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

No. 06-17-00202-CR

ROY LYNN AVANCE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 124th District Court
Gregg County, Texas
Trial Court No. 46099-B

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

MEMORANDUM OPINION

Roy Lynn Avance entered an open plea of guilty to two counts of indecency with a child by contact. The trial court accepted his plea and, after a hearing, sentenced him to ten years in prison for each count, with the sentences to run concurrently.

On appeal, Avance contends (1) that the sentence violated his right to due process because it was based on the State's mischaracterization of his statements and (2) that his counsel was ineffective for failing to object to the State's questions regarding his prior statements.

We affirm the trial court's judgment because: (1) Avance failed to preserve his due process objection; and (2) the record fails to show that Avance received ineffective assistance of counsel.

I. Factual and Procedural Background

In Gregg County, Avance was indicted on two counts of indecency with a child by contact. *See* TEX. PENAL CODE ANN. § 21.11(a)(1) (West Supp. 2017). The indictment alleged that, on two occasions, Avance "with the intent to arouse or gratify the sexual desire of the defendant, engage[d] in sexual contact with . . . the complainant, by touching the genitals of the complainant, a child younger than 17 years of age." Avance entered an open plea of guilty as to both counts. The trial court accepted Avance's plea and admitted into evidence, without objection, Avance's signed stipulation of evidence, the offense report, a recording of the child's interview at the Children's Advocacy Center, and Avance's interview with law enforcement. At the conclusion of the subsequent sentencing hearing, the trial court sentenced Avance to ten years in prison on each count, with the sentences to run concurrently.

II. Avance Failed to Preserve His Due Process Claim

In his first point of error, Avance argues that the sentence he received violated his right to due process because it was based on the State's mischaracterization of his statements to law enforcement.

During his initial interview with Detective Kay Lynn Newbill of the Kilgore Police Department, Avance denied any wrongdoing, but later that same day, Avance returned to the police station and spoke with Newbill a second time, admitting that he had touched the child on her vagina on top of her clothes "no less than 3 times and no more than 5 times." At the sentencing hearing, Newbill testified that Avance told her that the conduct had occurred "no less than three times and no more than five." However, on cross-examination, the following colloquy occurred between the State and Avance:

> Q. In your interview with Detective Newbill, the second interview you did, --
>
> A. Yes.
>
> Q. -- you said you touched [the child] on her vagina, --
>
> A. Yes.
>
> Q. -- right? You said at least five times; is that correct?
>
> A. Yes.
>
> . . . .
>
> Q. But you touched a six-year-old on the vagina -- that you loved -- at least five times, correct?
>
> A. Correct. And --
>
> . . . .

> Q. But you realize this didn't happen one time, that you said it happened at least five times, correct?
>
> A. Yes, ma'am.

In its closing argument, the State twice argued that Avance touched the child "at least five times." During sentencing, the trial court observed that, "instead of a one-time offense, [Avance] became a sexual predator . . . [and] decided that it would be appropriate, at least on four more occasions, according to his own admission . . . to rub her vagina . . . ."

Avance argues that the trial court violated his due process rights by basing his sentence on the State's mischaracterization of his statements to law enforcement.[1] "It is well established that almost every right, constitutional and statutory, may be waived by failing to object." *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (citing *Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986)). To preserve a complaint for our review, a party must first present to the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling if not apparent from the context. TEX. R. APP. P. 33.1(a)(1). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. TEX. R. APP. P. 33.1(a)(2).

Here, Avance neither raised a due process objection at the time his sentences were imposed, nor raised this argument in a post-trial motion. Therefore, Avance has failed to preserve this point of error. *See Hull v. State*, 67 S.W.3d 215, 218 (Tex. Crim. App. 2002) (even due process rights can be waived); *Eddie v. State*, 100 S.W.3d 437, 440 (Tex. App.—Texarkana 2003, pet. ref'd); *see*

[1]Avance admitted on the stand that he had touched the child at least five times.

also Ieppert v. State, 908 S.W.2d 217, 219 (Tex. Crim. App. 1995). Accordingly, we overrule this point of error.

III. The Record Fails to Show Ineffective Assistance of Counsel

In his final point of error, Avance contends that his trial counsel was ineffective because he failed "to object to or correct the State's erroneous statements and arguments, as well as the trial court's apparent misunderstanding of the evidence based on the State's misstatements."

To support allegations that trial counsel was ineffective, an appellant must prove by a preponderance of the evidence (1) that his counsel's representation fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The Texas Court of Criminal Appeals has said, "Trial counsel 'should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.'" *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). Where an appellate record is silent as to why trial counsel failed to take certain actions, the appellant has "failed to rebut the presumption that trial counsel's decision was in some way—be it conceivable or not—reasonable." *Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007); *see Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999).

Direct appeals often present a limited record for review of the effectiveness of trial counsel. *Mata*, 226 S.W.3d at 430; *Thompson*, 9 S.W.3d at 812. One way to obtain evidence of counsel's trial strategy or other matters in the direct appeal record is through a motion for new trial.[2] *See*

[2]Another way to develop a proper record is through a hearing in a habeas corpus collateral attack. *See generally* TEX. CODE CRIM. PROC. ANN. arts. 11.01–.45 (West 2015 & Supp. 2017).

Motley v. State, 773 S.W.2d 283, 290 (Tex. Crim. App. 1989) (evidence relating to counsel's trial strategy appeared in record because hearing on motion for new trial was held on issue of ineffective assistance).

In this case, no motion for new trial was filed, and there is no record to indicate why counsel failed to object to or correct the State's questions. The ineffectiveness of counsel is a matter that must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Smith v. State*, 51 S.W.3d 806, 813 (Tex. App.—Texarkana 2001, no pet.). In the absence of such a record, and in the lack of anything that would indicate such completely ineffective assistance as could be shown without such a record, we cannot find that trial counsel was ineffective. *See Holland*, 761 S.W.2d 307, 321 (Tex. Crim. App. 1988) (record must support appellant's claims of ineffective assistance). Therefore, we overrule this point of error.

IV. Conclusion

We affirm the trial court's judgment.

Ralph K. Burgess
Justice

Date Submitted: April 30, 2018
Date Decided: June 6, 2018

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