In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00051-CR

DONNELL TRAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 08-02728

MEMORANDUM OPINION

A jury found Donnell Traylor guilty of the offense of aggravated robbery.[1] He was sentenced to eighteen years confinement and assessed an $8,000 fine. Traylor asserts the trial court erred in allowing improper jury argument, admitting into evidence a gun stolen during the robbery, and removing an exhibit without replacing it with a photograph. He

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[1] Separately, Traylor also appealed another case involving another victim. Appellant does not raise a double jeopardy issue. Robbery is a form of assault. *See Ex parte Hawkins*, 6 S.W.3d 554, 560 (Tex. Crim. App. 1999). The Court of Criminal Appeals in *Hawkins* explained that "Prosecuting the applicant twice for robbery did not violate the Double Jeopardy Clause of the Fifth Amendment because the allowable unit of prosecution for robbery is each victim, and he assaulted two victims in the course of committing a theft." *See id*. at 561.

also claims his trial counsel was ineffective. The jury argument complaint was not preserved, we conclude no error requiring reversal occurred in admitting and retaining the evidence, and appellant has not demonstrated trial counsel's ineffectiveness. We therefore affirm the judgment.

BACKGROUND

Traylor was indicted for the January 10, 2008 aggravated robbery of Phillip Breaux in the parking lot of Nick's Grocery in Port Arthur, Texas. A witness reported the license plate of the get-away car, which led to the apprehension of Anthony Wilson. Wilson admitted Traylor asked him to assist in the robbery by driving Traylor to Nick's Grocery in exchange for a portion of the proceeds from the robbery. A tip from a confidential informant the evening of the robbery also implicated Traylor as the robber and led law enforcement to Traylor's whereabouts. Traylor was stopped after he committed a traffic violation, but he drove away, lost control of his vehicle, and then fled on foot. The police recovered a gun, admitted into evidence as State's Exhibit No. 1, on the ground outside the door of Traylor's abandoned vehicle. Traylor had $620 in cash when he was apprehended.

ISSUE ONE

In Traylor's first issue, he complains improper jury argument, that the complaining witness was traumatized, infected the trial with unfairness resulting in a

denial of due process. During the State's presentation of evidence, the State questioned Mary Plagman, an owner of Nick's grocery and victim of the robbery:

> Q. And, Mary, you weren't physically harmed that night, were you?
>
> A. Not physically.
>
> Q. It doesn't matter if it was a toy gun to you, did it?
>
> A. No, ma'am.
>
> Q. This pointed right at your head (indicating) caused you fear that night, and it still does --
>
> A. (Crying) (Nodding head up and down)
>
> Q. And I apologize for doing that to you. I am sorry.
>
> A. Excuse me.
>
> Q. Scary, wasn't it?
>
> A. Yes, ma'am.

Subsequently, during the State's closing argument in the guilt/innocence phase of the trial, the prosecutor commented:

> You saw how Mary Plagman reacted - - when I probably shouldn't have done it - - when I put it right in her face like he did that night. You saw how she acted in this courtroom to this thing with a safety lock on it, sitting here inside, lights on, controlled environment. How in the world do you think those two felt that night when this was at his head and in her face? . . . Those people were traumatized out there that night. They had a split-second look at what was going on with a gun at their head.

Traylor concedes he did not preserve error at trial. *See* TEX. R. APP. P. 33.1, 44.2(b). Traylor argues nevertheless that a new trial is required because the State's

demonstration with the gun during Plagman's testimony was "blatant prosecutorial misconduct" and the comment during closing argument after the demonstration "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

We do not find appellant's argument persuasive. During defense counsel's cross-examination of Plagman, he attempted to challenge the degree of harm caused by the robber by asking, "You were not injured physically, were you?" On re-direct, the prosecutor engaged in the demonstration with the gun. While the prosecution admitted in argument the conduct was improper, defendant did not object to the prosecutor's action, nor did he object during argument. We conclude any objection was not preserved, and the issue cannot be raised for the first time on appeal. *See* TEX. R. APP. P. 33.1. 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 until the day of trial, (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 and failed to object to the State's improper conduct during jury argument.

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.

ISSUES THREE AND FOUR

In his third and fourth issues, Traylor argues the trial court erred in admitting into evidence the gun stolen during the robbery and that he was harmed by the admission because 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). He also contends the trial court erred in retaining the gun. He maintains the exhibit is "missing" and the trial court's action in retaining the gun without replacing it with a photograph, and in the absence of a motion to substitute, thereby breaks the chain of custody and eliminates any way of determining if the gun at trial was the gun taken during the robbery.

"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 the proponent claims." TEX. R. EVID. 901(a); *see also 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 Plagman regarding whether she could identify State's Exhibit No. 1 as the gun stolen during the robbery:

> Q. I'll show you what's been marked, Mrs. Plagman, as State's Exhibit No. 1 and ask you if you recognize this (tendering).
>
> A. Yes, ma'am.
>
> Q. How is it that you recognize this?
>
> A. The hammer on that gun is broken right there (indicating).

The State offered the gun into evidence and Traylor objected on the basis of the absence of any identification marks on the gun that Plagman could identify as the same gun as the gun stolen during the robbery. The trial court overruled the objection and admitted the gun into evidence. Plagman further testified that she was "absolutely positive" that State's Exhibit No. 1 was the gun placed in the canvas bag at Nick's Grocery each night and that she recognized it as a .38 revolver. Phillip, one of the victims of the robbery and employee of Nick's Grocery, testified that he recognized State's Exhibit No. 1 as the gun

kept in the store and he identified it by the "broken hammer on the back[.]" He stated he was sure that the night of the robbery he put State's Exhibit No. 1 in the canvas bag that was stolen. Barbara Davis, another employee of Nick's Grocery, also identified State's Exhibit No.1 as the .38 revolver that was kept under the register at the store and placed in the money bag the night of the robbery. She also identified it because of its broken hammer. Two police officers dispatched regarding the robbery testified that, based on their training and experience, the broken hammer on State's Exhibit No. 1 was a unique identifying characteristic on the gun. 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.

Traylor argues it was reversible error for the trial court to remove State's Exhibit No. 1 from evidence without replacing it with a photograph and in the absence of a motion to substitute. According to Traylor, because the "exhibit is missing, and the chain of custody has been broken, there is no way to determine if any gun or picture of a gun is the gun taken in the robbery . . . [and] this court cannot determine if there are identification marks that can definitely say [it is] the same gun taken in the robbery."

We have already determined the trial court did not err in admitting State's Exhibit No. 1 into evidence. At the close of trial and after the jury was dismissed, the trial court stated that it would "hold on" to State's Exhibit No. 1 and advised the State to file a motion to have the gun returned to the owner. The court stated that a motion "may be

able to [be] file[d]" to photograph the gun and substitute the photograph in the record. The State responded, "I will look it up." Traylor did not object.

In place of State's Exhibit No. 1 is a document that says, "STATE'S EXHIBIT NO. 1 --.38 Revolver (RETAINED WITH COURT)[.]" Article 2.21(b) and (c) require a court reporter "[a]t any time during or after a criminal proceeding" to "release for safekeeping any firearm or contraband received as an exhibit in that proceeding" to either the sheriff or the law enforcement agency that took possession or produced the firearm at the proceeding and hold the exhibit and release it "only to the person or persons authorized by the court in which such exhibits have been received or dispose of them as provided by Chapter 18." TEX. CODE CRIM. PROC. ANN. art. 2.21(b), (c) (Vernon Supp. 2009). The record does not reflect that State's Exhibit No. 1 is "missing." Issues three and four are 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 McKeithen, C.J., Gaultney and Kreger, JJ.