the disclosure of the confidential informant, (3) subpoena necessary defense witnesses and business records, and (4) object

to irrelevant victim impact testimony at the guilt/innocence stage of the trial. He also complains his counsel put on evidence detrimental to his case.

Traylor did not file a motion for new trial. Absent an evidentiary hearing in which defense counsel is provided the opportunity to explain his actions and trial strategy, and in which Traylor is able to fully develop evidence supporting his claim of ineffective assistance, we generally must presume that counsel rendered reasonably effective assistance. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (appellant failed to establish deficient performance absent evidence in the record to rebut the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance). Issue two is overruled.

ISSUE THREE

In his third issue, Traylor argues the trial court erred in admitting into evidence the gun stolen during the robbery. Traylor asserts there are no identifiable markings or characteristics in the photograph of the gun, which was substituted in the trial record in place of the gun, or ownership papers indicating the gun admitted into evidence was the gun stolen during the robbery. He claims he was harmed by the trial court's admission of the gun into evidence. He argues the gun was the corroborating evidence necessary for the consideration of the accomplice testimony tending to establish Traylor's guilt. *See* TEX. CODE CRIM. PROC. ANN. art. § 38.14 (Vernon 2005).

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX. R. EVID. 901(a). *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007). We review a ruling admitting evidence for abuse of discretion and must uphold the trial court's admissibility ruling if it falls "within the zone of reasonable disagreement." *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). Error occurs when the trial court's ruling admitting the evidence "is so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005).

During trial, the State questioned the owner of the store regarding whether she could identify State's Exhibit No. 1 as the gun stolen during the robbery:

> Q. So, they -- the managers would put all of the cash money and the coin money into separate money bags --
> A. Right.
> Q. -- like Ziploc bags?
> A. Right, and then -- and then into the big canvas bag.
> Q. Okay. Was there anything else that was placed in that canvas bag on a nightly basis?
> A. Yes, the keys and the gun.
> Q. Okay. And can you describe that gun?
> A. I believe it was a .38, a dark barrel. The hammer was broken off.
> Q. And was that a very distinctive characteristic of that gun?
> A. Yes.
> Q. How long had you-all had that gun at the store?
> A. Years. I don't -- I really don't know how many years, but it was a long time.
> . . . .
> Q. I'll show you, Ms. Plagman, what's been marked for identification as State's Exhibit No. 1 and ask you if you recognize that.

A. Yes, ma'am.

Q. Do you recognize this to be the gun that was kept at Nick's and was placed in the canvas money drop bag every night?

A. Yes, ma'am.

Q. And this was something that had been done for years and years at Nick's?

A. Yes, ma'am.

Q. And you recognize this gun so distinctly because of --

A. The hammer.

Q. -- the hammer being broken off?

A. Broken off, uh-huh.

. . . .

Q. You've already identified . . . , State's Exhibit No. 1; and it's a very unique characteristic, a broken hammer. You're confident that this is the gun that belonged at Nick's Grocery for many, many years?

A. Yes, ma'am.

Q. And this was the same gun that was placed in your money -- duffle bag every evening on a very regular basis?

A. Yes, ma'am.

Q. Since January 10th of 2008, have you seen this gun?

A. No, ma'am, not since Monday.

[State's counsel]: Your Honor, at this time I tender State's [Exhibit No.] 1.

[Defense counsel]: Your Honor, we object in that there's no recording of the serial -- serial identification number on this weapon.

THE COURT: Okay. That's overruled. State's [Exhibit No.] 1 is admitted.

An employee working the night of the robbery also testified that he recognized State's Exhibit No. 1 as the revolver that he always put in the duffle bag at night when he "gave the drop to [the owner] or [her husband]," just as he did the night of the robbery. Although he acknowledged he did not know the serial number of the gun, he knew State's Exhibit No. 1 was the gun he placed in the bag the night of the robbery because of the broken hammer. Another employee testified that she recognized State's Exhibit No. 1

as the gun she placed in the money bag on the night of the robbery and she recognized it by the "broken piece right there." The trial court's admissibility ruling was not "so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *McDonald*, 179 S.W.3d at 576. Issue three is overruled.

The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on March 2, 2010
Opinion Delivered May 12, 2010
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.