TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00504-CR

Lorenzo Tyrell Marshall, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 426TH JUDICIAL DISTRICT
NO. 74,118, HONORABLE FANCY H. JEZEK, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Lorenzo Tyrell Marshall of the offense of aggravated assault, dating violence, and assessed punishment at 14 years' imprisonment.[1] The district court rendered judgment on the verdict. In four issues on appeal, Marshall asserts that: (1) trial counsel was ineffective in failing to object to what Marshall contends was an improper argument by the prosecutor; (2) the district court erred in ordering restitution; (3) the amount of court costs assessed for the district clerk's fee exceeds the amount authorized by statute; and (4) the name of the victim is misspelled in the portion of the judgment ordering restitution. We will modify the judgment of conviction to reflect the name of the victim as spelled in the reporter's record and affirm the judgment as modified.

[1] *See* Tex. Penal Code § 22.01(b)(2)(A).

BACKGROUND

The jury heard evidence that on the night of December 6, 2014, Marshall assaulted his girlfriend, Carlissa Brooks, who was then eight months' pregnant.[2] Brooks testified that on the night in question, she was inside her apartment talking on the phone when Marshall knocked on her back door, "pushed the door open" after Brooks had "opened the door like a crack," demanded to know with whom Brooks was speaking, and then "attempted to take the phone out of [her] hand." "[W]hen I wouldn't give him the phone," Brooks recalled, "that's when he hit me" in the mouth. Brooks then told Marshall that she was "going to call the police," whereupon Marshall ran away from the residence. Brooks testified that she proceeded to call 911 and that the police arrived at her apartment shortly thereafter, informing her that they would be patrolling the area and advising her to call them again "if anything occurs."

Brooks further testified that Marshall returned to her residence later that night and "attacked" her from behind while she was walking into her apartment from the front porch. Brooks recounted that Marshall first "pull[ed] on the back of [her] clothes" and then, as she tried to get away from him, "started to hit [her] in the face." When asked to describe how Marshall was hitting her, Brooks testified, "He would have one hand holding and then punching with the other." Brooks added, "I was punched in the face several times. Body as well. And I was hovering trying to like protect—because I was pregnant at the time—my baby." As the assault was occurring, Brooks recounted, she yelled to her five-year-old son, who was on the couch in the living room, to bring her

[2] Although Brooks testified that Marshall was not the father of the child, she explained that he had offered to fill that role in the child's life.

the phone. Her son did so, but Marshall "took the phone" from Brooks and "threw it" outside. Brooks testified that she then "ran out the door, and [Marshall] grabbed me from [my] shoulders and brought me down to the ground. And that's when he continue[d] to hit me in the face. And there [were] a few kicks. I remember feeling kicks underneath my belly button." Brooks added, "He was kicking me like [in the] stomach area. I remember painful kicks underneath the belly button." Eventually, Brooks recalled, Marshall "backed up," and she was able to get up from the ground and run to a neighbor's apartment. According to Brooks, as she did so, Marshall "ran up to me and he grabbed me, said, please don't call the police. And he was telling me he was sorry." Marshall then "ran off" when one of Brooks's neighbors came outside to help her.

The jury also heard evidence tending to show that as the assault was occurring, multiple neighbors had called 911 to report it. Officer James Burnett of the Killeen Police Department testified that when he arrived at the residence in response to the calls, he observed Brooks "crying and covered in blood." Officer Ronald Jackson of the Killeen Police Department similarly testified that, "[a]t that time we made contact with her, [Brooks] had been injured, had obvious injuries, bloody clothing, blood on her face and about her body." Photographs taken of Brooks on the night of the assault, showing her blood-stained face and body, were also admitted into evidence.

Marshall testified in his defense and claimed that Brooks had hit him first and that he was simply defending himself from her, although he acknowledged in his testimony that he "went too far" and that "what [he] did was wrong." Marshall also stipulated that he had a prior felony conviction for assault, family violence, and he acknowledged that he was on parole for that offense

at the time this incident occurred. Based on this and other evidence, which we discuss in more detail below, the jury found Marshall guilty of aggravated assault as charged and assessed punishment at 14 years' imprisonment as noted above. The district court rendered judgment on the verdict. Marshall subsequently filed a motion for new trial that was overruled by operation of law. This appeal followed.

ANALYSIS

Ineffective assistance of counsel

During the punishment phase of trial, the prosecutor, in her closing argument, discussed Marshall's eligibility for parole as follows:

> When you go back, there's no telling how they're going to consider him for parole. You don't know that. But good time and actual time served are one-fourth of the sentence, and he's eligible. You get a good time day for every day you're in. Well, that's an eighth. Is an eighth of 4 years sufficient for the act he committed on December 6th of 2014, no. Is it sufficient for a man who did that act while on parole, no. Is it sufficient for a man who has done it before while on a parole, it is not.

Trial counsel did not object to this argument. Shortly thereafter, the prosecutor added, again without objection, "And I'm asking for 15 years TDC. And cut that by an eighth and see if that's sufficient. But at least that's a time period of supervision after release." In his first issue, Marshall asserts that trial counsel provided ineffective assistance by failing to object to these arguments, which Marshall contends misstated the law of parole eligibility and violated the prohibition against applying parole law to the defendant.[3]

[3] *See* Tex. Code Crim. Proc. art. 37.07, § 4(c), (d).

"Ineffective-assistance-of-counsel claims are governed by the familiar *Strickland* framework: To prevail, the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense."[4] "An attorney's performance is deficient if it is not within the range of competence demanded of attorneys in criminal cases as reflected by prevailing professional norms, and courts indulge in a strong presumption that counsel's conduct was *not* deficient."[5] "If trial counsel has not been afforded the opportunity to explain the reasons for his conduct, we will not find him to be deficient unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'"[6] In other words, in the absence of a record explaining the reasons for counsel's decisions, we will not find counsel's performance deficient if any reasonably sound strategic motivation can be imagined.[7] "It is a rare case in which the trial record will by itself be sufficient to demonstrate an ineffective-assistance claim."[8]

Strickland establishes a similarly high bar for establishing prejudice: "A defendant suffers prejudice if there is a reasonable probability that, absent the deficient performance, the outcome [of the proceeding] would have been different."[9] "A reasonable probability is a probability

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[4] *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

[5] *Id*. at 307-08 (emphasis in original).

[6] *Id*. at 308 (quoting *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)).

[7] *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

[8] *Nava*, 415 S.W.3d at 308 (citing *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011)).

[9] *Id*. (citing *Strickland*, 466 U.S. at 694).

sufficient to undermine confidence in the outcome."[10] "It will not suffice for Appellant to show 'that the errors had some conceivable effect on the outcome of the proceeding.'"[11] "Rather, he must show that 'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt,'"[12] or, in the context of punishment proceedings, that the defendant would have received a different sentence.[13]

"The defendant bears the burden of proving ineffectiveness by a preponderance of the evidence."[14] "To succeed on an ineffectiveness claim, a defendant must show both components; failure to show either deficient performance or prejudice will defeat the ineffectiveness claim."[15] "Both prongs of the *Strickland* test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight."[16]

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[10] *Id*.

[11] *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 693).

[12] *Id*. (quoting *Strickland*, 466 U.S. at 695).

[13] *See Wiggins v. Smith*, 539 U.S. 510, 536 (2003); *Ex parte Lane*, 303 S.W.3d 702, 719-20 (Tex. Crim. App. 2009); *Bazan v. State*, 403 S.W.3d 8, 13 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).

[14] *Perez*, 310 S.W.3d at 893 (citing *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985).

[15] *Id*. (citing *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)).

[16] *Ex parte Flores*, 387 S.W.3d 626, 633-34 (Tex. Crim. App. 2012) (citing *Strickland*, 466 U.S. at 688; *Ex parte Butler*, 884 S.W.2d 782, 783-84 (Tex. Crim. App. 1994); *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990)).

In this case, even if we were to conclude that trial counsel's failure to object to the prosecutor's arguments constituted deficient performance, we could not conclude that Marshall was prejudiced by that performance. We initially observe that the district court's charge on punishment included an instruction that tracked the language of the parole statute and thus correctly recited the law on parole eligibility and good-conduct time as follows:

> Under the law applicable in this cause, the defendant, where sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant once sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
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> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Strickland requires that the reviewing court presume, absent evidence to the contrary, that the jury "acted according to the law" and "reasonably, conscientiously, and impartially appl[ied]

the standards that govern the decision."[17] Here, there is no evidence in the record from which we could conclude that the jury disregarded the court's instructions. We also observe that trial counsel, in his closing argument, described parole in a manner that was consistent with the above law, and he reminded the jury of the court's instructions as follows:

> As you read in this charge, parole is just—it's not promised. Parole is something that, number one, has to be earned. And if you did all the things parole wants you to do, there's no guarantee you're going to get it. Okay.
>
> A parole is something that is determined by the parole board, and neither myself, nor neither of the prosecutors in the case can guarantee how it's going to work in my client's case.
>
> Whether you gave him two or you gave him twenty, he may have to do the entire time in this case, so I'd like you to take that into consideration.
>
> I think a lot of times folks think that parole's automatic. It's not, as Judge Jezek has instructed you, in the instructions that have been given to you.

Thus, the district court's instructions, and trial counsel's argument drawing the jury's attention to those instructions, would tend to cure the harm, if any, from the prosecutor's arguments.[18]

Moreover, *Strickland* requires that the reviewing court consider "the totality of the evidence" in the case, keeping in mind that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."[19] Here, Brooks provided detailed testimony, summarized above, describing the manner in which

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[17] *Strickland*, 466 U.S. at 694-95.

[18] *See Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

[19] *Strickland*, 466 U.S. at 695-96.

Marshall had assaulted her. The circumstances of the assault included Marshall "attacking" Brooks from behind, "punching" Brooks in the face "several times," continuing the assault in the presence of Brooks's five-year-old son, throwing Brooks's phone away from her so that she could not call for help, forcing Brooks to the ground during the assault, and kicking her in the "stomach area" "underneath [her] belly button," at a time when Brooks was "almost eight months'" pregnant. Additionally, photos taken of Brooks following the assault, from which the jury could have reasonably inferred that the assault was bloody and brutal, were admitted into evidence. And, although Marshall claimed in his testimony that he had acted in self-defense, he acknowledged that he "went too far" and that "what [he] did was wrong." We also observe that the jury heard evidence of Marshall's extensive criminal history, including prior felony convictions for the offenses of assault family violence, specifically strangulation, and possession of a controlled substance, specifically crack cocaine; a misdemeanor conviction for resisting arrest; and out-of-state convictions for burglary of a habitation and armed robbery. In sum, the jury's decision to assess Marshall's punishment at 14 years' imprisonment, as opposed to some lesser amount, can be fairly characterized as having "overwhelming record support," and we cannot conclude on this record that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's failure, if any, to object to the prosecutor's arguments.[20]

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[20] *See id.*; *Ex parte Martinez*, 330 S.W.3d 891, 904 (Tex. Crim. App. 2011); *see also Wong v. Belmontes*, 558 U.S. 15, 26 (2009) ("[T]he reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice."); *Schwing v. State*, No. 06-15-00162-CR, 2016 Tex. App. LEXIS 4073, at *8-13 (Tex. App.—Texarkana Apr. 20, 2016, no pet.) (mem. op., not designated for publication) (appellant failed to show prejudice from counsel's failure to object to prosecutor's argument on parole "[b]ased on the strong and redundant enhancement evidence presented in this case, the context of the challenged argument, and the sentence imposed").

We overrule Marshall's first issue.

Restitution

When the district court pronounced Marshall's sentence, it included an order that Marshall pay Brooks $720.00 in restitution. In his second issue, Marshall asserts that it was improper for the court to order restitution because he elected the jury to assess punishment, and the jury did not include restitution in its assessment of punishment.

As an initial matter, we observe that Marshall did not raise this complaint in the court below, either at the time the district court pronounced sentence or in Marshall's motion for new trial. Accordingly, Marshall has failed to preserve error, if any, in the district court's restitution order.[21]

In arguing that he was prejudiced by counsel's performance, Marshall relies in large part on *Branch v. State*, 335 S.W.3d 893 (Tex. App.—Austin 2011, pet. ref'd), a non-unanimous opinion from this Court in which the majority of the panel concluded that appellant had established prejudice from trial counsel's failure to object to the prosecutor's arguments on parole law. *Id*. at 909-10. However, *Branch* is distinguishable from this case in several respects, most notably in that the prosecutor in *Branch* went beyond discussing Branch's "eligibility" for parole. Instead, "using language of certainty," the prosecutor argued that as a result of parole and good-conduct time, Branch was "going to get out" in "seven years, eight years" and was "never" going to be in prison for "fifteen or twenty" years, "even with [a] life [sentence]." *Id*. at 906-07. The jury subsequently assessed the "most severe sentence possible" in that case—life imprisonment for the offense of possession of a controlled substance with intent to deliver. *See id*. at 897, 910. In this case, the jury assessed a sentence of 14 years' imprisonment, which is six years below the maximum possible sentence of 20 years' imprisonment. *See* Tex. Penal Code § 12.33. We also observe that *Branch* did not involve a crime of violence (specifically, a brutal assault committed against a pregnant woman), the charge in *Branch* included an erroneous instruction on parole law that did not track the applicable statutory language, *see Branch*, 335 S.W.3d at 905 n.4, and defense counsel in *Branch* possibly compounded the harm from the prosecutor's arguments by stating with certainty that Branch "will come home some day" and that Branch "was going to be affected by that parole law," *see id*. at 906. In short, we do not view *Branch* as controlling here.

[21] *See* Tex. R. App. P. 33.1(a); *Idowu v. State*, 73 S.W.3d 918, 921 (Tex. Crim. App. 2002) ("If a defendant wishes to complain about the appropriateness of (as opposed to the factual basis for) a trial court's restitution order, he must do so in the trial court, and he must do so explicitly.");

Moreover, even if Marshall had preserved error, we could not conclude that it was improper for the district court to order restitution in the absence of a jury finding on that issue. Article 42.037 of the Code of Criminal Procedure expressly authorizes "the court" to order restitution and requires "the court," when deciding the amount of restitution, to consider "the amount of loss sustained by any victim" and "other factors *the court* deems appropriate."[22] There is no statutory provision authorizing the jury to make that determination. Accordingly, "although appellant elected to have the jury assess his punishment, the trial court had statutory authority to impose a restitution order."[23]

We overrule Marshall's second issue.

Ortegon v. State, 510 S.W.3d 181, 184 n.3 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (noting that appellant failed to preserve complaint that "the trial court improperly required him to pay restitution to the complainant because he elected to have the jury assess his punishment, and the jury did not impose a restitution requirement in its punishment verdict"); *see also Vasquez v. State*, No. 13-06-00540-CR, 2009 Tex. App. LEXIS 6117, at *48 (Tex. App.—Corpus Christi Aug. 6, 2009, pet. ref'd) (mem. op., not designated for publication) (concluding that by failing to object in court below, appellant waived similar argument that "he was entitled to a jury trial on restitution").

[22] *See* Tex. Code Crim. Proc. art. 42.037(a), (c) (emphasis added).

[23] *Ortegon*, 510 S.W.3d at 186; *see Campbell v. State*, 5 S.W.3d 693, 698 (Tex. Crim. App. 1999) ("At common law, the power to impose restitution rested with the judge. . . . Since then, the authority to impose restitution has remained by statute with the judge." (internal citation omitted)); *Davis v. State*, 757 S.W.2d 386, 389 (Tex. App.—Dallas 1988, no pet.) ("[I]t is clearly the function of the trial court, not the jury, to establish the amount of restitution for inclusion in the sentence."); *see also Burch v. State*, No. 13-97-002-CR, 1998 Tex. App. LEXIS 1881, at *3-5 (Tex. App.—Corpus Christi Mar. 26, 1998, pet. ref'd, untimely filed) (op.) (holding that jury's attempt to include restitution in its assessment of punishment "was unauthorized" by law).

Court costs

The judgment of conviction included an order that Marshall pay court costs in the amount of $341.00. According to the bill of costs, that amount included $80.00 for the "district clerk's fee." In his third issue, Marshall asserts that this amount exceeded the amount authorized by statute.

"[C]ourt costs are not part of the guilt or sentence of a criminal defendant, nor must they be proven at trial; rather, they are 'a nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of the case.'"[24] "As a result, we review the assessment of court costs on appeal to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost, and traditional *Jackson* evidentiary-sufficiency principles do not apply."[25] "Only statutorily authorized court costs may be assessed against a criminal defendant."[26] "However, when a specific amount of court costs is written in the judgment, an appellate court errs when it deletes the specific amount if there is a basis for the cost."[27]

The Code of Criminal Procedure authorizes the imposition of a $40.00 fee for the services of the district clerk.[28] Marshall asserts that because the bill of costs reflects that he was charged $80.00 for that fee, we should reduce that amount by $40.00. However, as the State

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[24] *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014) (quoting *Weir v. State*, 278 S.W.3d 364, 366-67 (Tex. Crim. App. 2009)).

[25] *Id*. (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)).

[26] *Id*. at 389 (citing Tex. Code Crim. Proc. art. 103.002).

[27] *Id*.

[28] *See* Tex. Code Crim. Proc. art. 102.005(a).

observes, there is a basis in the record for the additional $40.00 assessed. "A defendant convicted by a jury in a county court, a county court at law, or a district court shall pay a jury fee of $40."[29] It is undisputed that Marshall was convicted by a jury in the district court. Because there is no separate line item in the bill of costs for the jury fee, there is a basis in the record to conclude that the $80.00 assessed includes not only the $40.00 district-clerk's fee but also the $40.00 jury fee, both of which are statutorily mandated in this case. Accordingly, we are not permitted to reduce the amount of costs as requested by Marshall.[30]

We overrule Marshall's third issue.

Victim's name

In the portion of the judgment specifying the name of the victim to whom Marshall is to pay restitution, the victim's name is spelled as "Clarissa Brooks." However, throughout the reporter's record, including when Brooks identifies herself by name at the beginning of her testimony and when Marshall refers to Brooks in his testimony, Brooks's first name is spelled as "Carlissa." In his fourth issue, Marshall asserts that the judgment should be modified to reflect the name of the

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[29] *Id*. art. 102.004(a).

[30] *See Johnson*, 423 S.W.3d at 389; *Coronado v. State*, 431 S.W.3d 744, 748-49 (Tex. App.—Amarillo 2014, pet. ref'd); *see also Diaz v. State*, No. 03-17-00107-CR, 2017 Tex. App. LEXIS 6220, at *1-4 (Tex. App.—Austin July 7, 2017, no pet. h.) (rejecting similar challenge to amount of court costs).

victim as spelled in the reporter's record.[31] We agree. This Court has authority to modify incorrect judgments when the necessary information is available to do so.[32]

We sustain Marshall's fourth issue.

CONCLUSION

We modify the judgment of conviction to reflect that the name of the victim is "Carlissa Brooks" as spelled in the reporter's record. As modified, we affirm the judgment of the district court.

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Field

Affirmed

Filed: September 21, 2017

Do Not Publish

[31] We note that the State, although asserting that the names "Carlissa" and "Clarissa" are "sufficiently alike that a listener would have difficulty distinguishing them," represents in its brief that it "takes no position upon the proper name to be included."

[32] *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. ref'd); *see also Fields v. State*, No. 05-10-00833-CR, 2012 Tex. App. LEXIS 3849, at *2 n.1 (Tex. App.—Dallas May 16, 2012, no pet.) (mem. op., not designated for publication) ("We use the spelling used in the reporter's record when the witness testified to [her] own name.").