



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ROBERT TERRAZAS,	§	No. 08-20-00123-CR
Appellant,	§	
v.	§	Appeal from the
THE STATE OF TEXAS,	§	243rd District Court
Appellee.	§	of El Paso County, Texas
	§	(Trial Court No. 20180D04321)
	§	

OPINION

Appellant Robert Terrazas appeals his conviction of evading arrest with a vehicle in violation of Texas Penal Code § 38.04(b)(2)(A). In two issues, Appellant claims he was denied a fair trial because his counsel was ineffective, and the trial court erred by refusing to instruct the jury on the defense of necessity. We affirm.

BACKGROUND

Factual Background

In June 2018, Appellant was driving a Chevy Impala in El Paso, Texas, when he passed Texas Department of Public Safety Trooper Mark Jackson. Jackson observed that the tint on the Impala's windows was dark enough he could not clearly see into the vehicle. Suspecting the tint

violated the standards set by 31 Texas Administrative Code § 21.3, Jackson initiated a traffic stop by pulling behind the Impala and turning on his patrol car's emergency lights and siren. But Appellant did not stop. Instead, he continued to drive at a slow speed for five to seven minutes until he pulled into his mother's house. Jackson then arrested Appellant for evading arrest.

Procedural Background

A. Pre-Trial

A grand jury indicted Appellant for intentionally fleeing from Jackson in a vehicle while Jackson attempted to arrest or detain him. TEX.PENAL CODE ANN. § 38.04(b)(2)(A). The State filed a supplemental pleading putting Appellant on notice that it was seeking an enhanced sentence under Texas Penal Code § 12.42 because Appellant had previously been convicted of four felonies.

In a pretrial hearing, Appellant's counsel requested leave of the court to file a motion to suppress. Counsel claimed Jackson's stop was illegal at the hearing because it lacked probable cause. He stated while "the trooper alleges the tint initially," his "conversations that [Appellant] . . . had brought to light another issue" Appellant's counsel did not elaborate on what other issue had been "brought to light." And while the trial court granted the requested leave, counsel did not file a motion to suppress.

B. Trial

Appellant's counsel outlined his trial defense in his opening statement. First, he let the jury know the State was prosecuting Appellant for evading arrest; not for his past:

[A]s the trooper is waiting at the stoplight, he sees a full blown El Pasoan cholo without a shirt all tatted up and gets excited. Okay. This trooper I don't believe is a—got anything other [sic] exciting on his plate. He sees a cholo without a shirt and says, hey, let's see what we can find.

And unfortunately, as you'll see in the evidence, the penal code doesn't have a crime for being a—for having a rough past. Okay. The penal code doesn't have a crime for being all tatted up and bald.

[W]e're not here on him being a cholo and having a bad hair style; we're here for evading arrest with motor vehicle.

Counsel then argued the State would not be able to prove Appellant ever intended to flee from Jackson:

And at the end of the day, you will see that [Appellant] was never intending to get away. . . . You will see from the evidence that he was driving safely. And you'll also see through the evidence that he never at any point in time—any showing that [Appellant] actually knew the trooper was behind him.

Two witnesses testified at trial. The State elicited testimony from Jackson regarding the circumstances of Appellant evading arrest. He also testified his subsequent inspection of the tint on Appellant's vehicle showed the tint was too dark. Dashcam video taken from Jackson's patrol car showing Appellant fleeing from Jackson and his subsequent arrest was also introduced. During his cross-examination of Jackson, Appellant's counsel asked Jackson about Appellant's tattoos, which are visible in the dashcam video, and their affiliation with criminal activity:

Q. Okay. And from the looks of the video, he's got tattoos all along the upper body. Correct?

A. Correct.

Q. Okay. Those types of tattoos are often affiliated with criminal activity. Correct?

A. Possibly.

Q. Possibly. Okay. Now, driving around without a shirt often does get somebody's attention. Right? That's pretty strange. Correct?

A. I couldn't see inside his car, so I didn't know if he had a shirt on or not.

Q. So you never knew that he was without a shirt?

A. Not until I got him out of the car, sir.

Appellant was the second witness to testify. Throughout his direct examination, Appellant denied intending to flee from Jackson. Specifically, when asked why he chose to testify, Appellant said, "[b]ecause I'm not guilty, sir." He then testified he never intended to flee from Jackson. Appellant stated if he had wanted to evade Jackson, he would have "stopped and run." His attorney then asked him, "You've had interaction with law enforcement several times before. Correct?" "And in the past, there had been instances where you did try and run away on foot. Correct?" But the State objected before Appellant could answer.

Appellant also testified he did not stop for Jackson because he was worried Jackson would have his car towed:

Q. Okay. So had you pulled over from this point in time up until prior to arriving at your house, in your opinion, what was the greatest harm that could have—that could have resulted to you, in your opinion?

A. They would have taken the car.

Q. What harm would have occurred there?

A. Because of the money, I don't have money to take it out.

Q. And if you can't take it out, to your knowledge, what happens?

A. I wouldn't be able to go to work, pick up my kids from school.

Q. Would you ever get the car back?

A. I don't know, sir. It would probably be more expensive to get it out. I would probably be arrested, so it would probably be expensive.

Before Appellant’s testimony, the State argued Appellant’s counsel had opened the door to inquiry about Appellant’s gang affiliation “when he pointed out the tattoos and specifically asked the trooper if those are normally affiliated with gangs or criminal activity.” The trial court agreed, noting Appellant’s counsel had “opened the door really wide on that one.” Consequently, during its cross-examination of Appellant, the State asked him what his tattoos represented. While Appellant initially claimed the tattoos represent his Mexican heritage, he eventually testified he had once been a member of the Barrio Azteca gang. The State also asked Appellant about his convictions for graffiti, burglary of a habitation, aggravated assault with a deadly weapon, and assault of a family member. Appellant’s counsel objected to introducing Appellant’s past criminal history because it was irrelevant and overly prejudicial. The State responded that the convictions were admissible under Texas Rule of Evidence 609 and because Appellant’s counsel had himself raised the issue on direct examination when he asked Appellant about his past interactions with law enforcement. The trial court overruled Appellant’s counsel’s objections. And Appellant admitted to his former convictions.

After the close of evidence, Appellant’s counsel requested the trial court include a necessity defense in its jury charge. He argued Appellate fled from Jackson to avoid the police towing his car and the expenses associated with the vehicle towing. The trial court denied the request and issued a jury charge without an instruction regarding necessity. The jury found Appellant guilty of evading arrest or detention with a vehicle. After hearing evidence of Appellant’s past felony convictions, the jury sentenced Appellant to twenty-five years in prison. This appeal followed.

DISCUSSION

Issues

Appellant presents two issues on appeal. In his first issue, Appellant claims he received an unfair trial because his attorney was ineffective. Specifically, he argues his counsel was ineffective for three reasons: (1) he “opened the door to evidence of gang membership, criminal activity, prior bad acts and extraneous offenses . . .;” (2) he failed to file a motion to suppress; and (3) his “entire trial strategy was to employ the necessity defense.” In his second issue, Appellant argues the trial court erred by failing to charge the jury on the justification defense of necessity.

Ineffective Assistance of Counsel

A. Standard of Review

A criminal defendant is entitled to be represented by effective, competent counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Reversal for ineffective assistance of counsel is required where an appellant demonstrates by a preponderance of the evidence that (1) “counsel’s representation fell below an objective standard of reasonableness,” and (2) the appellant suffered prejudice, i.e., that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Id.* at 669. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Holland v. State*, 761 S.W.2d 307, 320 (Tex.Crim.App. 1988).

In evaluating the first prong of *Strickland*, we strongly presume the counsel is competent, that his actions “fell within the wide range of reasonable professional assistance,” *Thompson v. State*, 9 S.W.3d 808, 814 (Tex.Crim.App. 1999), and that his decisions “might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689. The appellant may overcome this presumption if he

“prove[s], by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission.” *Bone v. State*, 77 S.W.3d 828, 836 (Tex.Crim.App. 2002). Effectiveness is established by the record as a whole and not by isolated errors. *Scheanette v. State*, 144 S.W.3d 503, 509 (Tex.Crim.App. 2004).

Evidence establishing counsel’s rationale or lack thereof for any actions must be firmly rooted in the record. *Landers v. State*, 110 S.W.3d 617, 622 (Tex.App.—Houston [14th Dist.] 2003, pet. ref’d). Ordinarily, on direct appeal, the record is too underdeveloped to sustain the serious charge of ineffective assistance absent examination of counsel at a motion for a new trial hearing. *See Bone*, 77 S.W.3d at 833. We will not impute incompetence onto counsel from a silent record unless the challenged conduct was “so outrageous that no competent attorney would have engaged in it.” *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.Crim.App. 2005).

B. Analysis

Appellant claims his counsel was ineffective for three reasons: (1) he “opened the door to evidence of gang membership, criminal activity, prior bad acts and extraneous offenses . . .;” (2) he failed to file a motion to suppress; and (3) his “entire trial strategy was to employ the necessity defense.” We consider each of these in turn.

1. Opening the door to evidence of prior bad acts

Appellant claims his counsel was ineffective because he opened the door to the State asking him about his prior bad acts. Specifically, he argues counsel erred by asking Jackson whether Appellant’s tattoos “are often affiliated with criminal activity.” This line of questioning permitted the State to question him about his affiliation with the Barrio Azteca gang. He also argues counsel opened the door to the State asking him about his criminal history when he asked Appellant during

his direct examination whether he “had interaction with law enforcement several times before.” This led to Appellant admitting on cross-examination that he had several previous felony convictions. None of this evidence, according to Appellant, assisted his defense.

Appellant’s argument is without merit. Appellant’s counsel outlined his defense strategy in his opening statement. First, he attempted to mitigate Appellant’s appearance’s impact on the jury by telling them he was not on trial for “being a cholo and having a bad hair style[.]” Asking Jackson about Appellant’s tattoos, visible in the dashcam video from Jackson’s patrol car, could have furthered this strategy. Second, he argued the State would not be able to prove Appellant ever intended to flee from Jackson. A review of the record shows that in asking Appellant whether he had ever interacted with law enforcement before, Appellant’s counsel attempted to demonstrate that Appellant had previously run from law enforcement and, thus, knew how to flee from the police. The fact he did not run this time, according to counsel, was proof he did not intend to flee from Jackson. With these purposes in mind, counsel’s introduction of Appellant’s prior bad acts makes sense. That counsel may have elicited damaging testimony while pursuing this strategy does not mean he was deficient since effective assistance is not equivalent to errorless assistance. *See Ex Parte Welbron*, 785 S.W.2d 391, 393 (Tex.Crim.App. 1990)(holding the standard for reviewing trial counsel’s performance “has never been interpreted to mean that the accused is entitled to errorless or perfect counsel.”). It simply means this particular line of questioning backfired. Accordingly, we cannot conclude that counsel’s alleged infirmities in his examination of Jackson and Appellant fell below an objective standard of reasonableness.

2. Failing to file a motion to suppress

Appellant also claims his counsel was ineffective for failing to file a motion to suppress. We disagree.

Appellant was obliged to prove the trial court would have granted a motion to suppress to satisfy *Strickland*. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex.Crim.App. 1998)(citing *Roberson v. State*, 852 S.W.2d 508, 510-12 (Tex.Crim.App. 1993)). He has not met that burden. On appeal, he conclusively claims “[c]ounsel did not file a motion to suppress, and it appears the basis of the stop, excessive window tint, could have been challenged.” He does not provide any basis for this conclusion. Moreover, the record demonstrates the tint on Appellant’s vehicle was indeed too dark. Further, while counsel requested leave to file a motion to suppress because another issue had been “brought to light,” nothing in the record indicates what that issue was or if it had any merit. To prevail on his claim of ineffective assistance of counsel, Appellant had the burden to develop facts and details of the stop sufficient to conclude the stop was invalid. *Jackson*, 973 S.W.2d at 957. He did not do so. For this reason, Appellant’s claim of ineffective assistance of counsel cannot be sustained.

3. Trial Strategy

Appellant argues it was ineffective for his counsel to “have built the entire trial strategy around the necessity defense.” His contention is unfounded. The record shows that counsel’s trial strategy was to deny Appellant had the intent to flee from Jackson. He claimed during his opening statement that the State would be unable to prove Appellant intended to flee and elicited testimony from Appellant he never intended to evade arrest. Denying the elements of the charged crime is an objectively reasonable strategy. That he also attempted to develop a necessity argument indicates

counsel was thoroughly representing Appellant. As a result, Appellant's contention is without merit.

To sum up, counsel's performance at trial is supported by conceivable trial strategies. Accordingly, we do not find that his alleged infirmities constitute conduct so outrageous that no competent attorney would have engaged in it. As a result, Appellant has failed to establish that counsel's performance at trial fell below an objective standard of reasonableness. We overrule Appellant's first issue.

Necessity

Appellant contends the trial court erred in not instructing the jury on the necessity defense. We review a complaint of jury-charge error under a two-step process, considering first whether error exists. *Abdnor v. State*, 871 S.W.2d 726, 731-32 (Tex.Crim.App. 1994). If an error does exist, we then analyze that error to determine whether sufficient harm resulted from the error to require reversal. *Id.* We find no error in the trial court refusing to instruct the jury on necessity.

The trial court must "deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case [but] not expressing any opinion as to the weight of the evidence. TEX.CODE CRIM.PROC.ANN. art. 36.14. The trial court must give a requested instruction on every defense issue raised by the evidence. *See Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex.Crim.App. 2013). A defensive issue is considered raised by the evidence if there is some evidence on each element of a defense that, if believed by the jury, would support a rational inference that the element is true. *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex.Crim.App. 2007). "The defendant is entitled to an instruction on a defense when there is legally sufficient evidence to raise the defense, regardless of whether the evidence supporting the defense is weak or contradicted even if the trial court is of

the opinion that the evidence is not credible.” *Holland v. State*, 481 S.W.3d 706, 709 (Tex.App.—Eastland 2015, pet. ref’d)(citing *Shaw*, 243 S.W.3d at 657-58). Whether the record contains such evidence is a question of law, which means we do not apply the usual rule of appellate deference to the trial court’s ruling. *Shaw*, 243 S.W.3d at 657-58. “Quite the reverse, we view the evidence in the light most favorable to the defendant’s requested submission.” *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex.Crim.App. 2006).

A defendant is entitled to an instruction on the defense of necessity if the defendant reasonably believes the conduct is necessary to avoid imminent harm, the harm being avoided outweighs the harm sought to be prevented by the law criminalizing the act, and a legislative purpose to exclude the justification does not exist. TEX.PENAL CODE ANN. § 9.22. The defendant must also admit to violating the law as charged. *Young v. State*, 991 S.W.2d 835, 838 (Tex.Crim.App. 1999)(“In order to raise necessity, a defendant admits violating the statute under which he is charged and then offers necessity as a justification which weighs against imposing a criminal punishment for the act or acts which violated the statute.”). Here, Appellant did not admit to evading arrest. On the contrary, Appellant testified he was not guilty and never intended to flee from Jackson. Because Appellant did not admit to evading arrest, he was not entitled to a necessity defense. Therefore, the trial court did not err by refusing to instruct the jury on necessity. Appellant’s second issue is overruled.

CONCLUSION

For these reasons, we affirm Appellant’s conviction of evading arrest with a vehicle.

May 10, 2022

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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