IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0677-21

HAROLD GENE JEFFERSON, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS TAYLOR COUNTY

KELLER, P.J., delivered the opinion of a unanimous Court. YEARY, J., filed a concurring opinion.

Appellant was indicted for one count of sexual assault and one count of indecency with a child. The State amended the indictment to add two more sexual-assault counts. On appeal, Appellant complained that the trial court erred in allowing the amendment and that counsel was ineffective for failing to object to the amendment or otherwise preserve error. The first two questions in this case are whether adding a count constitutes adding an additional offense to the indictment and whether counsel should have known that. We answer both of those questions "yes." We also conclude that the court of appeals erred in its ineffective-assistance analysis in several other respects. Consequently, we reverse the judgment of the court of appeals and remand for further

proceedings.

I. BACKGROUND

A. The Indictments

Appellant was indicted for sexual assault by intentionally and knowingly penetrating the sexual organ of the child victim with his sexual organ. Appellant was also indicted for indecency with a child by touching the child's breast.

The State later moved to amend the indictment to add two new sexual assault counts. In addition to the original sexual assault count, the State sought to charge Appellant with (1) intentionally and knowingly causing the child victim's mouth to contact Appellant's sexual organ and (2) intentionally and knowingly causing the victim's sexual organ to contact Appellant's mouth. The trial court granted the State's motion to amend. As a result of the amendment, the number of counts charged by the indictment increased from two to four. The record does not reveal an objection by defense counsel to the amendment. Defense counsel requested ten additional days to prepare as a result of the change in the indictment.[1] The trial court granted that request.

At a motion for new trial hearing, defense trial counsel testified that he objected to the amendment in a hearing on the matter. But the reporter's record does not include a transcript of any such hearing, and the record does not otherwise corroborate trial counsel's claim that he objected. The trial court denied the motion for new trial.

B. Appeal

Among other things, Appellant complained on appeal that the trial court erred to amend the indictment to include the two new counts. He claimed that the convictions on the new counts were

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[1] *See* TEX. CODE CRIM. PROC. art. 28.10(a).

void because he was not indicted by a grand jury for the new counts. He relied on *Nix v. State*, which indicated that a judgment is void if a document purporting to be a charging instrument does not satisfy the constitutional requisites of a charging instrument.[2] Appellant contended, "The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case." He further argued, "Absent an indictment or valid waiver, a district court does not have jurisdiction over the case." And he pointed out that it was undisputed that the grand jury did not indict Appellant on the new counts, but that the charges "were added by the District Attorney's Office without authorization from the grand jury."

In addressing the complaint that his convictions in the added counts were void, the court of appeals held that the failure to object waives any error with respect to an amended indictment.[3] The court indicated that the right to a grand jury indictment is a waivable right.[4] Because the right is waivable, the court concluded that convictions on counts added by amending an indictment are not void.[5]

Appellant also complained that counsel was ineffective for failing to object to the amendment or failing to have that objection memorialized in the record. Although trial counsel testified that he objected in a hearing on the motion to amend, Appellant contended that the court reporter's record refuted that testimony by showing that no such hearing occurred. And Appellant contended, "Even

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[2] 65 S.W.3d 668 (Tex. Crim. App. 2001).

[3] *Jefferson v. State*, No. 11-18-00184-CR, 2021 WL 2462155, *2 (Tex. App.—Eastland June 17, 2021) (not designated for publication).

[4] *Id.* (citing *Trevino v. State*, 470 S.W.3d 660, 663 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd), quoting *Woodard v. State*, 322 S.W.3d 648, 657 (Tex. Crim. App. 2010)).

[5] *Id.* at *3.

if a hearing existed as trial counsel claims, trial counsel failed to preserve an objection to an amendment by requiring the hearing to be recorded or objecting in writing to the lack of a court reporter."

The court of appeals cited an unpublished court-of-appeals opinion holding that an amended indictment does not allege a different or additional offense if it adds another count of the same charged offense.[6] The court of appeals also found that there was a factual dispute about whether counsel objected to the amendment and that it must be assumed that the trial court resolved that conflict in support of its ruling denying Appellant's motion for new trial.[7] The court of appeals further suggested that, even if counsel did not oppose the amendment, he might have had a strategic reason for that lack of opposition.[8] And the court pointed to the State's contention that Appellant's defensive theory was the same for all offenses.[9]

II. ANALYSIS

A. Amendment of the Indictment

In his first ground for review, Appellant criticizes the court of appeals's reliance on the unpublished opinion its cites. Appellant contends that, because of their elements, the offenses at

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[6] *Id.* at *5 (citing *Duran v. State*, No. 07-07-0110-CR, 2008 WL 794869, at *3–4 (Tex. App.—Amarillo Mar. 26, 2008, pet. ref'd) (not designated for publication)) (discussing TEX. CODE CRIM. PROC. art. 28.10(c)).

[7] *Id.*

[8] *Id.* ("Even if we assume that trial counsel did not oppose the amendment, the State cites *Stewart v. State* . . . for the proposition that trial counsel might have a strategic reason for not opposing a requested amendment. In *Stewart*, the Dallas Court of Appeals noted that trial counsel might not want to oppose a requested amendment in order to avoid unnecessary delay.").

[9] *Id.*

issue here have been construed for double-jeopardy purposes to be separate offenses, and consequently, their addition to the indictment did in fact result in the allegation of additional offenses.[10]

1. Preservation

The State contends that Appellant's current argument was not raised before the trial court or the court of appeals. The State argues that Appellant seeks for the first time to have this Court construe the meaning of Article 28.10, which prohibits an amendment over defense objection that results in an "additional or different offense" in the indictment.[11] The State contends that Appellant did not raise this issue at trial or in his motion for new trial and that Appellant's argument on appeal was that the judgments for the new offenses were void under *Nix.*

It is true that Appellant's claim does not appear in the trial record. But Appellant did claim on appeal that counsel was ineffective for failing to preserve error with respect to the new counts in the amended indictment, and the court of appeals addressed that claim in part by relying upon an unpublished court-of-appeals opinion construing Article 28.10. Whether the court of appeals's reliance upon that opinion was correct is directly relevant to its resolution of Appellant's ineffective-assistance claim.[12]

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[10] In his petition, the ground for review reads: "The 11th Court of Appeals erred where it decided an important question of state law, specifically what constitutes an 'additional or different offense' in the context of Texas Penal Code section 22.011 (a)(2), based on erroneous statutory interpretation that conflicts with decisions of the Court of Criminal Appeals."

[11] *See* TEX. CODE CRIM. PROC. art. 28.10(c).

[12] The status of an added count as a separate offense might also be relevant to Appellant's claim before the court of appeals that the trial court erred in allowing the amendment. We need not address that issue here.

2. Merits

We shall first address the court of appeals's reliance on *Duran* for the proposition that a count can be added to an indictment if it alleges the same statutory offense as a count originally in the indictment. Article 28.10 provides, "An indictment . . . may not be amended over the defendant's objection . . . if the amended indictment . . . charges the defendant with an additional or different offense."[13] *Duran* relied on our earlier holding in *Flowers v. State* that an amendment could authorize a change in elements if the statutory offense remains the same.[14] The *Duran* court also concluded that the amendment in that case merely split one count that included two methods of committing sexual assault (penetration "of the anus or sexual organ") into two counts.[15]

An attorney's failure to raise a claim is not deficient if the law is unsettled,[16] but an unpublished court-of-appeals opinion in a criminal case does not constitute precedent,[17] so it cannot create an uncertainty when the law is otherwise clear. In *Martinez v. State*, we held that an indictment cannot authorize more convictions than there are counts.[18] This is because a "count" is the statutory method of alleging a separate offense in an indictment.[19] So when the State amends an indictment to add counts, it is adding allegations of separate offenses to the indictment. The original

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[13] *Id.*

[14] *Duran,* 2008 WL 794869, at *2-3 (citing *Flowers v. State*, 815 S.W.2d 724, 728 (Tex. Crim. App. 1991).

[15] *Id.* at *2-3.

[16] *State v. Bennett*, 415 S.W.3d 867, 869 (Tex. Crim. App. 2013).

[17] TEX. R. APP. P. 47.7(a).

[18] 225 S.W.3d 550, 554 (Tex. Crim. App. 2007).

[19] *Id.*

indictment in this case authorized only two convictions. The fact that the State obtained four convictions under the amended indictment necessarily means the State added offenses to the indictment.

If *Duran* held that *Flowers* authorized additional counts of the same statutory offense, it read too much into *Flowers*. The concern in *Flowers* was that too expansive a reading of the words "different offense" in the amendment statute (Article 28.10) would cause every substantive change in an indictment to be a prohibited different offense.[20] But Article 28.10 also prohibits amendments over objection that charge an "additional" offense,[21] and adding a count, even of the same statutory offense as a count already in the indictment, would constitute an additional offense.

Moreover, *Duran* is distinguishable because the court there essentially held that two separate offenses had been improperly pled as part of a single count and so could be split into separate counts.[22] In this case, however, only one method of committing sexual assault was alleged in the original indictment.

B. Ineffective-Assistance Issues

In his second ground for review, Appellant contends that the court of appeals's ineffective-assistance analysis was incomplete and erroneous for a variety of reasons.[23] First, he takes issue with

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[20] *Flowers*, 815 S.W.2d at 729.

[21] Art. 28.10(c); *Flowers*, *supra* at 728-29.

[22] We need not address whether court of appeals was correct in that regard, but we note that the two different methods of committing sexual assault were joined in the indictment in the disjunctive (with an "or") instead of the conjunctive (with an "and").

[23] The ground for review reads: "The 11th Court of Appeals erred where it applied an incomplete, and therefore wrong standard to dispose of Appellant's ineffective assistance of counsel claim."

the court of appeals's conclusion that the trial court could have found that trial counsel objected to the amendment. Appellant argues that the record conclusively refutes trial counsel's testimony to that effect. Second, Appellant contends that the court of appeals erred in attributing strategy to counsel for not objecting when counsel testified that he did object. He also contends that the court of appeals erred in its prejudice analysis. In evaluating his contentions, we keep in mind the standard of showing deficient performance and prejudice outlined in *Strickland v. Washington*.[24]

1. Error Preservation and Deficient Performance

The court of appeals concluded that the trial court could have found that trial counsel did in fact object, and so he was not deficient for failing to object. We find this problematic for two reasons. First, this conclusion conflicts with the court of appeals's disposition of another point of error. Appellant had both a stand-alone claim that the indictment was erroneously amended and an ineffective assistance claim faulting counsel for failing to preserve this error. Because Appellant perceived that the error was not preserved, his stand-alone claim could succeed only if he did not need to preserve error. So he claimed that the error was of the sort to render the judgment void.[25]

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[24] 466 U.S. 668, 687 (1984).

[25] Showing that a judgment was void is one way to show that error need not be preserved but is not the only way. *Nix v. State*, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001). It would be enough on direct appeal to show that the right in question was waivable only and was not waived. *Proenza v. State*, 541 S.W.3d 786, 798 (Tex. Crim. App. 2017) (A right that is waivable only is not "forfeitable by a party's inaction."). The court of appeals indirectly cited *Woodard* for the proposition that the right to a grand jury indictment is waivable, *see supra* at n.4, but *Woodard* does not merely say the right is "waivable" but also says it is waivable only. *Woodard*, 322 S.W.3d at 657 ("The right to a grand jury indictment under state law is a waivable right, which 'must be implemented by the system unless expressly waived.'"). The court of appeals did not address the implications of the complete statement in *Woodard* and whether it would have allowed the court to reach the merits of Appellant's grand-jury claim. Appellant does not raise that issue before us, however.

But he was still making a claim of trial court error, and if error was preserved, then the claim should have been addressed on the merits. It was improper to reject the ineffective-assistance claim by suggesting that error was preserved without addressing what happens to the related trial court error claim if error was indeed preserved.

The second problem with the court of appeals's preservation analysis is that it did not address Appellant's claim that, if counsel objected, he still failed to preserve error because he failed to memorialize that objection on the record. Although he focuses on his claim that the record shows that counsel did not object, Appellant notes in his petition for discretionary review that trial counsel "stated on the record that he did object to the amendments, but no record of such an objection exists." Appellant claimed on appeal that there was no hearing on the motion to amend (and so no objection), but if there were, the hearing was not recorded, and "trial counsel failed to preserve an objection to the amendment by requiring the hearing to be recorded or objecting in writing to the lack of a court reporter." If a failure to object forfeits the indictment error at issue here, the failure to memorialize the objection in a recorded hearing would also forfeit error, since an objection on the record would not be shown, even if it occurred.[26] The court of appeals's holding that the trial court was within its discretion to find that counsel objected did not address the claim that counsel failed to memorialize the objection.

2. Strategy

We next address the court of appeals's suggestion that, if trial counsel did not object, he might have had a strategic reason for not opposing an amendment. Counsel's testimony that he did

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[26] *See Davis v. State*, 345 S.W.3d 71, 77 (Tex. Crim. App. 2011) ("[O]ur case law also imposes an additional, independent burden on the appealing party to make a record demonstrating that error occurred in the trial court.").

object seems at odds with the claim that he might have had a strategy for not objecting. Since counsel's testimony occurred shortly after trial at a motion-for-new-trial hearing, the dimming of memory resulting from the passage of time would not seem to be an issue. We think more explanation is required to resolve this apparent inconsistency than what was given by the court of appeals. Also, Appellant's claim that counsel failed to memorialize any objection needs to be considered here. If the conclusion is that counsel objected but failed to memorialize the objection, then the question would be whether counsel had a strategy for that conduct.

3. Prejudice

We turn to the court of appeals's remark that Appellant's "defensive theory was the same for all offenses."[27] This seems to be an implicit conclusion that Appellant suffered no prejudice. But there is a potential harm that the court of appeals did not consider—Appellant being convicted of more counts than the indictment allowed.[28] The court of appeals should address that sort of harm and decide whether Appellant was prejudiced under *Strickland*.

C. Disposition

We reverse the judgment of the court of appeals and remand the case for further proceedings consistent with this opinion.

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Publish

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[27] *Id.*

[28] *See Martinez*, 225 S.W.3d at 555 ("The error here was not harmless, because appellant was convicted of more offenses than were authorized by the indictment. As such, even if viewed as a purely statutory violation, it affected appellant's substantial rights.").