Opinion issued October 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00783-CR

LADELL ONTWELL NELSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1235307

MEMORANDUM OPINION

Appellant, Ladell Ontwell Nelson, appeals a judgment convicting him of the first degree felony of possession with intent to deliver. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2010). Nelson was charged by indictment with possession of a controlled substance, cocaine, in an amount of four grams or more but less than 200 grams, and found guilty by a jury. Nelson pleaded true to one enhancement paragraph and the court sentenced him to fifteen years' confinement in the institutional division of the Texas Department of Criminal Justice. In Nelson's first issue, he contends that he received ineffective assistance because his counsel failed to present mitigating evidence of Nelson's prior mental health issues. In his second issue, Nelson contends that the trial court erred in admitting evidence of a prior conviction to impeach a defense witness. We conclude that Nelson's counsel was not ineffective and that the trial court did not abuse its discretion in admitting the 1997 conviction. We affirm.

Background

On October 1, 2009, two plain-clothed police officers, engaged in a surveillance operation, observed Nelson sitting on the porch of a home. The officers observed three separate instances in which Nelson engaged in a hand to hand drug transaction with different individuals. Either before or after each exchange, Nelson retrieved something from a white Styrofoam container that he

had stored under the porch. After the three transactions, Nelson surveyed the area, using binoculars. Shortly thereafter, he walked away from the house, leaving the Styrofoam container behind.

One of the officers arrested Nelson a short distance from the house. At the time he was detained, Nelson did not have any narcotics on him, but he had a large amount of money in small bills wadded up in his pockets. After Nelson was apprehended, the officers returned to the porch with Nelson. They removed a white substance from the Styrofoam container, which tested positive for narcotics. Lab testing showed that the substance was crack cocaine. Nelson was charged with possession with intent to deliver a controlled substance.

At trial, Nelson called Julius Cecil Kirby to testify on his behalf. Kirby testified that he saw police officers enter the house and steal unidentified items on the day of Nelson's arrest. Other defense witnesses corroborated Kirby's claim, but the officers denied it. During cross-examination, the State requested permission to discuss Kirby's prior criminal history for the purposes of impeachment. Kirby's criminal history included a 1980 robbery conviction, a 1995 possession of a controlled substance conviction, a 1997 possession of a controlled substance conviction, and a 2010 possession of a controlled substance conviction. The trial court excluded the 1980 robbery conviction and the 1995 conviction for possession of a controlled substance but permitted the State to

impeach Kirby with the 1997 and 2010 convictions. A jury found Nelson guilty of possession with intent to deliver a controlled substance, and the trial court sentenced him to fifteen years' confinement in the institutional division of the Texas Department of Criminal Justice.

Dr. Cullen Gibbs had performed a Competency Evaluation of Nelson before trial, but Nelson's counsel did not seek to introduce the report to the jury or offer it during sentencing. The report declared Nelson competent to stand trial because he functioned normally and understood the charges against him. It also referenced Nelson's statements that he had been treated by the Mental Health and Mental Retardation Authority of Harris County, had a diagnosis of bipolar disorder, and had been on medication for this condition. Nelson claims the report is mitigating evidence that should have been introduced by his attorney.

Effective Assistance of Counsel

In his first issue, Nelson contends that his trial counsel rendered ineffective assistance in violation of the Sixth Amendment of the United States Constitution by failing to introduce evidence of Nelson's past mental health history, which Nelson contends is mitigating evidence.

A. Standard of Review

To prevail on an ineffective assistance of counsel claim, Nelson must demonstrate, by a preponderance of the evidence, that (1) his trial counsel's

performance was deficient and (2) a reasonable probability exists that, but for the deficiency, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984). Under the first prong of *Strickland*, the appellant must show that his counsel's performance fell below an objective standard of reasonableness, which does not require showing that counsel's representation was without error. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The second prong of *Strickland* requires the appellant to demonstrate prejudice—a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Thompson*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A failure to make a showing under either prong defeats a claim of ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and therefore the appellant must overcome the presumption that the challenged action constituted "sound trial strategy." *Strickland*, at 689, 104 S. Ct. at 2065; *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009). To prevail, the appellant must provide an

appellate record that affirmatively demonstrates that counsel's performance was not based on sound strategy. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *see Thompson*, 9 S.W.3d at 813 (holding that record must affirmatively demonstrate alleged ineffectiveness). If the record is silent regarding the reasons for counsel's conduct—as it usually is on direct appeal—then the record is insufficient to overcome the presumption that counsel followed a legitimate trial strategy. *Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000); *Thompson*, 9 S.W.3d at 813–14.

B. Analysis

The record in this case is silent about trial counsel's reasons for not presenting evidence of Nelson's mental health history. When the record is silent as to the reason for counsels' actions "we will not conclude 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); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) (review is highly deferential to counsel). Nelson's trial counsel may have had a tactical motivation for not offering evidence relating to Nelson's past mental health, or may have investigated Nelson's claims of mental illness and found them to lack an adequate foundation.[1] Nelson's attorney's failure to offer the mental

[1] The report contains Nelson's own statements of his past mental conditions and

health history is far short of being "so outrageous that no competent attorney would have engaged in it" and therefore insufficient to overcome the presumption that his failure to do so was based on sound strategy. *Thompson*, 9 S.W.3d at 814; *Tong*, 25 S.W.3d at 714 ("[T]he record in the instant case is silent as to why appellant's counsel failed to object and is therefore insufficient to overcome the presumption that counsel's actions were part of a strategic plan."); *Weaver v. State* 265 S.W.3d 523, 538 (Tex. App.—Houston [1st Dist.] 2008. pet. ref'd) (holding that a silent record as to why no pre-trial jury election was made is insufficient to find counsel ineffective because the court cannot say that no reasonable attorney would fail to file such action).

Because Nelson has not satisfied the first prong of the *Strickland* test, we will not address the second prong. *Rylander*, 101 S.W.3d at 110. We overrule Nelson's first issue.

Impeachment with Convictions More Than Ten Years Old

In his second issue, Nelson contends that the trial court erred in allowing the State to use a 1997 felony conviction to impeach Kirby.

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states that the evaluator found Nelson was competent to stand trial. Nelson does not specify how the report itself would have aided him had his attorney tried to admit it at either phase of trial and there is nothing in the file itself that would indicate that it would have been helpful.

A. Standard of Review

"We review a trial court's decision regarding the admissibility of evidence of prior convictions for a 'clear abuse of discretion.'" *Davis v. State*, 259 S.W.3d 778, 780 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (quoting *Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992)). The trial court has wide discretion and its judgment will not be overturned unless it "lies outside the zone of reasonable disagreement." *Id.* (citing *Theus*, 845 S.W.2d at 881).

Rule 609 of the Texas Rules of Evidence provides that the trial court shall admit evidence of a witness's prior convictions for impeachment purposes if the crime was a felony or a crime of moral turpitude and the court determines that the probative value of admitting the conviction outweighs its prejudicial effect. TEX. R. EVID. 609(a); *Morris v. State*, 67 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). If ten years have passed since the date of conviction or release from confinement, however, the conviction is not admissible unless the trial court determines that the probative value of the conviction substantially outweighs its prejudicial effect. TEX. R. EVID. 609(b); *Jackson v. State*, 50 S.W.3d 579, 591 (Tex. App.—Fort Worth 2001, pet. ref'd) ("Whether to admit remote convictions lies within the trial court's discretion and depends on the facts and circumstances of each case.").

Generally, convictions more than ten years old are inadmissible because we presume that a witness is capable of rehabilitation and that his character has reformed over a period of law−abiding conduct. *See Morris*, 67 S.W.3d at 263. Subsequent convictions for felonies or misdemeanors involving moral turpitude however, may "remove the taint of remoteness from the prior convictions." *Id.* (citing *Hernandez v. State*, 976 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd)). In that circumstance, we use Rule 609(a)'s "outweigh" standard, instead of Rule 609(b)'s "substantially outweigh" standard, because "tacking" the intervening convictions "renders convictions more than ten years old no longer remote." *Id.*

In this case, evidence of a 2010 felony conviction for possession of a controlled substance removed the taint of remoteness from the 1997 conviction. Therefore, we apply the Rule 609(a) "outweigh" standard to determine whether admission of appellant's prior convictions more than ten years old was proper. *Id.*

B. Analysis

We consider the following non-exclusive list of factors in weighing the probative value of a witness's remote conviction against its prejudicial effect: (1) the impeachment value of the prior crime; (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent criminal history; (3) the similarity between the past crime and the charged offense; (4) the

importance of the witness's testimony; and (5) the importance of the witness's credibility. *Theus,* 845 S.W.2d at 880; *Morris*, 67 S.W.3d at 264. The second and third factors are modified slightly when applied to non-defendant witnesses. *Moore v. State*, 143 S.W.3d 305, 313 (Tex. App.—Waco 2004, pet. ref'd.); *Thompson v. State*, No. 03-06-00695-CR, 2007 WL 1647830 *3 (Tex. App.—Austin, no pet.) (mem. op., not designated for publication).

The first of these factors, the impeachment value of the crime, focuses on the nature of the prior crime being offered for impeachment. Under this test, crimes involving deception have a higher impeachment value and other crimes, such as those involving violence, have a higher potential for prejudice. *Theus*, 845 S.W.2d at 881. Drug related crimes tend to have a have lower impeachment value because they generally do not involve deception, moral turpitude or violence. *See Denman v. State*, 193 S.W.3d 129, 136 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (declining State's request to hold delivery of cocaine to be crime of moral turpitude but finding the first factor "cuts against admissibility of the delivery of cocaine conviction"). Here, the prior crime—possession of a controlled substance—does not have a high impeachment value, but does have some potential for prejudice. This factor weighs against admissibility.

The second factor, when applied to a non-defendant witness, focuses on the temporal proximity of the prior conviction to the date the witness testifies and the

witness's subsequent criminal history. *See Moore*, 143 S.W.3d at 313. "[T]he second factor will favor admission if the past crime is recent and if the witness has demonstrated a propensity for running afoul of the law." *Theus*, 845 S.W. 2d at 881. The 1997 conviction was not close in time to Kirby's testimony in Nelson's case. However, Kirby did have a recent subsequent criminal history—he was convicted again in 2010. Because the witness has a continuing pattern of criminal conduct, the second factor favors admissibility. *See Jackson v. State*, 11 S.W.3d 336, 340 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd.) (appellant's prior felony conviction and two misdemeanors within the previous five years showed that "he ha[d] a recent propensity for running afoul of the law").

The third factor focuses on the similarity between the past crime and any conduct of the witness that is at issue in trial. If the prior crime is similar to the accused crime, this factor weighs against admitting the evidence. *Theus*, 845 S.W. 2d at 881. "The rationale behind this is that the admission for impeachment purposes of a crime similar to the crime charged presents a situation where the jury would convict on the perception of a past pattern of conduct, instead of on the facts of the charged offense." *Id.*; *see Moore*, 143 S.W.3d at 313 (finding that third factor weighed in favor of admitting the prior conviction because the lack of similarity between the witness's prior theft conviction and his conduct as the victim of assault "indicate[d] no significant danger of unfair prejudice"). The focus

of Kirby's testimony at Nelson's trial was Kirby's eye-witness account of what he claimed transpired at the scene of Nelson's arrest for possession of crack cocaine. Kirby's claim that he saw the officers steal items from the house where Nelson sold drugs is not so unrelated to the conduct that formed the basis for Kirby's 1997 possession of a controlled substance conviction to say that there was no risk of prejudice. There is a risk that Nelson would be prejudiced for relying on a witness such as Kirby, who had been previously convicted of a similar crime. Because of the risk that a jury would associate Kirby's criminal drug history with Nelson's actions on the day of his arrest, the third factor weighs against admitting the 1997 conviction. *See Berry v. State*, 179 S.W.3d. 175, 180 (Tex. App.—Texarkana 2005, no pet.) (holding that because the defendant's charged crime and past crime were identical, the third factor weighed against admission).

With regard to the fourth and fifth factors, "[w]e consider the importance of appellant's testimony and of his credibility." *Martin v. State*, 265 S.W.3d 435, 445 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Theus*, 845 S.W.2d at 881). Texas courts use a sliding-scale analysis to determine admissibility. *See Theus*, 845 S.W.2d at 881. We consider Nelson's defense and the means at this disposal to prove that defense. *See Martin*, 265 S.W.3d at 445. By calling Kirby and others to accuse the officers, Nelson sought to undermine the State's case against him. For its part, the State had a need to impeach Kirby's credibility in

order to rehabilitate the officers. Both the testimony and the credibility of Kirby were important. Therefore, the fourth and fifth factors weigh in favor of admissibility. *See id.* (when appellant had a heightened need to establish his credibility and the State had a need to impeach it, factors four and five weighed in favor of admissibility).

Overall the factors weigh in favor of admissibility of the 1997 conviction. Accordingly, we hold that the trial court's decision to admit the evidence of Kirby's 1997 conviction was not a clear abuse of discretion. *See Davis*, 259 S.W.3d at 780 (citing *Theus*, 845 S.W.2d at 880).

We overrule Nelson's second issue.

Conclusion

We affirm the judgment of the trial court.

Rebeca Huddle
Justice

Panel consists of Justices Radack, Bland, and Huddle.

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