Affirmed and Opinion Filed March 30, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00407-CR

JOHN THOMAS GOWEN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 6
Dallas County, Texas
Trial Court Cause No. F-1848250-X

MEMORANDUM OPINION

Before Justices Partida-Kipness, Pedersen, III, and Goldstein
Opinion by Justice Pedersen, III

Appellant John Thomas Gowan pleaded guilty to a charge of aggravated sexual assault of a child. After hearing evidence, the trial court assessed punishment at confinement for thirty years. Appellant raises two issues in this Court. He challenges the trial court's admission of evidence of an unadjudicated offense and he contends that his guilty plea was involuntary due to ineffective assistance of counsel. We affirm the trial court's judgment.

I. PROCEDURAL HISTORY

On September 24, 2018, appellant was indicted on one count for aggravated sexual assault of a child under fourteen years of age. The count charged that

appellant "on or about the 15th day of November 2015[,] . . . did unlawfully then and there intentionally and knowingly cause the contact of the female sexual organ of E.W., a child, by an object, to-wit: the sexual organ of the [appellant], and at the time of the offense, the child was younger than fourteen years of age." Because both appellate issues pertain to limited evidentiary and procedural complaints, we confine our discussion of the facts and the evidence accordingly.

The trial court heard appellant's open plea on June 24, 2019. Appellant's trial counsel was Patrice Williams. The proceeding began with the following exchange regarding appellant's plea:

> THE COURT: And you are charged with aggravated sexual assault of a child, a first-degree felony with a punishment range from 5 years to 99 years or life in the penitentiary, and an optional fine not to exceed $10,000. You do have the right to a jury trial, but it's my understanding you wish to give up that right; is that correct?
>
> MR. GOWEN: Yes, sir.
>
> THE COURT: Does your client waive arraignment?
>
> MS. WILLIAMS: Yes, Your Honor.
>
> THE COURT: Mr. Gowen, how do you plead to this charge, guilty or not guilty?
>
> MR. GOWEN: Guilty.
>
> THE COURT: Are you pleading guilty of your own free will?
>
> MR. GOWEN: Yes.

The trial court then moved to the punishment phase of the hearing and heard evidence from (i) E.W.; (ii) J.W., who is E.W.'s mother; (iii) K.B., who testified appellant sexually assaulted her when she was eleven years old; and (iv) J.G., who is appellant's mother. Pertinent here, appellant objected to K.B.'s testimony, "subject to [his] request for notice of extraneous offenses." The trial court overruled this objection; K.B. testified; and Williams cross-examined K.B.

Ultimately, the trial court assessed appellant's punishment at thirty years confinement. This appeal followed.

II. ISSUES RAISED

Appellant raises two issues on appeal:

> (i) [Whether] the trial court abused its discretion by admitting an unadjudicated offense which the state failed to give notice of after Defendant requested disclosure under Rule 404(b) and (2).
>
> (ii) [Whether] appellant's plea of guilty was involuntary due to ineffective assistance of counsel.

III. STANDARDS OF REVIEW

A. Admission of Evidence

We review the admissibility of an extraneous offense for an abuse of discretion. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* "Trial courts have broad discretion in their evidentiary rulings[,] and . . . trial courts are usually in the best position to make the call on whether certain

evidence should be admitted or excluded." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We uphold the trial court's ruling if it is reasonably supported by the evidence and is correct under any theory of law applicable to the case. *Henley v. State*, 493 S.W.3d 77, 93 (Tex. Crim. App. 2016).

B. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, appellant must prove by a preponderance of the evidence (i) that counsel's representation fell below an objective standard of reasonableness and (ii) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). We examine the totality of counsel's representation to determine whether appellant received effective assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We do not judge counsel's strategic decisions in hindsight, and 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 that provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *Id.* at 813–14. When the record contains no evidence of the reasoning behind the trial counsel's actions, we cannot conclude that counsel's performance was deficient. *See Jackson v. State*, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994).

IV. DISCUSSION

ISSUE ONE: Whether the Trial Court Abused Its Discretion by Admitting Evidence of an Unadjudicated Offense

Appellant asserts the trial court abused its discretion when it permitted K.B. to testify regarding an unadjudicated extraneous offense of sexual assault. K.B. testified appellant was her aunt's boyfriend in approximately 2008 when K.B. was eleven years old. K.B. testified appellant touched her breasts twice at that time, over her clothes. K.B. explained she later told her aunt about the touching. K.B. remembered going to court and talking about the touching incident before, with a different prosecutor, but she did not otherwise remember what happened.

Appellant first contends the State failed to provide notice of its intent to introduce evidence of this unadjudicated extraneous offense. On the defendant's timely request to the attorney for the State, the State must give notice of its intent to introduce extraneous offense evidence in the same manner required by Texas Rule of Evidence 404(b). TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(g).[1] Alternatively,

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[1] Texas Rule of Evidence 404(b) provides:

> **(b) Crimes, Wrongs, or Other Acts**
>
> **(1) *Prohibited Uses*.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> **(2) *Permitted Uses; Notice in Criminal Case*.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence--other than that arising in the same transaction--in its case-in-chief.*

TEX. R. EVID. 404(b) (emphasis added).

a defendant may choose to embed such a request in a motion to the trial court—requesting for the court to order the prosecution to inform defense counsel in writing, prior to trial, of any extraneous offense evidence, which the state intends to introduce. *See Mitchell v. State*, 982 S.W.2d 425, 426-27 (Tex. Crim. App. 1998). However, should the defendant move the trial court to order the State to produce notice of extraneous offenses, which the State intends to raise during trial, such a motion is not effective until the trial court rules on it. *Id* at 427 ("'[W]hen a defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule.'" (quoting *Espinosa v. State*, 853 S.W.2d 36, 39 (Tex. Crim. App. 1993)).

On June 10, 2019, appellant filed a "Defendant's Request for Notice of Extraneous Offenses" pursuant to Texas Rule of Evidence 404(b), which (i) was directed "To the Honorable Judge of Said Court"; (ii) specifically "prays that the [trial court] order the prosecution to inform defense counsel in writing, prior to trial, of any extraneous offense, act or conduct not alleged in the indictment . . ."; and (iii) was filed with a proposed order granting appellant's request. The record does not show appellant requested a hearing nor otherwise obtained a ruling from the court. The record does not otherwise contain a request from appellant to the attorney of the State for notice of intent to introduce evidence of extraneous offenses. Therefore, we must conclude appellant did not trigger the notice requirement under

article 37.07, § 3(g). *See Mitchell*, 982 S.W.2d at 427; *Espinosa*, 853 S.W.2d 36 at 39.

Second, appellant contends that he was surprised by K.B.'s testimony—that he was not afforded the opportunity (i) to prepare to rebut the evidence of K.B.'s testimony, (ii) to contest its admissibility, or (iii) to offer evidence or arguments to mitigate it. However, to preserve an issue for appellate review, a timely and specific objection is required. TEX. R. APP. P. 33.1(a)(1)(A); *Layton v. State*, 280 S.W.3d 235, 238-39 (Tex. Crim. App. 2009). Although the record shows—as discussed above—appellant's objection that the State did not provide notice, the record does not show that appellant objected that he was surprised by this evidence. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012) ("The point of error on appeal must comport with the objection made at trial."). We must conclude appellant failed to preserve his objection that K.B.'s testimony surprised him.[2] Coupled with our conclusion that appellant failed to trigger the notice requirement under article 37.07 § 3(g), we must conclude the trial court did not abuse its discretion in admitting K.B.'s testimony. We overrule appellant's first issue.

[2] The record shows the State provided appellant with "this witness['s] complete DA file back on June 4, [2019]." Although appellant complains this was "inadequate notice and does not fulfill the basic requirements of [article 37.07 § 3(g)]," appellant concedes the record is silent on what the file contained. Nevertheless, the record shows the State provided its file on K.B. to appellant before appellant filed his motion for the trial court to "order the prosecution to inform defense counsel . . . of extraneous offense[s]." Additionally, appellant did not request a continuance on this evidentiary complaint. *Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. 1982) ("The failure to request a postponement or seek a continuance waives any error urged in an appeal on the basis of surprise.")

ISSUE TWO: Whether Appellant's Plea of Guilty Was Involuntary Due to Ineffective Assistance of Counsel

Appellant contends his guilty plea was involuntary due to the ineffective assistance of his counsel, Williams. However, appellant also concedes "[t]he record is silent on whether Appellant understood the options available to him." The record shows appellant pleaded guilty of his "own free will," and there is nothing in the record that shows appellant's guilty plea was involuntary. There is nothing in the record to show the basis for appellant's decision. Thus, appellant's assertion of an involuntary plea of guilty is not "firmly founded in the record," and we must conclude that appellant does not meet the first requirement of *Strickland*. *See Strickland*, 466 U.S. at 687–88; *Salinas*, 163 S.W.3d at 740.

Appellant argues that the option to plead "'no contest' in a bench trial afforded Appellant a possibility of probation and required the State to prove the one element that determined the range of punishment." Appellant asserts to this Court that the no contest plea was his "best option." However, in a criminal setting, a plea of no contest has "the legal effect of which shall be the same as that of a plea of guilty." CRIM. PROC. art. 27.02(5).[3] Had appellant pleaded no contest—the State's burden notwithstanding—he could have received any sentence within the statutory ranges

[3] For example, in cases where the defendant enters a plea of guilty or no contest, the defendant is not entitled to *Jackson* legal sufficiency review. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Ex parte Williams*, 703 S.W.2d 674, 682 (Tex. Crim. App. 1986) (discussing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The defendant's plea of guilty or no contest waives all non-jurisdictional defenses including any issue as to the insufficiency of the evidence. *See Williams*, 703 S.W.2d at 682.

of punishment. Furthermore, the trial court was not required to accept appellant's guilty plea. Depending on the evidence raised, the trial court retained its authority to (i) defer proceedings without entering an adjudication of guilt or (ii) withdraw appellant's guilty plea. CRIM. PROC. art. 42A.101; *Aldrich v. State*, 104 S.W.3d 890, 893 (Tex. Crim. App. 2003).[4] Additionally, the record provides no discernible explanation of the motivation behind Williams's decision for which appellant claims harm. We will not speculate as to counsel's possible motives. "Ineffective assistance of counsel claims are not built on retrospective speculation." *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002); *see Thompson*, 9 S.W.3d at 813–14.

There is no evidence in the record or support for a reasonable probability that, but for Williams's advice to appellant to plead guilty, the result of the proceeding would have been different. We must therefore conclude that the result of the trial court's proceeding—finding appellant guilty—would not have been different. Appellant does not meet the second requirement of *Strickland*. *See Strickland*, 466 U.S. at 687–88; *Salinas*, 163 S.W.3d at 740. Accordingly, we conclude appellant's

[4] In *Aldrich*, the Texas Court of Criminal Appeals held:

> In a long line of authorities this Court has held that when the evidence introduced makes evident the innocence of the accused or which reasonably and fairly raises an issue as to such fact and such evidence is not withdrawn, the trial court is required on its own motion to withdraw the defendant's guilty plea or nolo contendere plea and enter a not guilty plea for the defendant. This rule has been recognized and applied even when a jury has been waived and the plea is before the court without a jury.

Aldrich, 104 S.W.3d at 892–93.

guilty plea was not involuntary due to ineffective assistance of counsel. We overrule appellant's second issue.

V. CONCLUSION

Since we have overruled both of appellant's issues, the judgment of the trial court is affirmed.

Bill Pedersen, III

BILL PEDERSEN, III
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHN THOMAS GOWEN, Appellant	On Appeal from the Criminal District Court No. 6, Dallas County, Texas Trial Court Cause No. F-1848250-X.
No. 05-20-00407-CR V.	Opinion delivered by Justice Pedersen, III. Justices Partida-Kipness and Goldstein participating.
THE STATE OF TEXAS, Appellee	

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

Judgment entered this 30th day of March, 2021.