IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0163-17

COBY RAY HUDGINS, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE TWELFTH COURT OF APPEALS GREGG COUNTY

YEARY, J., delivered the opinion of the Court in which KELLER, P.J., and KEASLER, ALCALA, and KEEL, J.J., joined. HERVEY, J., filed a concurring opinion in which RICHARDSON and NEWELL, J.J., joined. WALKER, J., dissented.

O P I N I O N

Appellant argued on direct appeal that his trial counsel rendered ineffective assistance at the punishment phase of his murder trial by failing to call a psychological expert to the stand to testify about the effects of the sexual assault he suffered as a boy. At a hearing on Appellant's motion for new trial, he presented expert testimony describing in general terms how such an assault might cause post-traumatic stress disorder, a malady that a jury might find relevant to mitigate punishment. The expert failed, however, to specify how Appellant

himself has been afflicted, if at all. The Twelfth Court of Appeals nevertheless held that Appellant satisfied both the deficiency and prejudice prongs of the standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Hudgins v. State*, No. 12-15-00153-CR, 2017 WL 361204 (Tex. App.—Tyler Jan. 25, 2017) (not designated for publication). We granted the State Prosecuting Attorney's (SPA) petition for discretionary review in order to address whether, in the absence of expert testimony specifying how Appellant's sexual assault experience actually affected him, he can establish that there is a reasonable probability that the jury would have assessed a lesser punishment than the ninety-nine year sentence he received.

FACTS AND PROCEDURAL POSTURE

The principal issue at the guilt phase of Appellant's trial was not whether he shot Kayla Williams and killed her (he took the witness stand and admitted that he did), but whether he did so intentionally or knowingly, or recklessly—whether he committed murder or manslaughter. On the evening of Saturday, October 5, 2013, while his girlfriend was at work, twenty-two year-old Appellant was in the trailer home he shared with her, drinking with three other young women: his cousin, his girlfriend's sister, and the sister's best friend, Williams. When Appellant told Williams about a pistol he had recently purchased, she asked to see it. Appellant retrieved it from his bedroom and, in short order, shot her in the forehead, killing her. Appellant testified that he was unfamiliar with the various safety mechanisms on the pistol and had not intended for it to discharge. But he could not explain why he

subsequently fired the pistol three more times in the direction of the other two young women as they fled the trailer, simply testifying that he did not remember having done so. The jury convicted Appellant of the greater offense of murder.

During the guilt phase proceedings, Appellant sought to prove that he had made the recent purchase of the pistol because he was afraid of an older cousin who had threatened him. That cousin had recently been released from prison, where he had served a substantial sentence for sexually assaulting Appellant when Appellant was approximately eight years old. Appellant had testified against his cousin and, upon hearing about his release from prison, had obtained the gun for protection. The trial court would not allow Appellant to prove up the sexual assault aspect at the guilt phase of trial, ruling that such evidence was more prejudicial than probative. But the State did not contest the introduction of this evidence at the punishment phase of trial. Although Appellant himself did not testify at the punishment phase of trial, two family members, Appellant's grandmother and his father, both testified that Appellant had been sexually assaulted by his cousin, and that he had testified against him afterwards. They told the jury that the experience had been "bad" for Appellant and it was "hard" on the whole family. But again, the jury was not sympathetic, assessing Appellant's punishment at ninety-nine years in the penitentiary.

Appellant's new counsel on appeal filed a motion for new trial in which he alleged that trial counsel rendered ineffective assistance at the punishment phase of trial. New counsel faulted Appellant's trial counsel for failing to investigate and present "medical and

mental health" evidence with respect to the sexual assault Appellant had experienced at the hands of his cousin. At the hearing on the motion for new trial, Appellant presented testimony from Dr. Wade E. French, a psychologist who was licensed as a professional counselor, family therapist, and sex offender treatment provider. French testified in general terms about how trauma, including that which may follow from a sexual assault, can cause post-traumatic stress disorder (PTSD), inducing anxiety, depression, sleep disorders, intrusive thoughts, and flashbacks, and causing its victims frequently to self-medicate with alcohol and illicit drugs. Those who suffer from PTSD, he testified, often have trouble holding down jobs and maintaining stable relationships. They are "basically unable to live what we would consider to be a normal life and care for themselves physically and emotionally in a way that's productive." French had not evaluated Appellant himself, but he testified that he could have interviewed and evaluated Appellant for the effects of trauma and PTSD,[1] and provided a future risk assessment, had he been asked to do so, and that such information would have proved helpful to the jury in assessing punishment. The trial court denied the Appellant's motion for new trial, commenting that (among other things) the evidence at trial had showed that Appellant was able to maintain both a steady job and a

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[1] Specifically, French was asked, and responded, as follows:

> Q If asked, could you interview a person, determine whether or not they have had specific traumas and whether or not that would affect how that affects them and provide that testimony to a trier of fact?
>
> A I could assuming that I have access to sufficient data.

stable relationship with his girlfriend, and that the absence of testimony about PTSD was therefore "not a major factor" in the jury's assessment of punishment.

The court of appeals disagreed, holding that the trial court abused its discretion in denying Appellant's motion for new trial as to punishment. *Hudgins*, 2017 WL 361204, at *13. Having concluded that trial counsel performed deficiently in failing to investigate and produce mental health testimony for the punishment phase of trial,[2] the court of appeals held that "[t]he mitigating evidence potentially available to Appellant which was not adequately explored, taken as a whole, might have had an influence on the jury's assessment of Appellant's moral culpability." *Id*. The court of appeals therefore concluded that Appellant had demonstrated a reasonable probability of a better punishment outcome, and the trial court abused its discretion to conclude otherwise. *Id*.

THE STANDARD OF REVIEW

The *Strickland* two-pronged standard for assessing the constitutional effectiveness of trial counsel applies to the punishment phase of a non-capital trial. *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999). With respect to the prejudice prong, an appellant must

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[2] In order to establish ineffective assistance of counsel under the Sixth Amendment, an appellant must show both deficient performance and prejudice. *Strickland*, 466 U.S. at 687. We have not been asked in this case to review the court of appeals' conclusion regarding the performance prong, and we express no opinion on that score. Even had we been asked to evaluate the performance prong, it would be unnecessary to do so in a case in which we have concluded that Applicant failed to satisfy the prejudice prong. *See id*. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . even to address both components of the inquiry if the defendant makes an insufficient showing as to one."). Any opinion we might offer that trial counsel rendered deficient performance in a case in which we will ultimately hold that Appellant nevertheless suffered no prejudice would constitute purest *obiter dictum*.

show a reasonable probability that, but for trial counsel's deficiency at the punishment phase, the punishment fact-finder would have reached a more favorable verdict. *Ex parte Rogers*, 369 S.W.3d 858, 863 (Tex. Crim. App. 2012). It is not enough to satisfy this standard if the likelihood that the punishment fact-finder would have reached a more favorable verdict is merely "conceivable," based upon conjecture or speculation. *Ex parte Cash*, 178 S.W.3d 816, 818-19 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 693).

The court of appeals' opinion articulated the proper standard for review with respect to rulings on motions for new trial.[3] *Hudgins*, 2017 WL 361204, at *3. A reviewing court measures a trial court's ruling on a motion for new trial under an abuse of discretion standard. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). A trial court abuses its discretion in this context only when no reasonable view of the record could support its ruling, which will be upheld on appeal so long as it falls within the zone of reasonable disagreement. *Id*. The SPA argues that the court of appeals improperly applied this highly deferential standard, and we agree.

ANALYSIS

The court of appeals disagreed "with the trial court's assessment that the aggravating evidence presented by the State would clearly outweigh any potential mitigating evidence which a forensic psychiatrist or psychologist could have produced." *Hudgins*, 2017 WL 361204, at *13. The court of appeals concluded that there was "at least a reasonable

[3] Trial courts are now authorized to grant new trials as to punishment only, when appropriate. TEX. R. APP. P. 21.1(b).

probability that had [the] mitigation evidence been explored by counsel through assistance of a forensic psychological expert, a different result would have occurred[.]" *Id.* The court of appeals had reasoned that "[a] defense psychologist or psychiatrist could have helped craft a defense that explained the relationship between Appellant's sexual abuse and the homicide in a manner mitigating Appellant's blameworthiness while providing a scientific basis for discounting his future dangerousness." *Id*. at *12. If true, this observation would at least have *better* supported the court of appeals' ultimate conclusion that the trial court abused its discretion. But the record does not bear it out factually.

French was not asked to offer any opinion whether Appellant himself suffered from the effects of trauma or from PTSD as a consequence of the sexual assault he experienced as a child. He was not even asked to evaluate Appellant for that purpose. Had Appellant's jury heard the testimony French provided at the motion for new trial hearing, it would have been left to speculate whether the mitigating significance of suffering from the effects of a trauma or from PTSD even applies in Appellant's case.[4] As the trial court observed, the

[4] French was never asked to testify concerning the "relationship" between Appellant's childhood sexual abuse and his actions the night of the offense. *See* Concurring Opinion at 7 (trial counsel "could have used the mitigating information to attempt to secure the appointment of a defense expert to testify about the relationship between Hudgins's childhood sexual abuse and his actions the night of the murder"), and at 9 (referring to "the lack of testimony about the relationship between Hudgins's childhood sexual abuse, the impact of possible PTSD, and his actions the night of the murder"). Because he never even evaluated Appellant for the effects of trauma or PTSD, French was in no position to testify that Appellant suffered from such maladies as a result of his childhood abuse, much less to offer an opinion with respect to some "relationship" between any effects of trauma/PTSD and the offense. French testified neither that Appellant was traumatized or suffered from PTSD, nor that there was any "relationship" between suffering the effects of trauma/PTSD and the offense itself. None of the symptoms that French associated with

record suggests that at least two of PTSD's frequent effects—inability to hold down a job and maintain a stable relationship—did not seem to pertain to Appellant. The record presents no concrete basis for a jury to conclude that he suffered any of the other debilitating symptoms of PTSD that French described. Moreover, French did not actually conduct a risk-assessment evaluation so that he would be in a position to offer an opinion with respect to Appellant's potential for recidivism.

To establish ineffective assistance of counsel for failing to call a witness to the stand, including an expert witness, an appellant must show that the appellant would have benefitted from that witness's testimony. *Ex parte Flores*, 387 S.W.3d 626, 638 n. 54 (Tex. Crim. App. 2012). Especially in the absence of some testimony that Appellant personally suffered from the deleterious effects of PTSD, Appellant's new mitigating evidence was of marginal value at best.[5] It seems little more than merely conceivable that French's testimony, had it been presented to the jury at Appellant's punishment phase, would have had a beneficial effect on the punishment outcome. Consequently, we conclude that Appellant suffered no prejudice.

PTSD—anxiety, depression, disordered sleep, intrusive thoughts, flashbacks, or self-medication with alcohol or drugs—obviously serves to explain why Appellant committed this offense, and French himself suggested no connection. For example, neither French nor any other witness attributed Appellant's drinking on the night of the offense to trauma- or PTSD-induced self-medication.

[5] We need not definitively decide whether "French's testimony would have been *sufficient* to equip the jury to consider whether [Appellant] suffered from PTSD[.]" Concurring Opinion at 10 (emphasis added). Even if that inference was an available one, our holding is that, in the absence of direct testimony that Appellant had been evaluated for, and found to suffer from the effects of trauma/PTSD, it was within the trial court's discretion to conclude that the likelihood that French's testimony would have made a difference to the jury's punishment decision was insufficient to satisfy *Strickland*'s standard for proving prejudice.

In reaching a contrary conclusion, the court of appeals relied upon certain factors for determining prejudice in the non-capital punishment phase that it found in the opinion of another court of appeals. *Hudgins*, 2017 WL 361204, at *4. In *Lampkin v. State*, 470 S.W.3d 876 (Tex. App.—Texarkana 2015, pet. ref'd), the Sixth Court of Appeals compiled "factors" it deemed relevant to assessing whether a failure to investigate and introduce mitigating evidence at the punishment phase of a non-capital case was prejudicial:

> (1) whether mitigating evidence was available and, if so, whether the available evidence was admissible, (2) the nature and degree of other mitigating evidence actually presented to the jury at punishment, (3) the nature and degree of aggravating evidence actually presented to the jury by the State at punishment, (4) whether and to what extent the jury might have been influenced by the mitigating evidence, (5) whether and to what extent the proposed mitigating evidence serves to explain the defendant's actions in the charged offense, and (6) whether and to what extent the proposed mitigating evidence serves to assist the jury in determining the defendant's blameworthiness.

Id. at 922. Even if we were to assume that these are indeed legitimate "factors" that are relevant to the determination of *Strickland* prejudice in this context—a question we need not decide today—we do not think their application to the facts presented here cuts in favor of a holding that the trial court abused its discretion.[6]

There was little in the way of either aggravating or mitigating evidence presented at the punishment phase of Appellant's trial. The jury did hear that Appellant had been sexually

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[6] We do not assume that—and, in fact, we take no position at all today whether—these factors are legitimate. We have already concluded that the trial court did not abuse its discretion to deny Appellant's motion for new trial as to punishment. Our point here is simply to illustrate that, even if we were to accept for the sake of argument that the *Lampkin* factors are appropriate, their application here would not change our assessment.

assaulted and forced to testify against his cousin at a young age.[7] The mitigating value of those events was presented to the jury in this case, and the jury was able to consider it and weigh it in assessing Appellant's sentence for this offense.

The additional mitigating evidence he offered at the hearing on his motion for new trial consisted mainly of French's testimony regarding the effects of trauma and PTSD. But in the absence of an expert assessment that Appellant *actually suffered* from the effects of trauma, and/or that he *actually has* PTSD, his proposed mitigating evidence would have added only minimally incremental mitigating value and would have done next to nothing to assist the jury, beyond what was already available to it, in determining his blameworthiness.[8] As the trial court noted, any inference the jury might have drawn that Appellant personally suffers PTSD, and should be treated mercifully for that reason, was undermined by evidence of Appellant's steady job and stable relationship. The trial court justifiably concluded that its impact upon a jury's punishment deliberations would have been negligible at best. Finally, French was in no position to offer favorable testimony with respect to Appellant's likelihood

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[7] The jury was also aware that Appellant was highly intoxicated at the time of the offense. Within minutes, he drove his car into the railing of a bridge, was arrested for DWI, and was found to have a blood-alcohol level of 0.284.

[8] The concurring opinion says that Appellant was prejudiced because the jury "heard nothing about the clinical diagnosis of PTSD or how it might have influenced [Appellant's] actions the night of the murder." Concurring Opinion at 11 n.10. But French did not testify that he (or anyone else) had ever diagnosed Appellant with PTSD. He also never testified that the effects of such a malady would have influenced Appellant's actions on the night of the murder. All the jury would have heard was an abstract account of the effects of PTSD, without any testimony describing Appellant as suffering from those effects or how PTSD might somehow explain Appellant's behavior on the night of the murder.

to re-offend, since he never evaluated Appellant for that purpose.

CONCLUSION

Under these circumstances, the court of appeals erred to hold that the trial court abused its discretion to conclude that the failure to investigate and introduce the additional mitigating evidence was prejudicial. The trial court's ruling that Appellant failed to show a reasonable probability of a more favorable punishment verdict was not beyond the zone of reasonable disagreement. We reverse the judgment of the court of appeals insofar as it reversed the trial court's judgment as to punishment, and we reinstate the trial court's judgment in full.

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