Opinion issued October 21, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00765-CR

MICHAEL FITZGERALD GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Case No. 1050277

MEMORANDUM OPINION

A jury convicted appellant, Michael Fitzgerald Green, of aggravated robbery and assessed punishment at forty-five years' imprisonment. *See* TEX. PENAL CODE ANN. § 29.03 (Vernon 2003). On appeal, appellant argues he received ineffective assistance of counsel because (1) counsel failed to object to improper impeachment

evidence and (2) counsel failed to object to hearsay testimony concerning several anonymous tips. We affirm.

Background

Two men committed an aggravated robbery at a Cash America Pawn Shop. One robber, Robert Gilmore, had an employee remove cash from the cash drawer and open up the jewelry cases. The second robber, appellant, pressed a gun to another employee's back and demanded she open the store safe. The men took approximately $375 in cash and $10,000 worth of merchandise. Gilmore was apprehended and positively identified in a live lineup. He pleaded guilty to aggravated robbery and was sentenced to eight years in prison.

Officer Jeff Miller testified that he received two anonymous tips identifying two different people as Gilmore's accomplice. One tip identified appellant. Officer Miller created a photo line-up based on the anonymous tips, interviews with Gilmore, and the surveillance video from the robbery. The two pawn shop employees made "strong tentative" identifications of appellant.[1] Gilmore made a positive identification of appellant and initialed the photo line-up. Appellant was arrested, and he denied any involvement in the robbery. Appellant also made an

[1] One employee testified that he was 30% sure appellant was the robber. The second employee testified that on a scale of 1-10, she was a "4" with regards to appellant.

unrecorded, spontaneous statement in which he offered to confess in exchange for five years' jail time.

Appellant was indicted for aggravated robbery and pleaded not guilty. At trial, Gilmore testified and refused to identify appellant as his accomplice, contradicting his earlier statements and actions. The State impeached Gilmore by confrontation with his prior statements and with impeachment witnesses. Appellant's counsel neither objected nor requested a limiting instruction to the impeachment. Counsel also never objected to testimony regarding the anonymous tip identifying appellant. The jury found appellant guilty and assessed punishment at forty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division.

Ineffective Assistance of Counsel

Appellant argues he received ineffective assistance of counsel at trial because his counsel (1) failed to object to Gilmore's out-of-court statements; and (2) failed to object to Miller's testimony regarding the anonymous tip.

Standard of Review

The standard of review for ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687–96 (1984), and *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). To prevail, appellant must first show his counsel's performance was deficient. *Strickland*, 466 U.S. at 687; *Bone*, 77

S.W.3d at 833. "Specifically, appellant must prove, by a preponderance of the evidence, that his counsel's representation fell below the objective standard of professional norms." *Bone*, 77 S.W.3d at 833. "Second, appellant must show that this deficient performance prejudiced his defense," meaning "a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." *Bone*, 77 S.W.3d at 833 (quoting *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002)). A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id*. Thus, 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 on as having produced a just result." *Strickland*, 466 U.S. at 686.

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and the appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id*. at 689. To overcome the presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). When determining the validity of an

ineffective-assistance-of-counsel claim, judicial review must be highly deferential to trial counsel. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). The record on direct appeal will rarely contain sufficient information to evaluate an ineffective-assistance-of-counsel claim. *See Bone*, 77 S.W.3d at 833. Based on such a record, a finding that counsel was ineffective would normally require impermissible speculation by the appellate court. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). When the record is silent as to trial counsel's strategy, we will not conclude that defense counsel's assistance was ineffective 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) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

Improper Impeachment

Appellant cites *Hughes v. State*, 4 S.W.3d 1, 5 (Tex. Crim. App. 1999), for the proposition that the trial court abuses its discretion under Rule 403 of the Texas Rules of Evidence when a court allows the State to impeach a witness for the primary purpose of placing otherwise inadmissible evidence before the jury. Under *Hughes*, the court should consider whether the State knew its own witness would testify unfavorably. *Hughes*, 4 S.W.3d at 5. Appellant argues the State expected Gilmore to contradict his previous statements and called him for the

purpose of impeaching him. He further argues defense counsel provided ineffective assistance by not objecting to the testimony. He contends his counsel's failure to object rises to the level of deficient representation under the first prong of the *Strickland* test.

Appellant has provided no basis on which his attorney could have concluded the State intended to call Gilmore for the purpose of impeaching him. Appellant claims the prosecutor never mentioned Gilmore's testimony in opening statement. However, the record reflects the prosecutor did, in fact, mention Gilmore in her opening and said Gilmore would identify appellant as his accomplice. Appellant also claims the State followed Gilmore's testimony with a "litany of impeachment witnesses." The record reflects that the State actually called one witness whose testimony was impeaching and one witness who testified to other facts in addition to impeachment. This does not indicate to us that the State called Gilmore for the purpose of impeaching him. Further, our review of the record indicates the prosecutor appeared surprised when Gilmore refused to identify appellant.

Defense counsel has not been shown to have been deficient for failing to object to Gilmore's impeachment. Under the first prong of *Strickland*, appellant has failed to establish that his trial counsel's representation fell below the objective standard of professional norms. *See Bone*, 77 S.W.3d at 833. Since appellant failed to establish deficient representation under the first prong of *Strickland*, we

need not address his arguments relative to the second prong. *See Thompson*, 9 S.W.3d at 812.

Hearsay Objection

Appellant argues counsel should have objected to the statements regarding the anonymous tips. His sole appellate argument relating to the tips is that they were "plainly inadmissible hearsay and very prejudicial." He cites no cases and provides no analysis of why a hearsay objection would have been proper, why trial counsel failed to satisfy professional norms by failing to object, or how he was harmed by the testimony. Appellant failed to adequately brief this issue and error, if any, on this ground is waived. *See* TEX. R. APP. P. 38.1(i); *see Swearingen v. State*, 101 S.W.3d 89, 100 (Tex. Crim. App. 2003).

Since appellant fails to meet the first prong of *Strickland* and the hearsay objection was waived, we overrule appellant's sole issue of ineffective assistance of counsel.

Conclusion

We affirm the trial court's judgment.

Sam Nuchia
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Nuchia.[2]

Do not publish. TEX. R. APP. P. 47.2(b).

[2] The Honorable Sam Nuchia, Senior Justice, Court of Appeals for the First District of Texas, participating by assignment.