Opinion issued December 2, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00673-CR

JAMON REYNARD WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Case No. 1177742

MEMORANDUM OPINION

Appellant, Jamon Reynard Williams, was charged by indictment with aggravated sexual assault of a child.[1] Appellant pleaded not guilty. A jury found appellant guilty as charged and assessed punishment at life in prison. In four

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[1] *See* TEX. PENAL CODE ANN. § 22.021 (Vernon Supp. 2010).

points of error, appellant argues (1) the trial court's clearing of the courtroom during testimony of minors violated his state and federal constitutional rights to a public trial; (2) the trial court abused its discretion by admitting extraneous offense evidence during the punishment phase of the trial; and (3) he was denied effective assistance of counsel.

We affirm.

Background

In March of 2008, complainant, A.T., described to her mother an event that occurred around late October or early November of 2005 in which appellant sexually assaulted her. A.T.'s mother took her to the police and charges were filed against appellant.

During the guilt-innocence phase of the trial, the State presented the testimony of A.T.'s mother describing A.T.'s first outcry of the offense committed by appellant. No objection was raised. This testimony, as well as testimony of another witness, established that A.T. also had accused her grandfather of sexual abuse and that the grandfather was later charged and pleaded guilty.

In the morning of the second day of the trial, the State notified the trial court that, on the previous day, some members of appellant's family were seated near the jury box and were making comments and gesturing in response to the witness's testimony. The State asked the trial court to admonish the family members and to

have them moved to the other side of the courtroom. The only objections raised by appellant concerned whether his family members should be relocated while in the courtroom.

During this exchange, the trial court stated that it was the "usual and customary practice" of the court to clear the courtroom of everyone "except for court personnel, the defendant, the defense attorney, and the State" for all child witnesses rather than having the child in a separate room with a video camera that displayed in the courtroom. Neither party objected to this practice. Instead, the conversation continued about whether appellant's family members should be required to move and, later, about the bailiff making them move on his own accord.

During the punishment phase of the trial, the State sought the introduction of evidence concerning an extraneous offense alleged to have been committed by appellant while he was a juvenile. Appellant argued that his record as a juvenile should have been sealed and that the late notice of the offense caused an unfair surprise. The State argued that the record was not sealed and that appellant's counsel had alerted the State to the offense, so it could not come as a surprise to appellant. The trial court ultimately allowed the evidence to be presented to the jury.

Appellant's Right to a Public Trial

In his first two points of error, appellant argues that the trial court violated his right to a public trial guaranteed under the federal and state constitutions by closing the courtroom during the testimony of the three child witnesses.[2] The State argues that any error was waived at trial because appellant did not raise a proper objection to the closing of the courtroom during the testimony of the child witnesses. We agree.

In the morning of the second day of the trial, the State notified the trial court that, on the previous day, some members of appellant's family were seated near the jury box and were making comments and gesturing in response to the witness's testimony. The State asked the trial court to admonish the family members and to have them moved to the other side of the courtroom. The only objections raised by appellant concerned whether his family members should be relocated while in the courtroom.

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[2] Appellant's first point of error is based on the sixth amendment of the United States constitution. U.S. CONST. amend. VI. His second point of error is based on section 10 of article I of the Texas Constitution. TEX. CONST. art. I, § 10. Appellant argues these two points under the same section and draws no legal distinction between the breadth and applicability of the federal and state constitutional provisions. "State and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground." *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993). When an appellant does not make an argument that the two provisions offer different levels of protection, we will consider only the federal constitutional claim. *Mitschke v. State*, 129 S.W.3d 130, 132 (Tex. Crim. App. 2004).

During this exchange, the trial court stated that it was the "usual and customary practice" of the court to clear the courtroom of everyone "except for court personnel, the defendant, the defense attorney, and the State" for all child witnesses rather than having the child in a separate room with a video camera that displayed in the courtroom. Neither party objected to this practice. Instead, the conversation continued about whether appellant's family members should be required to move.

During the guilt-innocence phase of the trial, one child witness testified twice. Appellant made no objections to the courtroom being cleared either of those times. Additionally, two child witnesses testified during the punishment phase. Appellant did not object either time to the courtroom being cleared.

The federal constitution guarantees a criminal defendant the right to a public trial. U.S. CONST. amend. VI. "Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial." *United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006). The only objections raised by appellant concerned whether his family members should be relocated while in the courtroom. Appellant did not raise any objections to the closure of the courtroom for the testimony of each of the child witnesses. Appellant's point of error on appeal must comport with his objection at trial. *See Guevara v. State*, 97

S.W.3d 579, 583 (Tex. Crim. App. 2003). Accordingly, appellant waived any rights he had to a public trial.

We overrule appellant's first and second points of error.

Admission of Extraneous Offense

In his third point of error, appellant argues that the trial court abused its discretion during the punishment phase of the trial by admitting extraneous offense evidence to which jeopardy had attached. Specifically, appellant objected to the introduction of evidence regarding an incident that occurred when appellant was a minor in which appellant allegedly inserted his finger into the vagina of a 5-year-old female. Appellant was charged for the alleged offense and tried at least twice but never convicted.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *Green v. State*, 934 S.W.2d 92, 101–02 (Tex. Crim. App. 1996). If the trial court's evidentiary ruling is within the "zone of reasonable disagreement," there is no abuse of discretion, and the reviewing court must uphold the trial court's ruling. *Id.* All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by the rules of evidence, or by other rules prescribed pursuant to statutory authority. TEX. R. EVID. 402. Evidence is relevant

if it tends to make the existence of any consequential fact more or less probable than it is without the evidence. TEX. R. EVID 401.

In all criminal cases, after a finding of guilt by either a judge or a jury, both parties may offer any evidence relevant to sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (Vernon Supp. 2010); *Rivera v. State*, 123 S.W.3d 21, 30 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). This evidence may include the defendant's prior criminal record, character testimony, reputation testimony, or evidence of extraneous crimes or bad acts the defendant has been shown, beyond a reasonable doubt, to have committed. *Rivera*, 123 S.W.3d at 30. The determination of what is "relevant" in regard to punishment, under article 37.07 section 3(a), "should be a question of what is helpful to the jury in determining the appropriate sentence in a particular case." *Mendiola v. State*, 21 S.W.3d 282, 285 (Tex. Crim. App. 2000).

B. Waiver

As an initial matter, the State argues that appellant has waived this issue by not properly objecting to it at trial. To preserve an error for review on appeal, the party must make an objection, state a ground for the objection with sufficient specificity to make the trial court aware of the complaint, and either obtain a ruling or object to the court's refusal to make a ruling. TEX. R. APP. P. 33.1(a); *Wilson v.*

State, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). The party's complaint on appeal must comport with the objection raised at trial. *Wilson*, 71 S.W.3d at 349.

Appellant raised multiple objections at trial regarding the admission of the evidence. When the matter was first raised in the guilt-innocence phase, appellant's objected because "there is no conviction anywhere." The trial court observed that there was no attempt at that time to introduce the evidence and ruled only that, before any party could elicit testimony regarding the extraneous offense, they would have to come before the court and obtain a ruling then. Even if we were to construe appellant's objection as an objection to double jeopardy, the trial court did not specifically rule on this objection at this point. Because there was no ruling, this objection did not preserve any error to consider on appeal. *See* TEX. R. APP. P. 33.1(a)(2).

During the punishment phase of the trial, the State sought permission from the trial court to introduce the evidence of the extraneous offense. Appellant argued that he was objecting because he was a juvenile when the alleged offense was committed and, accordingly, the record should have been sealed because he was not convicted. The trial court stated it had concerns about the evidence:

> The thing that concerns me is that it was tried to a jury twice, and neither time was it found beyond a reasonable doubt. Now in order for it to be considered by this jury, they have to be able to find it beyond a reasonable doubt. But will the prejudicial affect [sic] outweigh the probative value[?]

At this point, appellant argued that the evidence would prejudice the case. The trial court expressed concern that the evidence would be too prejudicial, but stated that the law showed that the evidence could be introduced. At this point, the trial court ruled that the State could introduce evidence of the extraneous offense.

None of these objections are based on a double-jeopardy violation. Accordingly, they do not comport with the issue raised on appeal. *See Wilson*, 71 S.W.3d at 349.

Nevertheless, a double-jeopardy claim can be raised for the first time on appeal "when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate state interests." *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). Accordingly, we consider whether the undisputed facts show that appellant's claim of double jeopardy violation is clearly apparent on the face of the record and whether enforcement of usual rules of procedural default serves no legitimate state interests.

C. Analysis

As a general rule, unadjudicated juvenile offenses are admissible against a defendant in the punishment phase of a trial. *Strasser v. State*, 81 S.W.3d 468, 470 (Tex. App.—Eastland 2002, pet. ref'd). During the punishment phase, the State sought to introduce evidence regarding an incident that occurred when appellant

was a minor. The State alleged that, during this incident, appellant inserted his finger into the vagina of a 5-year-old female. Appellant was charged for the alleged offense. Both parties agreed that the case was tried twice, resulting in a hung jury both times. Appellant argued that the case went to trial a third time and the State dismissed the suit in the process of third trial. The State argued that, after the second hung jury, the case was nonsuited.

In this instance, the undisputed facts do not show that a double-jeopardy violation occurred. Appellant's counsel told the trial court that the case had been dismissed during the third trial. Even if we were to look only at the statements of appellant's counsel and consider them facts upon which we could make a determination, appellant's counsel did not state at what point during the third trial the case was dismissed. Jeopardy does not attach until a jury has been empanelled and sworn. *State v. Moreno*, 294 S.W.3d 594, 597 (Tex. Crim. App. 2009).

Appellant's sister testified during the punishment phase that the case went to trial three times. Appellant testified that, during the third trial, the case was dismissed. Neither appellant nor his sister testified at what point during the trial the case was dismissed. *See id.* In contrast, the complainant from the earlier case and her brother testified during the punishment phase of the current case. Both of them testified that the case only went to trial twice. The facts establishing double jeopardy were disputed in this matter. Therefore, it is not clearly apparent on the

face of the record that there was a double jeopardy violation. *See Gonzalez*, 8 S.W.3d at 643.

We overrule appellant's third point of error.

Ineffective Assistance of Counsel

In his final point of error, appellant argues that he was denied effective assistance of counsel.

A. Applicable legal principles

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. *See* U.S. CONST. amend. VI. To show ineffective assistance of counsel, a defendant must demonstrate both (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005).

An appellant bears the burden of proving by a preponderance of the evidence that his counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged

ineffectiveness. *Id*. at 813. We presume that a counsel's conduct falls within the wide range of reasonable professional assistance, and we will find a counsel's performance deficient only if the conduct is so outrageous that no competent attorney would have engaged in it. *Andrews*, 159 S.W.3d at 101.

In most ineffective-assistance-of-counsel cases, the record on direct appeal is not developed and does not adequately reflect the alleged failings of trial counsel. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). This is particularly true when the alleged deficiencies are matters of omission and not of commission that is shown in the record. *Id*. In such cases, the record is best developed in a hearing on a motion for new trial or on application for a writ of habeas corpus. *See id*.

B. Analysis

Appellant claims that three errors establish that his attorney rendered ineffective assistance: (1) failing to challenge the complainant's mother's outcry testimony; (2) failing to object to the testimony establishing that the child had also accused another person of sexual abuse and that person had pleaded guilty; and (3) notifying the State of the offense that appellant had been charged with as a juvenile.

Appellant did not file a motion for new trial complaining about ineffective assistance of counsel to develop a record establishing counsel's reasons for the

alleged conduct. Because the record is silent, we cannot determine whether trial counsel's inaction was grounded in sound trial strategy. *See Jackson*, 877 S.W.2d at 771. In the absence of direct evidence of counsel's reasons for the challenged conduct, an appellate court will assume a strategic motivation if any can be imagined. *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (presuming reasonable trial strategy supported failure to object in face of silent record). Accordingly, we review each of the claims of error to determine whether a strategic motivation can be imagined. It is a valid trial strategy not to object if objection would have been futile. *Mooney v. State*, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991). It is also a reasonable strategy not to object to outcry testimony in order to use that testimony to challenge the credibility of a witness. *Saldaña v. State*, 287 S.W.3d 43, 63 (Tex. App.—Corpus Christi 2008, pet. ref'd).

1. Outcry testimony

Appellant's first claim of ineffective assistance is based on his counsel's failure to object to the complainant's mother's testimony about her daughter's first outcry of the offense.

Article 38.072 of the Texas Code of Criminal Procedure concerns statements that describe an alleged offense of any of certain enumerated offenses—including the offense of sexual assault—that were made by the child against whom the

offense was committed and that were made to the first person 18 years of age or older to whom the child made the statements. TEX. CODE CRIM. PROC. ANN. art. 38.072 § 2(a) (Vernon Supp. 2010). Such statements are not rendered inadmissible because of hearsay if (1) certain notification of the intent to use the testimony is timely provided; (2) "the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement;" and (3) the child testifies or is available to testify. *Id.* § 2(b). The test for reliability looks to the circumstances surrounding the making of the statement, not the circumstances of the abuse. *See Carty v. State*, 178 S.W.3d 297, 307 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (holding child describing events in her own words using immature language is indicia of reliability); *Reyes v. State*, 274 S.W.3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref'd) (holding that outcry statement must provide specific details and not just be general allegation of abuse).

It is undisputed that the State provided timely notification of its intent to use A.T.'s mother's testimony of A.T.'s first outcry. It is also undisputed that the child testified at the trial. Appellant complains, however, that no hearing was ever held to determine if A.T.'s outcry statement was reliable.

The test for reliability looks to the circumstances surrounding the making of the statement, not the circumstances of the abuse. *Carty*, 178 S.W.3d at 306–07.

The conversation between A.T. and her mother began when her mother was telling A.T. about how she was starting to mature physically and that people may try to touch her and tell her it was natural but that she should not allow people to do this. A.T. grew quiet during this conversation, started to shake, began crying, and told her mother that this had already happened to her. A.T. identified her grandfather as the perpetrator.

This conversation took place on a Friday. The following Sunday evening A.T.'s mother explained that they were going to go to the police to explain what had happened. The mother told A.T. that she needed to be sure there was not anything else she was not telling her. At this point, A.T. became upset again and identified appellant as having sexually abused her one time a little over two years earlier. The events and abuse that complainant described were different from what she described that happened with her grandfather. A.T. described the events in her own words, using immature terms to describe the events.

Appellant's counsel could have reasonably believed that the trial court would have found the testimony "reliable based on the time, content, and circumstances of the statement." *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 § 2(b)(2); *see also Carty*, 178 S.W.3d at 307 (holding child describing events in her own words using immature language is indicia of reliability); *Reyes*, 274 S.W.3d at 727 (holding that outcry statement must provide specific details and not

just be general allegation of abuse). Appellant's counsel was not required to request a hearing to determine the admissibility of the outcry testimony if it would have been futile to do so. *See Mooney*, 817 S.W.2d at 698 (holding it is valid strategy not to object if objection would have been futile).

Because the record is silent regarding his counsel's reasons for not objecting to the outcry testimony, appellant fails to overcome the presumption that counsel exercised reasonable professional judgment when he did not object to A.T.'s mother's outcry testimony. *See Thompson*, 9 S.W.3d at 814 (holding appellant bears burden of proving by preponderance of evidence that his counsel was ineffective).

2. Guilty plea of another accused

Appellant's second claim of ineffective assistance is based on his counsel's failure to object to the testimony regarding the facts that A.T. also claimed that her grandfather sexually abused her and that her grandfather pleaded guilty to the subsequent charges. Appellant argues that this testimony bolstered the child's credibility.

Assuming without deciding that appellant's counsel could have successfully challenged and excluded the testimony regarding the allegations against the grandfather, a strategic motivation can still be imagined. During closing arguments, Appellant's counsel's used the testimony regarding the accusation of

the grandfather and his subsequent plea of guilty to challenge the credibility of the charges against appellant. Appellant's counsel pointed out inconsistencies and ambiguities in the testimony regarding the allegations against the grandfather that questioned the veracity of the allegations and then compared those inconsistencies and ambiguities to the ones appellant's counsel argued existed in this case. It is a reasonable strategy not to object to outcry testimony in order to use that testimony to challenge the credibility of a witness. *Saldaña*, 287 S.W.3d at 63.

Because the record is silent regarding his counsel's reasons for not objecting to the testimony of another accused who subsequently pleaded guilty, appellant fails to overcome the presumption that counsel exercised reasonable professional judgment when he did not object to A.T.'s mother's outcry testimony. *See Thompson*, 9 S.W.3d at 814 (holding appellant bears burden of proving by preponderance of evidence that his counsel was ineffective).

3. Notice of extraneous offense

Appellant's third claim of ineffective assistance is based on his counsel's notification to the State of the offense that was alleged to have occurred when appellant was a juvenile.

Here, the record is not only silent as to appellant's counsel's reasons for his action, it is also silent as to what specifically happened that led the State to discover this offense. During the trial, the State argued that appellant's counsel

"gave us notice and let us know about the case." In another part of the trial, the State told the trial court that it had located one of the victims of the alleged abuse "[b]ased upon some comments that Defense counsel made." What these comments were is not in the record. Without knowing the comments, the context in which they were made, and whether there were direct or indirect references to the extraneous offense, appellant has not met his burden of showing that his counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064 (holding defendant must show counsel's performance fell below objective standard of reasonableness).

On this record, appellant has not met his burden to show that counsel's assistance fell below an objective standard of reasonableness. *See Thompson*, 9 S.W.3d at 814 (holding appellant bears burden of proving by preponderance of evidence that his counsel was ineffective). Appellant has failed to satisfy *Strickland*'s first prong on each of these three claims of ineffective assistance of counsel; thus, we need not consider the second prong. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

We overrule appellant's fourth point of error.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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