Opinion issued May 19, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00424-CR

DEMETRIUS JEROME EVANS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case No. 1,251,322

MEMORANDUM OPINION

A jury convicted appellant, Demetrius Jerome Evans, of delivery of a simulated controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 482.002 (Vernon 2010), and assessed punishment at six years' confinement. Appellant

timely appealed. In a single point of error, he seeks a new trial, arguing that his appointed trial counsel was ineffective because he failed to object to hearsay testimony. We affirm the trial court's judgment.

BACKGROUND

On the night of February 9, 2010, several Houston police officers were working as part of an undercover team investigating drug activity on the outskirts of downtown. Officer R. Brown was posing as a drug buyer, while Officer J. Hartnett was stationed two blocks south of Officer Brown. Officer Hartnett would wait until Officer Brown provided a description of a suspect, and then he would locate and arrest the alleged violator.

Officer Brown testified that he was approached by appellant and a small group of other men. Appellant was wearing a red hoodie and tan shirt. Appellant asked Brown if he was "looking for some work?" Brown explained that "work" is a common slang word for drugs. Brown told appellant that he was looking for "a forty," which is the slang term for $40 of narcotics, usually crack cocaine. As they were talking, Brown was pulling out two $20 bills from his pocket. Appellant dropped two small rocks—consistent in size and weight to crack cocaine—in Officer Brown's hand, grabbed two $20 bills, and took off running. The serial numbers of the $20 bills had been previously recorded. Appellant unknowingly ran towards the location of Officer Hartnett. Officer Brown immediately contacted

nearby units, including Officer Hartnett, with a description of the suspect and the direction he had run. Once back in his car, Officer Brown did an initial examination of the two rocks and concluded they were likely not crack cocaine. Later testing confirmed this.

Officer Hartnett arrested appellant a short time later as he was leaving a convenience store. Officer Hartnett testified he detained the appellant because he matched Officer Brown's description of the suspect, he was in the area where the suspect was known to have fled, and because, in Officer Hartnett's experience, drug dealers commonly use convenience stores after a sale to exchange potentially marked money.

Officer Hartnett did not talk to or detain any of the other men outside the convenience store. Hartnett retrieved one of the two marked $20 bills from the convenience store clerk. The other was never located.

At trial, Officers Brown and Hartnett testified about the $20 bill retrieved from the clerk. Officer Brown described the interaction between Hartnett and the store clerk: "[T]he clerk there had received $20 from [the appellant]. We did recover that $20 bill. The clerk said that [the appellant] gave the other $20 to one of his friends or acquaintances there." During cross-examination, Brown admitted he was not in the store when the money was recovered or when Officer Hartnett talked to the clerk.

The prosecutor asked Officer Hartnett a series of questions about his exchange with the clerk:

> Q. What did you learn in going to the clerk?
>
> A. I asked him if the person that had just exited the store that he saw who we put in custody had given him money.
>
> Q. And were you able to recover money from the clerk?
>
> A. I did, yes, ma'am.

Appellant's lawyer did not object to either officers' testimony.

While cross-examining Officer Hartnett, the appellant's lawyer also questioned him about the $20 bill recovered from the convenience store:

> Q. [Y]ou said you walked in and talked to the clerk about the $20 bill. Where was the $20 dollar bill?
>
> A. He took it out of the cash register.

At trial, the defense attempted to discredit the State's case by arguing that the two $20 bills had not been directly linked to the appellant and that the two white rocks were not an illegal substance. The appellant's attorney also sought to cast doubt about whether the officers gave a correct description of the seller of the two rocks, as no other members of the group of men were ever detained or identified.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his sole point of error, appellant contends he received ineffective assistance of counsel because his trial counsel failed to object to the officers'

statements about the interaction between appellant and the convenience store clerk with regards to the $20 bill as improper hearsay, and because trial counsel repeated the same improper hearsay during his cross-examination.

A. Standard of Review

The United States Supreme Court has established a two-pronged test for determining whether there was ineffective assistance of trial counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Williams v. State*, 313 S.W.3d 393, 399 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). To prevail on a claim of ineffective assistance of counsel under *Strickland*, 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 proceeding would have been different. *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068; *Williams*, 313 S.W.3d at 399.

The first prong of the *Strickland* test requires that the defendant show that counsel's performance fell below an objective standard of reasonableness. *Williams*, 313 S.W.3d at 399–400. The defendant must prove, therefore, by a preponderance of the evidence that trial counsel's representation objectively fell below professional standards. *Id.* at 400. The second prong requires the defendant to show a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). "Reasonable probability" means a "probability sufficient to undermine confidence in the outcome." *Id.* A failure to make a showing under either prong defeats a claim for ineffective assistance. *Id.*

Any allegation of ineffectiveness must be firmly founded in the record, which must affirmatively demonstrate the alleged ineffectiveness. *Id.* It is the appellant's burden to prove ineffective assistance by a preponderance of the evidence and to overcome the strong presumption that his counsel's conduct falls within the wide range of reasonably professional assistance or might reasonably be considered sound trial strategy. *Id.* We will not speculate to find trial counsel ineffective when the record is silent on his counsel's reasoning or strategy. *Id.* In rare cases, the record can be sufficient to prove that counsel's performance was deficient, despite the absence of affirmative evidence of counsel's reasoning or strategy. *Id.* (citing *Robinson v. State,* 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000)). Such cases are limited to occasions when no reasonable attorney could have made such a decision. *Id.*

B. Discussion

Appellant did not file a motion for a new trial, and the record is silent about why his trial counsel failed to object to the alleged hearsay testimony. There is a strong presumption that an attorney will provide reasonable, professional

assistance, and we cannot speculate beyond the record before us. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Lagaite v. State*, 995 S.W.2d 860, 864 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

Appellate cites *Thompson v. State* in arguing that a "single error may be so substantial that it causes the attorney's performance to fall below the standard set forth." 9 S.W.3d at 813–14. He alleges that the substantial single error in this case was his trial counsel's failure to object to the allegedly improper hearsay testimony of Officers Hartnett and Brown, as it was the only evidence tying the appellant to the marked $20 bill and, by extension, the crime. Appellate argues that because this error was so egregious, the appellate record is sufficient to demonstrate the ineffectiveness of counsel. Specifically, he asserts: "[I]t is patently unreasonable for a defense lawyer not to object to hearsay testimony [in this case]. . . . There is really no trial strategy, moreover, that can justify a return to the topic with questions on cross-examination that amplify and corroborate [the improper testimony]." We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d); *see also Smith v. State*, 866 S.W.2d 731, 732 (Tex. App.—Houston [14th Dist.] 1993, no pet.). We assume without

deciding that the officers' testimony forming the basis of Evans' complaint on appeal is hearsay.

A failure to object to improper testimony does not automatically demonstrate ineffective assistance of counsel. *Ryan v. State*, 937 S.W.2d 93, 103 (Tex. App.—Beaumont 1996, pet. ref'd); *see also Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (en banc) ("An isolated failure to object to certain procedural mistakes or improper evidence does not constitute ineffective assistance of counsel."); *Garcia-Sandoval v. State*, No. 01-08-00842-CR, 2010 WL 1571207, at *3 (Tex. App.—Houston [1st Dist.] Apr. 8, 2010, no pet.) ("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."). The act, or lack thereof, must be so egregious that no reasonable attorney would act in this manner.

Without a trial record demonstrating counsel's reasons, we must determine whether counsel's actions conform to a reasonable trial strategy. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). As Texas courts have frequently noted before, inaction can be supported by a sound and plausible strategy. *See Bone v. State*, 77 S.W.3d 828, 834 (Tex. Crim. App. 2002); *Johnson v. State*, 68 S.W.3d 644, 655 (Tex. Crim. App. 2002); *Garcia*, 57 S.W.3d at 440; *Weaver v. State*, 265 S.W.3d 523, 538 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd).

Appellant has not demonstrated that trial counsel's actions were not the result of a reasonable trial strategy. To convict the appellant of delivery of a simulated controlled substance, the State was required to prove beyond a reasonable doubt that appellant sold the two rocks in a manner to lead a reasonable person to believe he purchased a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 482.002. In other words, the State had to prove beyond a reasonable doubt that appellant's actions would lead a reasonable person to believe he or she purchased cocaine. The State did not have to prove that Brown paid for the rocks with the marked $20 bills.

Based on the trial transcript, it is clear that appellant's counsel sought to show Officer Brown could not have reasonably believed the two rocks were cocaine. During voir dire, appellant's counsel asked questions regarding what should be the basis for a "reasonable belief" as to the nature of the white rocks—an experienced police officer or a layperson. During the trial, counsel repeatedly asked Officer Brown and Karrie Adams, the Houston Police crime lab scientist who tested the rocks' composition, about their initial impressions about the rocks and whether they believed Officer Brown purchased a controlled substance. In closing argument, trial counsel again argued Officer Brown could not have reasonably believed the two rocks were cocaine. The record indicates appellant's trial counsel was trying to negate an essential element of the State's case—a

common and effective strategy in criminal cases. *See, e.g., Juarez v. State*, 308 S.W.3d 398, 403 (Tex. Crim. App. 2010); *Scott v. State*, 235 S.W.3d 255, 260–61 (Tex. Crim. App. 2007).

In argument, defense counsel also referenced and tried to cast doubt on the testimony of Officer Brown and Officer Hartnett regarding the marked $20 bill found at the convenience store. He stressed that there was no testimony directly linking appellant to the $20 bill, as neither officer ever personally saw appellant use the money; nor could they be sure the money did not come from one of the other individuals outside the store. Counsel summarized the officer's testimony as, "[a]ll they are saying is we found a $20 bill in the cash register. [No witness] saw [appellant] or anybody . . . give anybody that $20 bill." Counsel's strategy focused on the chain-of-custody in an attempt to create reasonable doubt about whether the appellant is the source of the marked bill. *E.g.*, *Velasquez v. State*, 941 S.W.2d 303, 311 (Tex. App.—Corpus Christi 1997, pet. ref'd). The fact that the convenience store had the marked $20 was clearly admissible, as was the fact that appellant, who matched Officer Brown's description as to dress and location, was outside the store. The jury could easily make an inference connecting the two even without the testimony of Officers Brown and Hartnett. In light of this, it is reasonable that counsel purposefully chose to overlook the hearsay testimony so as to not call attention to potentially damaging evidence that is otherwise admissible.

See, e.g., *Chapa v. State*, No. 04-02-00346-CR, 2003 WL 1025148, at *5 (Tex. App.—San Antonio Mar. 12, 2003, pet. ref'd) ("While trial counsel could have objected to the complained-of testimony as being hearsay, we cannot rule out the possibility that counsel purposefully did not object so as not to call attention to damaging evidence that was otherwise admissible or merely cumulative.") *abrogated on other grounds by Delgado v. State*, 235 S.W.3d 244 (Tex. Crim. App. 2007); *see also Young v. State*, 10 S.W.3d 705, 712 (Tex. App.—Texarkana 1999, pet. ref'd); *Tutt v. State*, 940 S.W.2d 114, 118 (Tex. App.—Tyler 1996, pet. ref'd). Because appellant has not demonstrated his counsel's performance was objectively unreasonable under *Strickland*'s first prong, he cannot meet his burden to prove he received ineffective assistance of counsel. We overrule appellant's sole point of error.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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