In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00084-CR

MICHAEL DESHANE WASHINGTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court No. 1422778D

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

When Allison Williams returned with her children to her Colleyville home after her morning workout, she discovered that someone had broken a pane of glass out of her front door. Fearing for her and her children's safety, she took them to a neighbor's and called the police. After the police arrived, she determined that nothing more had been disturbed, except in her bedroom, which was in disarray. She discovered that all of her jewelry, including two family heirloom rings, was missing. Later that day, Michael DeShane Washington pawned the two family heirloom rings at First Cash Pawn. Consequently, Washington was convicted by a Tarrant County[1] jury of burglary of a habitation[2] and, after enhancement, was assessed seventy-two years' imprisonment and a fine of $5,000.00. On appeal, Washington complains that he was denied effective assistance of counsel at trial as a result of his trial counsel's alleged errors during the punishment phase of his trial. Because we find that ineffective assistance of counsel has not been shown, we affirm the trial court's judgment.

During the punishment phase of the trial, the State called Officer David Baker of the Dallas Police Department. Baker testified that he has known Washington[3] since 2001 when he became involved in the investigation of ten to twenty break-ins of houses in the North Dallas area. All of the break-ins were similar in that entry was gained by breaking a pane out of the front door window

[1]Originally appealed to the Second Court of Appeals in Fort Worth, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Second Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[2]*See* TEX. PENAL CODE ANN. § 30.02(a)(1), (2) (West Supp. 2017).

[3]Washington was also known as Michael Freeman.

next to the door knob and, after gaining entry, the suspect would go to the master bedroom, remove any jewelry, and exit the house. Washington was suspected because a car he was driving was identified with the break-ins. He was caught after another officer working with Baker saw Washington walk out of a residence and then determined that the window next to the door had been broken and that items in the master bedroom had been moved around. Baker and another officer, who had been surveilling his car, tackled Washington when he returned to his car. When they did so, jewelry from a jewelry box carried by Washington went everywhere. Baker testified that Washington went to prison for the 2001 burglary.

Baker also testified that, in 2005, Washington became the suspect in similar offenses when it was learned he had been released from prison. He explained that the burglaries were carried out in the same manner and not too far from where the 2001 burglaries had occurred. After a witness observed Washington break into a house and called the police, Washington was arrested for the 2005 burglary and went to prison. Baker also testified regarding Washington being identified as a suspicious person in 2015 by a homeowner in a neighborhood that had experienced a recent burglary. As a result, Washington was once again put under surveillance. Washington's trial counsel did not object to any of Baker's testimony.

On cross-examination, Baker testified that, out of all of the burglaries, Washington had been convicted of two burglaries in 2001 and one in 2005. He also acknowledged that much of his testimony was based on information provided by third persons he was working with in his investigative unit. Baker admitted that he had not been present for Washington's convictions, but that Washington received sentences of seven years in 2001 and twenty-five years in 2005.

The State also introduced documentary evidence of prior convictions and arrests through a Tarrant County Sheriff's Office fingerprint analyst. Certified copies of judgments of conviction showed that Washington had been previously convicted of burglary of a habitation in Dallas County in 2006, for which he received a sentence of twenty-five years; that Washington had been convicted of two burglaries of a habitation in Dallas County in 2002, and of two burglaries of a habitation in 1991, and received sentences of seven years and fifteen years, respectively; and that Washington had been convicted of aggravated perjury in Dallas County in 1991 and received a sentence of fifteen years. Certified copies of records from Tom Green County showed that Washington had also received a three-year, probated sentence in that county in 1985 for burglary of a motor vehicle.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel for his or her defense. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The right to effective assistance of counsel does not mean, however, "errorless or perfect counsel whose competency of representation is to be judged by hindsight." *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006).

To prevail on his ineffective-assistance claim, Washington must prove by a preponderance of the evidence (1) that his counsel's performance was deficient, that is, that it fell below an objective standard of reasonableness and (2) that it is reasonably probable that, except for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 687–88, 694; *Ex parte Martinez*, 330 S.W.3d 891, 900–01 (Tex. Crim. App. 2011). For us to find that Washington's trial counsel was ineffective, the trial record must

affirmatively demonstrate his deficiency. *Lopez v. State*, 343 S.W.3d 137, 142–43 (Tex. Crim. App. 2011). It is insufficient to show that his trial counsel's acts or omissions were merely questionable. *Id.* We presume that trial counsel had a sound trial strategy, and this presumption cannot generally be overcome unless there is evidence in the record of counsel's reasons for his conduct. *Martinez*, 330 S.W.3d at 901. When a claim of ineffective assistance of counsel is raised for the first time on direct appeal, the record "is in almost all cases inadequate to show that counsel's conduct fell below an objectively reasonable standard of performance." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). Nevertheless, "when no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as she did." *Id*. However, where the reviewing court "can conceive potential reasonable trial strategies that counsel could have been pursuing," the court "simply cannot conclude that counsel has performed deficiently." *Id*. at 103. Thus, when a party raises an ineffective assistance of counsel claim for the first time on direct appeal, the defendant must show that, "under prevailing professional norms," *Strickland*, 466 U.S. at 690, no competent attorney would do what trial counsel did or no competent attorney would fail to do what trial counsel failed to do. *Andrews*, 159 S.W.3d at 102.

In assessing prejudice, "we look to the totality of the circumstances and evidence presented to determine if there is a reasonable probability that, but for Counsel's deficient performance, the result of the proceeding would have been different." *Martinez*, 330 S.W.3d at 903 (citing *Strickland*, 466 U.S. at 694). "A reasonable probability" is defined as "a probability sufficient to

undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Further, in determining whether the alleged deficiencies prejudiced Washington, we presume that the jury acted in accordance with the law. *Id.* Failure to satisfy either prong of the *Strickland* test is fatal. *Ex parte Martinez*, 195 S.W.3d 713, 730 n.14 (Tex. Crim. App. 2006); *Andrews*, 159 S.W.3d at 101.

Washington contends that his trial counsel rendered ineffective assistance of counsel because (1) he failed to object to the hearsay contained in Baker's testimony, (2) he failed to object that proof of the extraneous offenses that did not result in convictions was not sufficient to enable a rational jury to find they had been proven beyond a reasonable doubt, and (3) during Baker's testimony, he failed to request a limiting instruction regarding extraneous offenses.[4] Washington argues that there could not be a reasonable trial strategy for these lapses. Further, he argues that, although he had seven prior convictions, the implication that he had committed significantly more burglaries must have influenced the jury in its punishment assessment. We disagree.

Although Washington argues that there could not be a reasonable trial strategy for these alleged errors by his trial counsel, he did not file a motion for new trial, so trial counsel was not given the opportunity to explain his actions. As acknowledged by Baker, some of his testimony was based on information he received from other officers involved in the several investigations of Washington. While some of Baker's testimony may have been hearsay, Washington's trial counsel may have decided it was better not to risk the State bringing additional officers to testify regarding Washington's extraneous offenses, and thereby emphasize those extraneous offenses. Regarding

[4]Although Washington designates these contentions as three separate issues, he treats them as one issue in his argument, and we shall do the same.

the ten to twenty burglaries Washington was suspected of committing in 2001, Baker testified that all of them had similar characteristics: entry gained by breaking a glass pane in the front door, unlocking the door, proceeding directly to the master bedroom where the jewelry is taken, and then exiting the house. These characteristics corresponded to the method employed in the burglary in this case, for which Washington had been found guilty. In a non-capital case, evidence of extraneous misconduct is admissible in a punishment hearing if the trial court determines that the jury could rationally find the defendant is criminally responsible for the misconduct. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2017); *Smith v. State*, 227 S.W.3d 753, 759–60 & n.16 (Tex. Crim. App. 2007). Thus, trial counsel may have decided to not emphasize these suspected extraneous offenses, reasoning that the trial court was likely to admit the testimony. Instead, trial counsel elicited testimony on cross-examination that, out of all the burglaries suspected to have been committed by Washington in 2001, he had only been convicted of two. We cannot say that this was not a reasonable trial strategy, particularly when coupled with the trial court's instruction that the jury was not to consider any extraneous offense unless they found that it was proven beyond a reasonable doubt.

Finally, Washington faults trial counsel for failing to request a contemporaneous limiting instruction that the jury was not to consider extraneous offenses that were not proven beyond a reasonable doubt. The Fort Worth Court of Appeals has held that, "[w]hen the record is silent on trial counsel's reasons for not seeking a limiting instruction, it is reasonable to conclude that the decision was the product of some strategic motive." *Harkcom v. State*, No. 02-12-00576-CR, 2016 WL 3960581, at *4 (Tex. App.—Fort Worth July 21, 2016, no pet.) (mem. op., not designated for

publication)[5] (citing *Agbogwe v. State*, 414 S.W.3d 820, 837–38 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Aldaba v. State*, 382 S.W.3d 424, 433 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd); *Ali v. State*, 26 S.W.3d 82, 88 (Tex. App.—Waco 2000, no pet.)). Further, a limiting instruction was included in the trial court's charge on punishment.[6] The record does not reflect whether this instruction was included *sua sponte* by the trial court or whether Washington's trial counsel requested its inclusion. Trial counsel may have reasoned that it was more advantageous for his client to insure that the limiting instruction was included in the court's charge and not emphasize the extraneous offenses by requesting a contemporaneous limiting instruction. Therefore, we cannot say that these alleged errors by trial counsel were not based on a reasonable trial strategy.

Finally, even if we were to assume one or more of the alleged errors showed ineffective assistance of counsel, Washington has failed to show any prejudice. Washington argues that he was prejudiced only because the jury may have considered the extraneous offenses that did not result in a conviction. However, as noted, the trial court's charge included a limiting instruction that the jury was not to consider any extraneous offense unless they found that it was proven

[5]Although unpublished cases have no precedential value, we may take guidance from them "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

[6]In its punishment charge, the trial court gave the following instruction to the jury:

> The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. Said evidence was admitted only for the purpose of assisting you, if it does, in determining the proper punishment for the offense for which you have found the defendant guilty. You cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other acts, if any were committed.

beyond a reasonable doubt. In the absence of evidence to the contrary, we presume that the jury followed the trial court's instructions. *Johnson v. State*, 370 S.W.3d 100, 105 (Tex. App.—Fort Worth 2012, no pet.) (citing *Resendiz v. State*, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003)). In this case, the evidence showed that Washington had five previous convictions for burglary of a habitation, a conviction for aggravated perjury, and a conviction for burglary of a motor vehicle. In his previous convictions for burglary of a habitation, he had received sentences of seven, fifteen, and twenty-five years. The evidence also showed that, each time he was released from prison, Washington would once again burglarize homes. In its jury argument, the State did not suggest a sentence and emphasized Washington's multiple prior convictions, barely mentioning the other burglaries he was suspected of committing. Although the jury could have assessed a sentence up to life or ninety-nine years, it assessed a sentence of seventy-two years. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2017). Under this record, even assuming one or more errors by trial counsel, we cannot say there is a reasonable probability that the outcome would have been different.

For the reasons stated, we find that Washington has not shown ineffective assistance of counsel, and we overrule his issue.

We affirm the judgment of the trial court.

Josh R. Morriss III
Chief Justice

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Date Decided: November 29, 2017

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