Opinion issued October 13, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00981-CR

OLIVIA RENA FORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th Judicial District Court
Harris County, Texas
Trial Court Case No. 1221810

MEMORANDUM OPINION

Appellant, Olivia Rena Ford, without an agreed punishment recommendation from the State, but with an agreed punishment cap of confinement for thirty-five years, pleaded guilty to the offense of aggravated

kidnapping,[1] and the trial court assessed her punishment at confinement for thirty-five years. In her sole issue, appellant contends that her trial counsel provided her with ineffective assistance of counsel at the punishment phase of her trial.

We affirm.

Background

A Harris County grand jury issued a true bill of indictment, accusing appellant of committing the offense of aggravated kidnapping by unlawfully and knowingly abducting the complainant, Alex Mitchell, Jr., with the intent to facilitate flight after robbery. Appellant and her trial counsel signed her plea of guilty and accompanying admonishments, with an agreed punishment cap of confinement for thirty-five years, and the trial court reset the matter for a pre-sentence investigation ("PSI") hearing.

The PSI report indicated that appellant, a high school student at the time of the offense, was already acquainted with the complainant. Appellant had arranged for the complainant to meet with her friend, Deaundre Randall, for the purpose of robbing the complainant. Appellant had the complainant pick up Randall in his car, and the complainant drove appellant and Randall to a vacant house under the pretense of helping Randall move items out of the house. Appellant stayed in the complainant's car while Randall and the complainant entered the house, where

[1] *See* TEX. PENAL CODE ANN. § 20.04(a) (Vernon 2011).

Randall and several others robbed and severely beat the complainant. They then forced the complainant to exit the house and crawl into the trunk of his car. Randall dropped appellant off at her cousin's house and later burned the car with the complainant still in the trunk, in which he died. Telephone records demonstrated that after being dropped off, appellant was in "almost constant contact" with Randall through the complainant's cellular telephone and Randall's home telephone.

At the PSI hearing, Lisa Andrews, a former Harris County assistant district attorney, testified that she interviewed appellant at her school as a "person of interest" in the murder of the complainant. During the interview, appellant admitted that she knew that Randall had planned to rob the complainant. Appellant appeared "very hostile" to Andrews and "unsympathetic" regarding the death of the complainant. At one point, appellant stated that the complainant "should have known it was all a setup." Andrews also stated that appellant continued to communicate with Randall after his incarceration through mail and she did not "express any fear" towards Randall. On cross-examination, appellant's trial counsel challenged the voluntariness of the interview, suggested that appellant was "intimidated" by the investigators, and asserted that appellant's immaturity at the time of the offense may have contributed to her demeanor. Trial counsel also asserted that Randall had manipulated appellant into "luring" the complainant to

the vacant house and she was too frightened to object to the plans. In closing argument, trial counsel stated that appellant felt "regret" for her actions and "accept[ed] responsibility" for her role in the complainant's death. After an apologetic statement by appellant, the trial court assessed her punishment at confinement for thirty-five years.

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 2064–68; *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. *Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006); *Thompson*, 9 S.W.3d at 813.

A failure to make a showing under either prong defeats an ineffective-assistance claim. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Moreover, allegations of ineffectiveness must be firmly founded in the record. *Thompson*, 9 S.W.3d at 814; *Bone v. State*, 77 S.W.3d 828, 833 & n.13 (Tex. Crim. App. 2002). In the absence of evidence of counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined and will not conclude that the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

Ineffective Assistance of Counsel

In her sole issue, appellant argues that her trial counsel rendered ineffective assistance of counsel at the punishment phase of trial because counsel "presented only limited mitigation evidence" during the PSI hearing. Appellant asserts that trial counsel did not offer "a single scrap of mitigation evidence" during the hearing, he should have introduced testimony from "an expert, family member or the [a]ppellant herself," and such evidence "would have at least given the [c]ourt reason" to impose a sentence less than the maximum stated in the plea agreement.

Here, appellant did not file a motion for new trial, and there is nothing in the record to indicate why trial counsel did not call any witnesses at the PSI hearing.

Although appellant asserts that trial counsel could have called an expert or a family member to testify on her behalf, there is no showing in the record that such witnesses were available or willing to testify. Moreover, there is nothing in the record demonstrating that appellant would have benefitted from their testimony or her own testimony, which would have been subject to cross-examination. Furthermore, there is no showing in the record that trial counsel failed to adequately investigate potential witnesses to testify at the PSI hearing. As a result, we cannot conclude that trial counsel's not procuring such witness testimony constituted a performance that fell below an objective standard of reasonableness. *See, e.g.*, *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) ("To obtain relief on an ineffective assistance of counsel claim based on an uncalled witness, the applicant must show that [the witness] had been available to testify and that his testimony would have been of some benefit to the defense.") (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983)).

Appellant's counsel on appeal acknowledges that there is no evidentiary record, but he asserts that "there can be no explanation" for trial counsel's alleged failure to put on mitigation evidence. However, the decision to present witnesses is largely a matter of trial strategy. *Shanklin v. State*, 190 S.W.3d 154, 164 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd) (citing *Rodd v. State*, 886 S.W.2d 381, 384 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)). "[A]n attorney's

decision not to present particular witnesses at the punishment stage may be a strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant." *Id.* In the absence of evidence in the record of trial counsel's reasoning, we cannot presume that his not presenting any witnesses "was so outrageous that no competent attorney would have" done the same. *See Garcia*, 57 S.W.3d at 440.

Although trial counsel did not call any witnesses, he did attempt to present mitigation evidence in cross-examination, and he argued for leniency in his closing argument. At the PSI hearing, the State primarily argued that appellant's demeanor in her interview with Andrews and in court demonstrated a lack of remorse. On cross-examination of Andrews, trial counsel attempted to elicit that the setting of the interview, the parties conducting the interview, and the immaturity of appellant may have contributed to her demeanor rather than a lack of remorse. Trial counsel also elicited that appellant was very young at the time of the offense and was significantly influenced by Randall. Finally, in his closing argument, trial counsel argued that appellant had expressed remorse for her behavior and referenced appellant's statement included in the PSI report.

In sum, appellant has not demonstrated that her trial counsel's performance fell below an objective standard of reasonableness. Accordingly, we hold that appellant has not satisfied *Strickland*'s first prong.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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