In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00447-CR

MARCOS DESHAWN ADAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 10853JD

MEMORANDUM OPINION

A jury found Marcos Deshawn Adams guilty of the offense of impersonating a public servant. Adams pleaded true to the enhancements and the trial court sentenced Adams to thirty-five years in prison. Adams argues that he was provided ineffective assistance of counsel, that the trial court erred in admitting certain evidence, and that the court erred in denying an oral motion for recusal.

BACKGROUND

LaDonna Martin testified she paid Adams, who pretended to be a probation officer, $2,140 in delinquent probation fees to secure her son's release from jail. Her son

was incarcerated. She explained that her son's girlfriend, Tonya Rhodes, told Martin that she had met with the probation officer. Rhodes told Martin that the probation officer "was going to help" if Martin could meet him at a restaurant in Jasper and bring approximately $600. Martin and Rhodes went to the restaurant, and Martin waited in the car while Rhodes went inside with the money. Martin saw a man who was "dressed really nice" and had a briefcase. The man, whom Martin identified at trial as Adams, walked into the restaurant. Rhodes returned with a receipt for the money. Later, Rhodes told Martin that they had to bring another $1,500 to the same restaurant. Martin borrowed the money. She and Rhodes went to the same restaurant and met with Adams. Martin testified Adams took the money and gave her a receipt. She testified that he called her later and told her that her son would be released from jail. Her son was not released from jail.

INEFFECTIVE ASSISTANCE CLAIM

Adams argues that his trial counsel should have challenged for cause veniremembers 25 and 30. To prevail on an ineffective assistance claim, the appellant must show (1) counsel's performance was deficient, and (2) a probability, sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Perez v. State*, 310 S.W.3d 890, 892-93 (Tex. Crim. App. 2010). An appellant must satisfy these requirements by a

preponderance of the evidence. *Perez*, 310 S.W.3d at 893. If the appellant fails to do so, the appellate court must affirm the judgment. *Id.* at 893, 897.

Trial counsel's explanation for the allegedly deficient conduct is important to the appellate review. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). The record here contains no motion for new trial or testimony concerning the alleged ineffective assistance. When an appellant fails to show that counsel's conduct was not the result of a strategic decision, "a reviewing court 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.'" *State v. Morales*, 253 S.W.3d 686, 696-97 (Tex. Crim. App. 2008) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

Counsel for the State asked the veniremembers if they knew Adams. Veniremember 25, identified as "Officer" by State's counsel, acknowledged that he knew Adams from "[s]everal law enforcement encounters," as well as personally. When asked whether he could be fair and impartial if he were to serve on the jury in this case, veniremember 25 responded, "Yes, sir." When State's counsel asked if any of the veniremembers knew Adams's mother and step-father, who had the same surname as veniremember 25, the record shows that State's counsel stated, "Officer . . . I've already talked with you about [Adams]."

Veniremember 30 said that Adams's failure to testify would indicate his guilt and "it would be really, really hard for me to get past that personal bias in my head and make a fair and impartial decision based on that." Counsel for the defense and the State later questioned veniremember 30 outside of the jury's presence. She acknowledged that she understood that it was the State's burden to prove Adams guilty beyond a reasonable doubt. She indicated that if Adams did not testify and the State did not meet its burden, she would follow the court's instructions and return a not-guilty verdict.

The record shows that although veniremember 25 knew Adams, he stated unequivocally that he could be fair and impartial. Veniremember 30 said she would find Adams not guilty if the State did not meet its burden. On this record it does not appear likely that the veniremembers would have been struck for cause if challenges had been made. *See Holland v. State*, 761 S.W.2d 307, 319 (Tex. Crim. App. 1988) (not ineffective in failing to do a futile act).

Adams also argues that counsel should have exercised peremptory strikes on these two veniremembers. Counsel used all available peremptory strikes on jurors lower in number, and more likely to be selected for the jury. Adams has not shown counsel's performance to be deficient. *See Perez*, 310 S.W.3d at 893.

OUT-OF-COURT STATEMENTS

Adams maintains the trial court erred in allowing witness LaDonna Martin to testify to statements made to her by Rhodes. On two different occasions, Adams's

counsel objected to Martin's testimony on the basis of hearsay. The first objection was sustained. After counsel for the State asked why she and Rhodes went to the restaurant, Martin testified that Rhodes told her that she had met the probation officer and he was going to help. Defense counsel responded, "Your Honor, I'm going to object to any answers responding as 'she said.'" The State argued that the testimony "goes to state of mind." The trial court overruled the objection.

Adams argues that the "state of mind" exception to the hearsay rule is inapplicable, because Martin's testimony regarding her "memory or belief of what Tonya Rhodes said or did are statements that should not have been admitted because . . . they were statements offered to prove the fact (albeit by inference) that [Adams] was the party that Tonya Rhodes had been in contact with." The State maintains that the trial court acted within its discretion in overruling the objection to Martin's testimony, because the testimony was offered to show why Martin accompanied Rhodes to the restaurant.

Regardless, the admission of the evidence was harmless. Tex. R. App. P. 44.2(b). Martin identified Adams at trial as the man to whom she handed the money at the second meeting. A restaurant employee working at the time of the two meetings knew Adams, had seen him during the two meetings, and identified him from the company's surveillance video as the man meeting with Rhodes and Martin. A handwriting analyst testified that the signatures on the receipts received by Martin from the man at the restaurant were Adams's handwriting.

Adams contends on appeal that our review should extend to all of Martin's hearsay testimony, because defense counsel objected "to any answers responding as 'she said[,]'" which Adams asserts was a "running" objection. A defendant claiming a trial court erred in admitting evidence must preserve the issue by a proper objection and by obtaining a ruling on that objection. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). Rule 33.1(a) of the Texas Rule of Appellate Procedure states that the record must show the "complaint was made to the trial court by a timely request, objection, or motion." The objection must state "the grounds for the ruling . . . sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context[.]" Tex. R. App. P. 33.1(a). The requirement to preserve error has given rise to the "contemporaneous objection" rule, which requires a party to object "every time allegedly inadmissible evidence is offered." *See Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) (quoting *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984)). There are exceptions to the contemporaneous-objection rule; one is to request a "running" objection and receive a ruling on that request from the trial court. *Id.* at 858-59. Even if Adams's objection could be characterized as a "running" objection, the trial court overruled the objection.

As for Adams's argument that he was "deprived of the right of confrontation," and that Martin's testimony regarding what Rhodes told her "violates the Confrontation Clause of the 6th Amendment to the U.S. Constitution," Adams did not object at trial on

that basis. A hearsay objection is not sufficient to preserve error on a confrontation claim. *See Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005); *Holland v. State*, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991); *see also* Tex. R. App. P. 33.1(a).

MOTION TO RECUSE

Finally, Adams argues that his motion for recusal at the punishment phase of the trial preserved the issue for appellate review, and that the trial court erred in denying the motion. Prior to the trial, Adams's counsel knew of the possible existence of a judicial complaint by Adams against the trial judge. Adams filed the complaint months before trial. At trial, Adams handed his counsel "what appear[ed] to be a letter in response to the [complaint Adams] filed from the Judicial Board of Conduct acknowledging that they had received his [complaint] against [the trial judge] with some other instructions." Adams's counsel approached the trial court about the letter immediately after the trial but Adams's counsel did not file a motion to recuse at that time. Prior to Adams's sentencing hearing, Adams's counsel made an oral motion to recuse the trial judge. Adams's counsel requested the trial judge's removal based on "the mere fact that [the trial court] has been made aware that [a complaint] is definitely filed and pending against him[.]" The trial judge denied the motion.

A recusal motion generally must be filed at least ten days before trial and must be verified. *See* Tex. R. Civ. P. 18a(a) (amended 2011);[1] *Arnold v. State*, 853 S.W.2d 543,

[1] The recusal procedures set out in Rule 18a apply in criminal cases. *De Leon v. Aguilar*, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004) (orig. proceeding). Effective August 1,

544-45 (Tex. Crim. App. 1993); *Barron v. State of Tex. Attorney Gen.*, 108 S.W.3d 379, 383 (Tex. App.—Tyler 2003, no pet.). The provisions of Rule 18a obligating a trial judge to recuse himself or refer the motion to the presiding judge of the administrative judicial district apply when a written, verified motion to recuse is filed. *Id.* If the basis for recusal does not become apparent until later, the defendant preserves the complaint by promptly filing the written, verified motion when the basis for recusal is discovered. *See Rosas v. State*, 76 S.W.3d 771, 774 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Martin v. State*, 876 S.W.2d 396, 397 (Tex. App.—Fort Worth 1994, no pet.). Counsel was aware of a possible complaint more than ten days before the punishment hearing. Adams did not timely file a verified written motion to recuse. *See* Tex. R. App. P. 18a(a); *Barron*, 108 S.W.3d at 383. The issue was not preserved for appellate review. *See Arnold*, 853 S.W.2d at 544-45.

Appellant's issues are overruled. The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on August 25, 2011
Opinion Delivered October 19, 2011
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Before Gaultney, Kreger, and Horton, JJ.

2011, Rule 18a was amended. Similar to its predecessor, Rule 18a requires that the movant must file a verified motion to recuse or disqualify a judge sitting in the case as soon as practicable after the movant knows of the ground for disqualification or recusal. *See* Tex. R. Civ. P. 18a.