Affirmed and Opinion Filed June 14, 2018

In The

Court of Appeals

Fifth District of Texas at Dallas

Nos. 05-17-00660-CR

05-17-00661-CR

05-17-00662-CR

05-17-00663-CR

05-17-00664-CR

FREDERIC LAMONT PAIGE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court

Dallas County, Texas

Trial Court Cause Nos. F15-71713-T, F15-75185-T, F15-75237-T, F15-75263-T, & F15-76309-T

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright

Opinion by Justice Bridges

Appellant Frederic Lamont Paige was indicated for five separate aggravated robberies involving a deadly weapon.[1] Appellant entered open guilty pleas for each indictment.[2] After presentation of evidence, the trial court accepted appellant's guilty pleas and assessed concurrent

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[1] The offense in F15-71713-T (appellate cause number 05-17-00660-CR) occurred on June 21, 2015 at a Family Dollar store. The offense in F15-75185-T (appellate cause number 05-17-00661-CR) occurred on December 14, 2014 at a Family Dollar store. The offense in F15-75237-T (appellate cause number 05-17-00662-CR) occurred on January 19, 2015 at a McDonald's. The offense in F15-75263-T (appellate cause number 05-17-00663-CR) occurred on February 17, 2015 at a Shell station. The offense in F15-76309-T (appellate cause number 05-17-00664-CR) occurred on August 29, 2015 at a CVS Pharmacy.

[2] The State enhanced each case with a 2003 aggravated robbery conviction in which appellant spent twelve years in prison. Within approximately three months of his release, appellant committed the robberies at issue in this case. The State abandoned the enhancement allegation after appellant agreed to plead guilty to the robberies at issue in these appeals.

twenty-five-year sentences in each case. Appellant raises fifteen issues on appeal. In issues one, three, five, seven, and nine, he challenges the sufficiency of the evidence establishing the aggravating element in each case. In issues, two, four, six, eight, and ten, he raises ineffective assistance of counsel. In his final five issues, he argues he is entitled to file out-of-time motions for new trial. We affirm the trial court's judgments. Because the facts are well-known to the parties, we include only those necessary for disposition of the appeals and issue this memorandum opinion. TEX. R. APP. P. 47.1.

Sufficiency of the Evidence

In issues one, three, five, seven, and nine, appellant argues the evidence is insufficient to substantiate his guilty pleas because he used an air soft pellet gun rather than a real gun.[3] He asserts there was no testimony the air soft pellet gun was designed, made, or adapted for the purpose of inflicting death or serious bodily injury, and there was no evidence he used it in a manner capable of causing death or serious bodily injury because he never removed it from his waist area during the robberies. The State responds appellant's judicial confessions are sufficient to support his convictions.

Article 1.15 of the code of criminal procedure provides that when a defendant pleads guilty, he cannot be convicted upon his plea alone without sufficient evidence to support the pleas. TEX. CODE CRIM. PROC. ANN. art. 1.15 (West 2005). Our appellate "sufficiency" review of non-capital felony guilty pleas to the court is confined to determining whether sufficient evidence supports the judgment of guilt under article 1.15. *Id.*; *see also McGill v. State*, 200 S.W.3d 325, 330 (Tex. App.—Dallas 2006, no pet.). Although the State must introduce evidence into the record establishing the defendant's guilt, there is no requirement that the supporting evidence prove the

[3] Although appellant had an air soft gun on him when officers arrested him, the man driving the car during the robberies had a gun in his possession when officers arrested him.

defendant's guilt beyond a reasonable doubt. *Id*. Rather, the supporting evidence must simply embrace each essential element of the offense charged. *Stone v. State*, 919 S.W.2d 424, 427 (Tex. Crim. App. 1996). Importantly, a judicial confession, standing alone, is sufficient to sustain a conviction based on a guilty plea and satisfies the requirements of article 1.15 as long as it embraces every element of the charged offense. *Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009).

Here, the State alleged in each case that appellant "intentionally and knowingly, while in the course of committing theft of property and with the intent to obtain or maintain control of said property . . . threaten and place [victim] in fear of imminent body injury and death," and appellant "used and exhibited a deadly weapon, to-wit: A FIREARM."

At the plea hearing, appellant said his attorney had gone over the indictments with him and he understood the charges and everything he signed. Appellant voluntarily pleaded guilty. The State introduced his signed judicial confessions that addressed every element of the charged offenses, including that he used and exhibited a deadly weapon, specifically a firearm, in each offense. Although appellant argues the evidence is insufficient because the air soft pellet gun is not a firearm and he did not intend to hurt anyone, as evidenced by using a "fake" gun and not removing it from his waist band, his judicial confession, standing alone, was sufficient to support his plea in each case. *Id*.; *see also Ross v. State*, 931 S.W.2d 633, 635 (Tex. App.—Dallas 1996, no pet.). We overrule appellant's first, third, fifth, seventh, and ninth issues.

Ineffective Assistance of Counsel

In issues two, four, six, eight, and ten, appellant asserts he received ineffective assistance of counsel because defense counsel allowed him to plead guilty rather than challenge the aggravating deadly weapon element. Appellant contends that because he did not use a deadly weapon per se, counsel should have challenged the proof and advised appellant to plead guilty to

only simple robbery. Instead, appellant argues defense counsel was ineffective and undermined a viable defense without any possible strategic basis. The State argues the record does not support an ineffective assistance claim.

We examine ineffective assistance of counsel claims under well-known standards. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). It is appellant's burden to show by a preponderance of the evidence (1) counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms and (2) but for counsel's errors, there was a reasonable probability the result of the preceding would have been different. *See Strickland*, 466 U.S. at 687–88; *State v. Morales*, 253 S.W.3d 686, 696–97 (Tex. Crim. App. 2008); *see also Hill v. Lockhart*, 474 U.S. 52, 58, (1985) (*Strickland* test applies to cases involving guilty pleas).

We examine the totality of counsel's representation and the particular circumstances of each case to determine whether appellant received effective assistance, but do not judge counsel's strategic decisions in hindsight. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Rather, we strongly presume counsel's competence. *Id*.

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. In most cases, a silent record providing no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *See Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). Further, trial counsel should ordinarily be given an opportunity to explain his actions before being deemed ineffective. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Absent such an opportunity, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392. Accordingly, under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-

making as to overcome the presumption that counsel's conduct was reasonable and professional. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Thompson*, 9 S.W.3d at 813. Appellant must prove both prongs by a preponderance of the evidence to prevail. *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000).

When a defendant enters his plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of such plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and, if not, (2) whether there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Cantu v. State*, 993 S.W.2d 712, 717 (Tex. App.—San Antonio 1999, pet. ref'd). However, when as here, the record shows the trial court properly admonished appellant regarding the consequences of his plea, the record presents a prima facie showing that he entered a knowing and voluntary plea. *Id*. The burden then shifts to appellant to show the plea was not voluntary. *Id*.

With regard to the first *Strickland* prong, appellant did not file a motion for new trial raising ineffective assistance of counsel. Therefore, the record is silent as to defense counsel's reasons for not challenging the aggravating element and advising appellant to plead to simple robbery. Nothing in the record reveals the reason appellant decided to enter guilty pleas or indicates what, if any, advice counsel gave him in that regard. Because this Court must strongly presume counsel was effective, we will not presume counsel did not understand the law and facts as appellant seems to suggest. *Thompson*, 9 S.W.3d at 812. Accordingly, appellant has failed to show that counsel's advice regarding entering a guilty plea was not within the range of competence demanded of attorneys in criminal cases. There is simply nothing in the record that affirmatively demonstrates

trial counsel's ineffectiveness such that appellant's plea was rendered involuntary. *See, e.g., Penny v. State*, No. 03-16-00306-CR, 2017 WL 1832458, at *3 (Tex. App.—Austin May 3, 2017, no pet.) (mem. op., not designated for publication) (overruling ineffective assistance claim when record silent on counsel's advice regarding entering guilty plea); *Hosseini v. State*, No. 04-02-00175-CR, 2003 WL 244837, at *2 (Tex. App.—San Antonio, Feb. 5, 2003, no pet.) (mem. op., not designated for publication) (same). An allegation of ineffective assistance of counsel will be sustained only if it is firmly founded in the record. *Thompson*, 9 S.W.3d at 812. Appellant has failed to make such a showing; therefore, we overrule appellant's second, fourth, sixth, eighth, and tenth issues.

Out-of-Time Motions for New Trial

In his final five issues, appellant argues he is entitled to a remand to file out-of-time motions for new trial because he was deprived of counsel during the critical time for filing motions for new trial. The State responds appellant has not rebutted the presumption of ongoing representation during the period for filing motions for new trial and cannot show harm by alleging a facially plausible claim that could have been presented in the motions.

The Sixth Amendment of the Constitution guarantees a criminal defendant the right to have counsel present at all "critical" stages of prosecution. U.S. CONST. amend. VI; *Carnell v. State*, 535 S.W.3d 569, 571 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The period for filing a motion for new trial is a "critical" stage. *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007). If a defendant is deprived of counsel during this stage of his prosecution, his constitutional rights are violated. *Id*. However, if the defendant was represented by counsel at trial, there is a rebuttable presumption that trial counsel continued to represent the defendant after trial, including during the critical motion-for-new-trial stage. *Id*. If the defendant was represented by counsel at trial and he does not file a motion for new trial, we assume it was because the defendant, with the benefit of counsel's continued representation, considered and rejected that option. *Id*. at 911 n.6.

The defendant has the burden of presenting evidence to rebut the presumption of continued representation. *Green v. State*, 264 S.W.3d 63, 69 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). In order to rebut the presumption, the record must "compel the conclusion that appellant was abandoned by trial counsel." *Monakino v. State*, 535 S.W.3d 559, 565 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (quoting *Green*, 264 S.W.3d at 71). An appellant must show more than that (1) appellant filed a notice of appeal; (2) the appellate attorney was "to be determined"; (3) the trial court appointed counsel after the expiration of the time for filing a motion for new trial; (4) on appeal, appellant would have raised further complaints had a motion for new trial been filed; (5) appellant appeared without counsel when signing a pauper's oath and requesting appellate counsel; and (6) the record shows no activity by trial counsel or any motion to withdraw from the case. *Green*, 264 S.W.3d at 69 (citing *Oldham*, 977 S.W.2d at 362–63). If the defendant rebuts this presumption and shows that he was deprived of counsel during a critical stage of his prosecution, the error is reviewed to determine whether it was harmful. *Cooks*, 240 S.W.3d at 911.

Here, the trial court imposed appellant's sentences on April 28, 2017. Under rule 21.4(a), he then had thirty days to file a motion for new trial. *See* TEX. R. APP. P. 21.4(a). Therefore, appellant's motion for new trial had to be filed no later than May 29, 2017. Appellant argues he rebutted the presumption of ongoing representation by sending letters to the clerk on May 18, 2017 and May 26, 2017, which were both within the time for filing motions for new trial.

Appellant's May 18 letter began by stating, "This letter is to ensure that my convictions for agg robbery are appealed." He noted that one point of his "appeal" was ineffective assistance of counsel in which he then detailed his account of interactions (or lack thereof) with his attorneys. He stated, "I am asking for either a new trial or a time cut." He concluded, "Any help that you can give me regarding my appeal would be helpful." This Court interpreted his letter as his notice of appeal. Similar to his first letter, appellant's May 25 letter informed the court he wanted to appeal

his convictions and "one aspect" of his appeal was ineffective assistance of counsel. The record also shows that on June 6, 2017, the trial court acknowledged appellant's indigency and assigned his case to the public defender's appellate division.

As previously stated, our appellate review begins with the presumption, absent a motion to withdraw, that trial counsel continued to effectively represent appellant during the thirty-day window for filing a motion for new trial. *Oldham v. State*, 977 S.W.2d 354, 361 (Tex. Crim. App. 1998); *Schremp v. State*, No. 05-02-01634-CR, 2003 WL 21508792, at *2 (Tex. App.—Dallas July 1, 2003, pet. ref'd) (not designated for publication). The filing of pro se matters, such as a notice of appeal, does not rebut the presumption that trial counsel acted in accordance with his continuing duty to represent his client, as the practice of filing pro se matters is commonplace when defendants are represented by counsel. *See Green*, 264 S.W.3d at 70; *Schremp*, 2003 WL 21508792, at *2 ("presumption is not rebutted by *pro se* motions"). Rather, the fact that appellant filed a pro se notice of appeal is evidence that he was informed of at least some of his appellate rights. *Smith v. State*, 17 S.W.3d 660, 663 (Tex. Crim. App. 2000); *Schremp*, 2003 WL 21508792, at *2. A pro se filing, without more, raises the issue of hybrid representation, not a lack of representation. *Green*, 264 S.W.3d at 70. Moreover, the appointment of appellate counsel after expiration of the time to file a motion for new trial is not sufficient to rebut the presumption that appellant was represented by counsel and that counsel acted effectively. *See Oldham*, 977 S.W.2d at 362–63.

There is nothing in the record before this Court indicating trial counsel did not advise appellant of his post-conviction rights or that counsel refused to take any action requested by appellant. Under these circumstances, we cannot conclude appellant has rebutted the presumption that he had assistance of counsel after sentencing and during the time for filing motions for new trial. We overruled appellant's eleventh, twelfth, thirteenth, fourteenth, and fifteenth issues.

Conclusion

We affirm the trial court's judgments.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FREDERIC LAMONT PAIGE, Appellant	On Appeal from the 283rd Judicial District Court, Dallas County, Texas
No. 05-17-00660-CR V.	Trial Court Cause No. F15-71713. Opinion delivered by Justice Bridges.
THE STATE OF TEXAS, Appellee	Justices Brown and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 14, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FREDERIC LAMONT PAIGE, Appellant	On Appeal from the 283rd Judicial District Court, Dallas County, Texas
No. 05-17-00661-CR V.	Trial Court Cause No. F15-75185. Opinion delivered by Justice Bridges.
THE STATE OF TEXAS, Appellee	Justices Brown and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 14, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FREDERIC LAMONT PAIGE, Appellant	On Appeal from the 283rd Judicial District Court, Dallas County, Texas
No. 05-17-00662-CR V.	Trial Court Cause No. F15-75237. Opinion delivered by Justice Bridges.
THE STATE OF TEXAS, Appellee	Justices Brown and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 14, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FREDERIC LAMONT PAIGE, Appellant

No. 05-17-00663-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F15-75263.
Opinion delivered by Justice Bridges.
Justices Brown and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 14, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FREDERIC LAMONT PAIGE, Appellant

No. 05-17-00664-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F15-76309.
Opinion delivered by Justice Bridges.
Justices Brown and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 14, 2018.