Opinion issued February 24, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00848-CR

REYNALDO AMAYA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1186977

MEMORANDUM OPINION

Appellant, Reynaldo Amaya, was charged by indictment with aggravated assault.[1] Appellant pleaded not guilty. A jury found appellant guilty and sentenced him to 18 years' confinement. Following the trial, appellant obtained

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[1] *See* TEX. PENAL CODE ANN. §§ 22.01, .02 (Vernon Supp. 2010).

new counsel and filed a motion for new trial, alleging ineffective assistance of counsel. A hearing was held, and the trial court denied the motion. In two points of error, appellant argues that he was denied effective assistance of counsel in the guilt-innocence phase and in the punishment phase of the trial.

We affirm.

Background

Dawn Rowland, complainant, was at the West End Pub with some friends on the night of October 4, 2008. Appellant was also at the bar with Sherrie Carroll, his girlfriend at the time, and Manuel Matala. At a certain point, appellant ordered some drinks for Rowland and one of her friends. Rowland and her friend declined the drinks. Rowland testified that appellant subsequently made repeated crude comments and gestures to her.

Rowland complained to the owner of the bar. The owner told her he would take care of it. She also told Michael Lewis, a friend that she knew from the bar, that appellant was harassing her. The owner told Lewis he could ask appellant to leave. Lewis approached appellant and told him he had to leave. Appellant became aggressive and a brief fight ensued. Appellant threatened to call for police assistance, but later left.

After the bar closed, Rowland left with Andrea Hunsucker. They planned to drive their cars to another friend's house. As she left, she noticed a car pull up

behind her and begin following her. Another person that was at the bar that night and that saw the fight between Lewis and appellant testified that he saw appellant and his girlfriend in a silver or gray BMW follow Rowland's car out of the parking lot.

When she arrived at her destination, Rowland saw a man approach her car and smash in the driver's side window. The man hit her with a crowbar. Rowland escaped outside the passenger's side window and attempted to run away. She fell when the assailant hit her knees. The assailant continued to hit her over 20 times with the crowbar, yelling things like "this is how it feels." At this point, Rowland recognized appellant as the assailant.

Hunsucker witnessed the assault and recognized appellant as well. She was talking on her cell phone to her friend in the house, Colby Van Cleave, and yelled for help. When Van Cleave ran out of the house, he saw a silver BMW speeding away. Van Cleave picked up a cinder block he kept on his property and threw it at the car. The cinder block hit one of the side mirrors on the car. Later, a piece of a car mirror was found on the street where Van Cleave had thrown the cinder block.

One of the investigating officers later located appellant's silver BMW at a repair shop. The car had sustained damage to one of the side mirrors and one of the doors, though the mirror fragments from the damaged side mirror had already

been removed. Additionally, blood samples found on the front passenger seat, the interior driver's door, and the hood of Rowland's car matched appellant's DNA.

Appellant took the stand in both the guilt-innocence phase and the punishment phase of the trial. In the guilt-innocence phase, appellant admitted to being at the bar with Carroll and Matala and to ordering drinks for Rowland and her friend. He denied speaking to Rowland or making any lewd gestures at her. Appellant testified that Lewis started the fight and that he got punched and kicked in the head during the fight. Appellant testified that he was told that the police had been called and stayed outside the bar waiting for them. He also testified that he called the Fort Bend County Sheriff's Office even though the offense occurred in Harris County. Because the police did not arrive while he was waiting and because Carroll and others were urging him to leave, appellant finally left.

Appellant testified that Carroll drove them home, that it only took about 10 to 15 minutes to get home, and that he was thinking about how he was ashamed and embarrassed during the ride home. He testified that during the ride home he heard a thud, Carroll asked what the sound was, and he said he didn't care and to go home. Appellant later attributed this unknown sound to the damage to his door and side mirror.

Appellant repeatedly asserted that he never attacked Rowland. He could not explain, however, how blood found at the scene of the crime matched his DNA. During his testimony, the following exchange took place:

> Q. When you say you don't have an explanation or an answer to questions like what happened to your door or what happened to Ms. Rowland other than what we know here because of the trial, or how your DNA could have possibly gotten into her car, are you being truthful when you make those statements?
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> A. Yes, ma'am.
>
> Q. Are you trying to hide behind intoxication or a faulty memory?
>
> A. No, ma'am.
>
> Q. Are you trying to hide behind any injuries you may have sustained that night?
>
> A. No, ma'am.
>
> Q. You're saying that because you don't know the answers to those questions, correct?
>
> A. That's correct.

During the trial, an audio recording was admitted into evidence containing appellant's statement to police about four days after the incident. In that statement, appellant said he was jumped at the bar but insisted that he did not talk to any girl other than his girlfriend. He also said that they drove his girlfriend's Toyota to the bar and back to his place and that his BMW was at home the entire time. He told the officer that they drove straight to his apartment. He admitted that his BMW was in the shop for repairs but said it was because some kids had thrown

something at the car around dusk time the previous Saturday. He identified a movie that was playing on a television station when he got home. Finally, he said he showered and went to bed.

Carroll and Matala testified for appellant as well. Their testimony corroborated the testimony of appellant. Matala testified that appellant did not make any crude gestures or comments to Rowland and that Lewis started the fight. Carroll testified similarly, adding that she drove appellant directly to his home and that appellant never attacked Rowland.

The jury found appellant guilty of aggravated assault. During the punishment phase, appellant again testified, and the following exchange took place:

> Q: And what do you do as far as -- or do you do any volunteer work or community work with churches or anything like that?
>
> A: Yes, ma'am. Back when I was -- I used to fight, kickboxing. I've held some -- I fought for a world title in 2000 in Canada, ISKA world title kickboxing. I hold the Southwest Texas kickboxing title. I hold the Texas kickboxing title and I hold the US kickboxing title, full contact.
>
> I wanted to pass that along . . . .

The jury assessed punishment at 18 years' confinement.

After the trial, appellant obtained new counsel and filed a motion for new trial, arguing he had received ineffective assistance of counsel. Appellant argued that he received ineffective assistance of counsel due to her failure to investigate

and present testimony that appellant "suffers from a mental illness, disease, or defect that may have prevented him from forming the requisite culpable mental state to commit aggravated assault" and "that minimized his moral blameworthiness."

At the hearing, appellant's counsel presented the affidavits of appellant's trial counsel, appellant, a psychiatrist, and a neuropsychologist. Appellant's trial counsel, Kennitra Foote, stated in her affidavit:

> When I prepared for trial, I did not know that [appellant] might suffer from a mental illness or defect. I had no way of knowing this information, nor was it reported to me that [appellant] had a history of head trauma and dementia. Had I known that information and recognized the possibility that his mental health could be relevant to guilt-innocence and/or punishment, I would have had him evaluated before trial by a mental health professional. I neither hired a mental health professional to evaluate him nor presented evidence at trial regarding his mental health. My failure to conduct this investigation and present this evidence was not strategic.

Appellant stated in his affidavit:

> Ms. Foote did not ask me before trial about my mental health history or if I had a history of head injuries, nor did I have any reason to volunteer this information. Had she asked, I would have told her that I have an extensive history of closed head injuries from years of kickboxing . . . .

The psychiatrist, Dr. A. David Axelrad, described in his affidavit the relevant information provided to him in an interview with appellant. In that interview, appellant told Dr. Axelrad that he had a history of significant alcohol use starting from the age of 12 or 13 and that there is a history of alcohol abuse in

his family. He also told Dr. Axelrad that he began training in kickboxing in 1994 and began competing. During that time, he suffered three concussions "and he would frequently sustain closed head injuries during the course of this experience."

Dr. Axelrad noted in his affidavit that appellant was significantly intoxicated and received blows to the head on the night of the assault. Dr. Axelrad also stated in his affidavit:

> It is to be noted that [appellant] has no memory for [*sic*] any of the events involved in the commission of the offense of Aggravated Assault against . . . Rowland. [Appellant] did testify in both the guilt and punishment phases that he has no memory of being involved in the commission of the aggravated assault against . . . Rowland.

Dr. Axelrad reported in his affidavit that appellant "has experienced significant problems with his memory over the course of the last several years."

Dr. Axelrad concluded that appellant "is mildly impaired as a result of his underlying psychiatric disorders" but also concluded that any further diagnosis would require a psychological evaluation by a neuropsychologist.

The neuropsychologist, Dr. Larry Pollock, noted appellant's history of head trauma but made no mention of appellant's history of alcohol abuse. Dr. Pollock stated in his evaluation:

> [Appellant] was suffering from Chronic Traumatic Encephalopathy associated with years of kickboxing before the events in question. My evaluation also indicated that he suffered an Acute Traumatic Brain Injury and Post-Traumatic Amnesia immediately before the alleged offense. Post-Traumatic Amnesia is the result of trauma to the brain and involves a significant alteration in consciousness, impaired

> cognitive functioning, and memory loss. Consequently, Post-Traumatic Amnesia disrupts rational, goal-directed behavior and causes disinhibition of neurological regulation of behavior.

Dr. Pollock concluded that, because of these impairments, appellant was not "capable of forming the requisite culpable mental state to commit an aggravated assault. It is possible that, because of his mental condition at the time of the events in question, he engaged in the alleged conduct but truthfully does not remember having done so."

Dr. Axelrad provided a subsequent affidavit where he stated that he had reviewed Dr. Pollock's report, discussed it with him, and agreed with his conclusions. He also stated, "I conclude that, within reasonable medical probability, [appellant] did not act intentionally or knowingly when he engaged in the alleged conduct. I do not believe that he was capable of forming the necessary culpable mental state to commit an aggravated assault."

The trial court denied the motion for new trial, finding, among other things, that Foote did not have any indication that appellant had any sort of mental health issue and that the testimony of appellant regarding the events of the night in question were clear and concise, as was appellant's statement to the police. The trial court also noted that appellant's testimony regarding the events of the night were corroborated by the testimony of Carroll and Matala.

Standard of Review

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Strickland generally requires a two-step analysis in which an appellant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's unprofessional error, there is a reasonable probability that the result of the proceedings would have been different. *Id.* at 687–94, 104 S. Ct. at 2064–2068; *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that his performance falls within the wide range of reasonable professional assistance or trial strategy. *Thompson*, 9 S.W.3d at 813. The record must affirmatively support the alleged ineffectiveness. *Id.*

When the claimed ineffective assistance of counsel is based on a failure to investigate, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "In assessing counsel's investigation, we must conduct an objective review of their

performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536 (2003) (quoting *Strickland*, 466 U.S. at 688, 689, 104 S. Ct. at 2052).

Appellant presented his ineffective assistance claim to the trial court in a motion for new trial. After a hearing, the trial court overruled appellant's complaint by denying the motion. We therefore analyze the ineffective assistance of counsel issue as a challenge to the denial of the motion for new trial. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004) (holding appropriate standard of review for ineffective assistance claim brought forth in motion for new trial is abuse of discretion). In such circumstances, we review the trial court's application of the *Strickland* test through an abuse of discretion standard. *Id.* Thus, we reverse only if the trial court's decision is arbitrary or unreasonable, viewing the evidence in the light most favorable to the ruling. *Id.*

Failure to Investigate

In his two points of error, appellant argues that he was denied effective assistance of counsel due to his attorney's failure to discover appellant's alleged mental impairment during the course of her investigation. Appellant argues that

this information would have been beneficial in both the guilt-innocence phase and the punishment phase of his trial.

The record does not establish the extent and details of Foote's pretrial investigation. Instead, we know only that Foote did not discover, in the course of her investigation, the alleged mental impairment diagnosed by Dr. Axelrad and Dr. Pollock. Foote only stated in her affidavit that she did not know that appellant "might suffer from a mental illness or defect" and that it was not reported to her that he "had a history of head trauma and dementia." Appellant stated in his affidavit that Foote did not ask him about his mental health history or if he had a history of head injuries. We do not otherwise know what actions Foote took to determine that further investigation into appellant's mental health was not necessary.

Because we do not have any details of the investigation performed by Foote, we must follow the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. We can only find Foote ineffective by finding that any reasonable investigation should have uncovered the relevant evidence. *See Ex parte Gonzales*, 204 S.W.3d 391, 396 (Tex. Crim. App. 2006).

In *Purchase*, we held that there was no requirement that counsel must always ask a defendant about his psychiatric history when there are no indicators

of possible incompetency. *Purchase v. State*, 84 S.W.3d 696, 700–01 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). In that case, Purchase was found guilty of felony theft. At the hearing on the motion for new trial, Purchase's psychiatrist testified that Purchase had been previously diagnosed with adjustment disorder with depressed mood and anxiety symptoms and that Purchase was taking prescribed antidepressants for the condition. *Id.* at 699. Purchase testified that he was not taking his medication during the trial. *Id.* Purchase's doctor testified that failure to take the medication would have affected Purchase's mental state and his ability to communicate with his attorney. *Id.* at 699–700. Purchase's trial attorney testified that he did not have problems consulting with Purchase during the trial and he never believed Purchase was incompetent to stand trial. *Id.* at 700.

In the opinion, we noted that there was no evidence that Purchase's attorney knew of any factors that might have prompted further investigation into appellant's competency. *Id.* Instead, Purchase appeared competent and his attorney was not informed that he was on medication or under a psychiatrist's care. *Id.* We held that Purchase failed to establish that he had received ineffective assistance of counsel. *See id.* at 701.

In this case, there is no evidence that there were any indicators that would suggest that appellant's mental history would be relevant to the case. Foote stated that she did not know that appellant might suffer from a mental impairment and

appellant stated that Foote did not ask him about his mental history. There is no indication that appellant or anyone else was aware at that time that appellant might have a mental impairment. Nothing in the record shows that, prior to appellant's post-trial diagnosis, appellant had ever been diagnosed with any mental impairment or was aware of it himself. Accordingly, even if we were to accept as true appellant's statement that Foote never asked him about his mental history, there is nothing to suggest that this would have been a fruitful inquiry.

Appellant argues that even if he had told Foote that no evidence existed to support a claim that he was suffering from a mental impairment, Foote still had a duty to conduct an investigation to determine whether this evidence existed. This is too broad a statement of Foote's duty. An attorney is not allowed to rely exclusively on the client's version of events without performing some independent investigation. *See, e.g.*, *Ex parte Ewing*, 570 S.W.2d 941, 947 (Tex. Crim. App. 1978). On the other hand:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information . . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691, 104 S. Ct. at 2065. As we have already stated, the only evidence presented is that Foote did not uncover appellant's alleged mental impairment in the course of her investigation and that appellant never told Foote about his mental health history or his history of sustaining closed head injuries. There is no evidence that Foote did not perform any investigation.

Furthermore, assuming without deciding that appellant has the mental impairment diagnosed by Dr. Axelrad and Dr. Pollock, there is no evidence that appellant exhibited the characteristics of the impairment in front of Foote or that appellant's description of the events relevant to the assault would have suggested a mental impairment to Foote.

Dr. Axelrad asserted in his affidavit that appellant testified in both the guilt-innocence and punishment phases of trial that he had no memory of being involved in the commission of the aggravated assault. Appellant makes a similar assertion in his brief. We disagree, however, with this characterization of appellant's testimony.

Appellant testified at trial about the details of the events on the night in question. While appellant testified that he could not remember certain specific details about the night due to being "out of it" after getting beat up in the bar, he never testified that he could not remember significant portions of any part of the night. In fact, he provided details of what he remembered from the moment he was

at the bar to when he went to bed. Instead of testifying that he did not remember attacking Rowland, he repeatedly asserted that he did not attack Rowland. Appellant further clarified that he was not "trying to hide behind intoxication or a faulty memory" and that there was no possible way that he committed the assault against Rowland.

Likewise, in his statement to the police four days after the incident, appellant said he was jumped at the bar but insisted that he did not talk to any girl other than his girlfriend. He also said that they drove his girlfriend's Toyota to the bar and back to his place and that his BMW was at home the entire time. He told the officer that they drove straight to his apartment. He admitted that his BMW was in the shop for repairs but said it was because some kids had thrown something at the car around dusk the previous Saturday. He identified a movie that was playing on a television station when he got home. Finally, he said he showered and went to bed.

Additionally, Carroll's and Matala's testimony corroborated the testimony given by appellant. Their testimony specifically excluded any possibility that appellant harassed Rowland at the bar or assaulted her afterwards. Accordingly, Foote would not have had reason to believe, based on appellant's, Carroll's and Matala's recounting of the events in question, that appellant was exhibiting any mental impairment that night.

Appellant argues in his brief that there were two indicators that should have suggested to Foote that appellant might suffer from a mental impairment: (1) "she was obviously on notice that [appellant] was a long-time kick-boxer" and (2) "there was nothing in his past to indicate the random violence presented by the facts of this case." Addressing the second point first, we fail to see how the lack of a history of violence would suggest a mental impairment while a history of violence would not. To the degree that appellant argues that any act of violence—whether a solitary act or one in a history of such acts—automatically raises a suggestion of a mental impairment precluding the offender from forming the requisite mental state, we decline to create such a rule.

Appellant testified at the punishment hearing that he held the full contact kickboxing title for Southwest Texas, Texas, and the United States. He also testified that he competed for the world title in 2000, but lost. Assuming without deciding that we can impute Foote with this knowledge prior to trial,[2] we cannot conclude that any failure by Foote to do further investigation based on this information would constitute ineffective assistance of counsel. In *Purchase* we held that "we will not now begin creating a list of mandatory questions that must be asked of defendants regardless of the circumstances surrounding the legal representation." 84 S.W.3d at 701. We decline to hold that failure to investigate

[2] Appellant volunteered this information upon being asked by Foote whether he did any volunteer work with churches.

whether a person trained and competing in martial arts is suffering from a mental impairment constitutes conduct "so outrageous that no competent attorney would have engaged in it." *Shanklin v. State*, 190 S.W.3d 154, 160 (Tex. App.—Houston [1st Dist.] 2005), *pet. dism'd improvidently granted*, 211 S.W.3d 315 (Tex. Crim. App. 2007).

Appellant also compares his situation to the facts in *Gonzales*. In *Gonzales*, the defendant was convicted of capital murder. 204 S.W.3d at 393. In a writ of habeas corpus proceeding, Gonzales sought to establish that his trial counsel was ineffective for failing to uncover the extensive physical and sexual abuse he suffered as a child. *Id.* at 394. It was established that the abuse he experienced caused him to suffer from post-traumatic stress disorder. *Id.* It was also established that, while Gonzales's attorney talked to Gonzales, his mother, and his sister, the attorney did not ask about any specific topics. *Id.* Instead, the interviews were only global in nature. Gonzales' attorney later stated that he should have "at least inquired" into Gonzales' background and that it was a mistake on his part not to do so. *Id.* at 395. The Court of Criminal Appeals agreed, holding that, considering Gonzales's attorney's constitutional and statutory obligation to present mitigating evidence during the punishment phase of a capital murder trial, the attorney was expected to have inquired whether Gonzales has been abused as a child. *Id.* at 397.

We believe a number of factors distinguish *Gonzales* from this case. First, it was established that Gonzales's attorney only asked Gonzales, his mother, and his sister global questions, without asking about any specific topics. *Id.* at 394. Second, it was established that this information was readily available to the attorney from the people he already had access to. *Id.* Third, the Court of Criminal Appeals emphasized that its holding concerned capital murder cases specifically. *Id.* at 397 (holding "[w]e think that, at the time of the applicant's trial, an objective standard of reasonable performance for defense counsel *in a capital case* would have required counsel to inquire whether the defendant had been abused as a child") (emphasis added). None of these critical factors are present in this case.

Because we do not know the extent of the actual investigation performed by Foote and must follow the strong presumption that her investigation was reasonable, because nothing in the record suggests that Foote should have been aware that appellant ever suffered from a mental impairment, and because nothing in the record shows that an investigation into appellant's mental history at that time would have suggested that a neuropsychological evaluation would be necessary or useful, we hold that the trial court did not abuse its discretion in overruling appellant's motion for new trial based on a claim of ineffective assistance of counsel.

We overrule appellant's two points of error.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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