Opinion issued August 19, 2010

In The

Court of Appeals

For The

First District of Texas

NOS. 01-09-00215-CR
01-10-00196-CR

LOYDE D. WAGGONER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 217th District Court
Angelina County, Texas
Trial Court Case No. 28,174 (Counts I & II)

MEMORANDUM OPINION

Appellant Loyde D. Waggoner was convicted by a jury of two counts of aggravated assault (count I, appellate case number 01-09-00215-CR; count II, appellate case number 01-10-00196-CR). *See* TEX. PENAL CODE ANN.

§ 22.02(a)(2) (Vernon Supp. 2009). Waggoner pleaded true to prior felony convictions for aggravated assault and indecency with a child, and the jury assessed punishment at imprisonment for 60 years for each count, to run concurrently, and a $10,000 fine for both counts. *See* TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 2009). Waggoner brings three issues, claiming legal and factual insufficiency of the evidence and ineffective assistance of counsel.[1] We affirm.

Background

Trampas Smith testified at trial that he heard his neighbor cry for help. He saw a woman on the porch of the next-door house who was bloody and bruised. At her request, Smith called 9-1-1.

Chief J. Burns of the Hudson Police Department testified that he responded to the 9-1-1 call and found the woman on the porch. Chief Burns observed a large amount of blood on her clothes. He went inside the house and found another woman, who was also very bloody. The second woman was very agitated and unable to speak.

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Twelfth District of Texas. Misc. Docket No. 08-9177 (Tex. Dec. 15, 2008); *see* TEX. GOV'T CODE ANN. § 73.001 (Vernon 2005) (authorizing transfer of cases). We are unaware of any conflict between precedent of the Court of Appeals for the Twelfth District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

Investigator C. Wells of the Angelina County Sheriff's Department also responded to the 9-1-1 call. He testified that he examined the house and found multiple blood stains on carpet, clothes, and other items including a billy club. In the bathroom, Investigator Wells found a baseball bat lying in the tub. The bat had reddish stains on it, but the bat was never sent to a laboratory to confirm whether the stains were blood.

Investigator Wells testified that he was trained in using a billy club when he was a Houston Police Officer. During that training he was instructed not to hit someone in the head with the club. Investigator Wells also testified that he worked on a previous case in which a baseball bat was used to strike the victim, who died from the injuries.

S. Osburn, the complainant in Count I, testified at trial. Osburn is the aunt of M. Thompson, the complainant in Count II. Thompson is a woman with autism and an intellectual disability. She does not speak. Osburn discovered in 2006 that Thompson was a resident at the Lufkin State School, and Osburn moved to the Lufkin area hoping to become Thompson's guardian. The school allowed Osburn to take Thompson out for a couple of days at a time to stay with her.

To be near her niece, Osburn rented a room from Waggoner in May 2008. Osburn brought Thompson over to Waggoner's house to visit approximately three

times, and she testified that she felt safe in the house. The assaults occurred the first time that Osburn brought Thompson to the house to spend the night.

Osburn testified that she was sleeping in the living room when Waggoner woke her up early in the morning of June 13, 2008. She went outside to smoke a cigarette and shortly thereafter heard Thompson moan. Osburn ran back in the house, and Waggoner told her that he thought Thompson had fallen. As Osburn went back to her bedroom to find Thompson, she was hit in the head and passed out. Osburn testified that Waggoner hit her from behind and that she did not see what was in Waggoner's hands.

Osburn woke up about four hours later, with her hands tied behind her back. She testified that Waggoner was acting "crazy" and told her he needed thousands of dollars. Osburn managed to free her hands, and when Waggoner left the room to make a telephone call, she crawled out of a bedroom window into the back yard and began yelling. Waggoner grabbed her and forced her back into to the house, where she passed out.

During one period when Osburn was conscious, she offered to go to the bank with Waggoner and get cash for him. Waggoner helped Osburn to write a check. Another time when Osburn awoke, Waggoner was choking Thompson and saying, "She won't shut up." Osburn told Waggoner to leave Thompson alone, and he left, taking Osburn's credit cards and car.

After Waggoner left, Osburn took a baseball bat she saw and hid it in the bathroom. She eventually crawled to the front door and out on the porch, where she cried for help. Osburn testified that she was hospitalized for a week for her injuries.

Deputy D. Childress of the Angelina County Sheriff's Department also responded to the 9-1-1 call. When he arrived, Osburn was being taken to the hospital. Deputy Childress saw Thompson come out of the house, and she had bruises around her eyes and was bloody.

Deputy Childress saw a nearby vehicle being driven that fit the description of Osburn's car, and he and another deputy, Lieutenant J. York, followed. Deputy Childress eventually found Osburn's car flipped over in a ditch and arrested Waggoner.

Sergeant B. Riley of the Angelina County Sheriff's Department testified that he interviewed Osburn and Thompson at the hospital. He was unable to get a statement from Thompson as she does not speak, but Osburn was conscious and spoke with him. Over objection, Sergeant Riley testified that Osburn stated that she believed Waggoner hit her with a baseball bat. On cross-examination, Sergeant Riley stated that no tests were done on the baseball bat to determine the presence of blood, hair, or fingerprints.

Lieutenant L. Arnold of the Lufkin Fire Department testified that he was the paramedic who responded to the incident. Lieutenant Arnold described Osburn as having multiple injuries to her head and scalp that showed signs of trauma. Over objection, Lieutenant Arnold testified that Osburn told him that she was hit in the head with a baseball bat.

Nurse S. Boston testified at trial that she examined Thompson in the emergency room. Boston said that Thompson's head injuries were consistent with being struck by an object that caused blunt trauma and that these types of blows were capable of causing serious bodily injury or death. On cross-examination, Boston admitted that she had no personal knowledge of how Thompson's injuries were inflicted and that it was possible that the injuries were caused by a fist.

Angelina County Sheriff K. Henson testified at trial that he responded to the incident. At the arrest scene, Waggoner asked Sheriff Henson if "they" were dead. After taking Waggoner to the office, Sheriff Henson gave Waggoner his *Miranda* warnings and conducted a recorded interview. During the interview, Waggoner admitted to Sheriff Henson that he had used approximately $2,000 worth of cocaine. Sheriff Henson testified at trial that it appeared Waggoner was using crack cocaine.

At trial, the recorded interview of Waggoner was played for the jury without objection, and in that interview Waggoner stated that he struck the complainants with a billy club.

Analysis

Legal sufficiency of the evidence

In his first issue, Waggoner contends the evidence is legally insufficient in both Counts I and II to establish that he committed aggravated assault. Waggoner specifically argues that the State failed to prove that Waggoner struck either Osburn or Thompson with a deadly weapon, i.e., a bat or club, as alleged in the indictment.

The standard of review for legal sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). The jury is the exclusive judge of the credibility of witnesses and of the weight of their testimony. *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000), *overruled on other grounds by Laster v. State*, 275 S.W.3d 512 (Tex. Crim. App. 2009).

Waggoner concedes on appeal that he admitted in his recorded interview with Sheriff Henson that he used a billy club to strike Osburn and Thompson.

Nonetheless, Waggoner contends that his statement should have been challenged at trial and in essence asks this Court to review his legal-sufficiency issue without considering his admission. However, in conducting a sufficiency review, we must consider all the evidence presented to the jury, whether rightly or wrongly admitted. *See, e.g.*, *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988). We, therefore, must consider Waggoner's admission, as well as Sergeant Riley's and Lieutenant Arnold's testimony that Osburn said Waggoner hit her with a baseball bat.

Reading Waggoner's brief broadly, there is also a suggestion that the evidence was legally insufficient to prove that either the baseball bat or billy club was a deadly weapon. A deadly weapon is defined as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17)(B) (Vernon Supp. 2009). To hold the evidence legally sufficient to sustain a deadly-weapon finding, the evidence must demonstrate that: (1) the object meets the statutory definition of a dangerous weapon; (2) the deadly weapon was used or exhibited during the transaction from which the felony conviction was obtained; and (3) other people were put in actual danger. *See Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005).

Waggoner specifically suggests that because the State indicted him for aggravated assault based on using a deadly weapon (Penal Code § 22.02(a)(2)),

and not based on causing serious bodily injury (Penal Code § 22.02(a)(1)), the State has somehow failed to prove that the baseball bat or billy club was in the manner of its use or intended use capable of causing death or serious bodily injury. *See* TEX. PENAL CODE ANN. § 22.02(a) (Vernon Supp. 2009).

Investigator Wells testified that he worked on a previous case in which a baseball bat was used to strike the victim, who died from the injuries. Nurse Boston also testified that Thompson's head injuries were consistent with being struck by an object that caused blunt trauma and that these types of blows were capable of causing serious bodily injury or death. Taken together with the evidence that Waggoner hit Osburn with either a baseball bat or billy club, and the evidence that Waggoner hit Thompson with a billy club, we hold there is legally sufficient evidence to support the judgment of conviction.

We overrule the first issue.

Factual sufficiency of the evidence

In his second issue, Waggoner contends the evidence is factually insufficient in both Counts I and II to establish that he committed aggravated assault because (1) the evidence is insufficient to prove that a deadly weapon was used and (2) someone other than Waggoner may have hit the complainants. When conducting a factual-sufficiency review, we view all of the evidence in a neutral light. *Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997). We will set the verdict

aside only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id.* Before finding that evidence is factually insufficient to support a verdict under the second prong of *Johnson*, we must be able to say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id.* In conducting a factual-sufficiency review, we must also discuss the evidence that, according to the appellant, most undermines the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

We may not substitute our judgment for that of the fact-finder. *King v. State*, 29 S.W.3d 556, 563 (Tex. Crim. App. 2000). The fact-finder alone determines what weight to place on contradictory testimonial evidence because that determination depends on the fact-finder's evaluation of credibility and demeanor. *Cain*, 958 S.W.2d at 408–09. As the judge of the credibility of the

witnesses, the fact-finder may choose to believe all, some, or none of the testimony presented. *Id.* at 407 n.5. The standard for reviewing the factual sufficiency of the evidence is whether, after considering all of the evidence in a neutral light, the jury was rationally justified in finding guilt beyond reasonable doubt. *Watson*, 204 S.W.3d at 415.

Waggoner specifically points to the following testimony to undermine the jury's verdict: (1) Boston's testimony that a fist could have caused Thompson's injuries and (2) Osburn's testimony that Waggoner hit her from behind and that she did not see what was in Waggoner's hands. He also argues that the State did not perform any laboratory tests on the baseball bat, billy club, or reddish stains found in the house, but he does not cite any requirement that the State was required to do so.

Considering all of the evidence in a neutral light, the jury could have found that the billy club caused Thompson's injuries and that the inconsistencies in Osburn's statements were a result of her head injuries. Further, even without Waggoner's admission to Sheriff Henson, the jury could have found that the evidence established that Waggoner was the person who assaulted the complainants. Accordingly, we cannot say that the jury's verdict is against the great weight and preponderance of the evidence.

We overrule Waggoner's second issue.

Ineffective assistance of counsel

In his third issue, Waggoner claims his trial counsel was ineffective in failing (1) to object at trial to the statement Waggoner gave to Sheriff Henson and (2) to request a hearing on the voluntariness of his statement. To be entitled to a new trial based on ineffective assistance, a defendant must show that counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986). The defendant bears the burden to prove ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Allegations of ineffective assistance of counsel must be firmly founded in the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The review of trial counsel's representation is highly deferential and presumes that counsel's actions fell within a wide range of reasonable professional assistance. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). When the record is silent on the motivations underlying trial counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that trial counsel's conduct was reasonable. *See id.*

In most cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *See Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). Because the reasonableness of trial counsel's choices often involves facts that do not appear in the appellate record, the Court of Criminal Appeals has stated that trial counsel should ordinarily be given an opportunity to explain his actions before a court reviews that record and concludes trial counsel was ineffective. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). A petition for writ of habeas corpus usually is the appropriate vehicle to investigate ineffective-assistance claims. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). Without proof from the defendant that there is no plausible professional reason for trial counsel's act or omission, the reviewing court may not speculate on why counsel acted as he did. *See Bone*, 77 S.W.3d at 835–36.

On appeal, Wagoner argues that his trial counsel failed the first prong of *Strickland*—i.e., counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment—because counsel did not object to the admission of the recorded statement based on its voluntariness. Waggoner concedes that the recorded statement itself contains the required statutory warnings. *See* TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon 2005) (setting out statutory requirements for

admission of oral statement made as result of custodial interrogation). Nevertheless, Waggoner argues that because Sheriff Henson spoke with Waggoner at the arrest scene and the sheriff may have been present when Lieutenant Arnold treated Waggoner at the scene, trial counsel should have requested a *Jackson v. Denno* hearing to determine the voluntariness of Waggoner's possible statements to Sheriff Henson. *See Jackson v. Denno*, 378 U.S. 368, 380, 84 S. Ct. 1774, 1783 (1964) (holding that defendant objecting to admission of confession is entitled to fair hearing in which both underlying factual issues and voluntariness of confession are actually and reliably determined).

Waggoner also suggests that even though the recorded statement itself contains the required statutory warnings, the statement was nonetheless involuntary. Without expressly admitting on appeal that he had used cocaine on the date of the incident, Waggoner suggests that trial counsel's cross-examination of Sheriff Henson, in which counsel asked the sheriff if Waggoner appeared to be on a cocaine "binge" when he gave his recorded statement, is sufficient evidence that the statement was involuntary to demonstrate that trial counsel was ineffective in not requesting a *Jackson v. Denno* hearing.

We disagree. Waggoner presents no evidence to demonstrate that trial counsel could not have had any plausible professional reasons for his actions in this regard, as no evidentiary motion for new trial was filed. *See Bone*, 77 S.W.3d

at 835–36. On appeal Waggoner does discuss his trial counsel's cross-examination of Sheriff Henson, which suggests that Waggoner may have owed drug dealers money for crack cocaine and that the dealers could have been the people who assaulted the complainants. We also note that Sheriff Henson testified on cross-examination that Waggoner "had a lot of his facilities" during the statement.

Mere identification of instances in which counsel did not make an evidentiary objection, without more, does not establish deficient performance of counsel for the purposes of an ineffective-assistance claim. *See, e.g.*, *Thomas v. State*, 886 S.W.2d 388, 392 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) ("Isolated failures to object to certain procedural mistakes or improper evidence or argument do not constitute ineffective assistance of counsel. . . . Failure to object to inadmissible testimony can constitute a sound and plausible trial strategy." (citing *Davis v. State*, 830 S.W.2d 762, 765 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd)). Waggoner has not offered any authorities or argument to establish that trial counsel could not have had any plausible professional reasons for his failure to object. *See Bone*, 77 S.W.3d at 835–36.

It is the defendant's burden to prove there is no plausible professional reason for trial counsel's act or omission. *See Bone*, 77 S.W.3d at 836. Without an evidentiary motion for new trial, we are not persuaded, based on the existing appellate record and argument, that trial counsel could not have had any plausible

professional reasons for his actions. *See id.* (stating that counsel should ordinarily be accorded opportunity to explain his actions before being condemned as unprofessional and incompetent). We therefore hold that Waggoner has not met his burden under the first prong of *Strickland* to prove that his trial counsel was deficient. Because failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim, we do not reach Waggoner's argument on the second prong of *Strickland*. *See Thompson*, 9 S.W.3d at 813.

We overrule Waggoner's third issue.

Conclusion

We affirm the trial court's judgment.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.
Do not publish. TEX. R. APP. P. 47.2(b).