Opinion issued March 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00050-CR

MOIZ TEJANI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Court Case No. 22276

MEMORANDUM OPINION

A jury convicted appellant, Moiz Tejani, of the first-degree felony offense of possession with intent to deliver a controlled substance,[1] and the trial court

---

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.113(a), (d) (West Supp. 2015).

assessed his punishment at ten years' confinement, probated, ninety days in jail, and a $10,000 fine. In two points of error, appellant contends that he was denied effective assistance of counsel when his trial counsel failed to object to (1) improper opinion testimony and (2) the admission of appellant's unrecorded custodial statements. We affirm.

Background

On August 31, 2011, the Polk County Sheriff's Department visited a number of local businesses known to sell synthetic marijuana to put them on notice of upcoming changes to the law regarding the possession and sale of these products.[2] Lieutenant Anthony Lowrie went to appellant's convenience store, the Corner Shell Station, and gave him a written letter which stated:

> As of Thursday September 1st, 2011 it will be against the law in the State of Texas to possess or sell any type of synthetic marijuana, potpourri used as synthetic marijuana and any type of complex synthetic substances currently marketed and sold as bath salts. As of September 1st, 2011, the Polk County Sheriff's Office will be actively pursuing and arresting subjects who prey on the general public by selling these items just to make a dollar. This is the only warning given and the outcome of breaking this new law will be you being arrested and facing jail time.

---

[2] Beginning September 1, 2011, certain synthetic chemical cannabinoids, including the chemical compound known as AM-2201, were designated as controlled substances under the Texas Controlled Substances Act. *See id.* § 481.1031 (West Supp. 2015).

Despite the warning, Lieutenant Lowrie learned that several businesses, including appellant's, continued to sell synthetic marijuana. To confirm the information, Lieutenant Lowrie drove Joe Roberts, a cooperating individual, to appellant's store to make a controlled purchase of synthetic marijuana. Lieutenant Lowrie gave Roberts $40.00 in marked bills and directed him to enter the store and approach only appellant to make the buy. Shortly thereafter, Roberts returned with a package of synthetic marijuana in a brown paper bag.

After radioing for two additional units to seal the parking lot, Lieutenant Lowrie entered appellant's store. When he asked appellant if he knew why he had returned, appellant told him that he did, that it was because he had been warned that if he continued to sell the product he would see the officer again. Appellant then voluntarily produced two plastic bags containing numerous packets and gave Lieutenant Lowrie written consent to search the premises.

During the search, Lieutenant Lowrie asked appellant why he continued to sell the product despite the warning, and appellant told him that "his customers demanded it" and that he believed the products were legal. He then gave Lieutenant Lowrie two laboratory reports and an opinion letter from a Kansas law firm that he had received from the vendor in Houston in support of his belief that

the products he was selling were legal.[3] In the ensuing search, officers located approximately 289 packets of suspected synthetic marijuana and recovered the marked bills. The packets were sent to the Texas Department of Public Safety Laboratory for chemical analysis where testing revealed that fourteen of the packets contained 119.62 grams of AM-2201, one of the synthetic chemical compounds banned under the new law.

The jury found appellant guilty of the charged offense. At the conclusion of the punishment phase, the trial court assessed appellant's punishment at ten years' confinement, probated, ninety days in jail, and a $10,000 fine. Appellant timely filed this appeal.[4]

Discussion

In two points of error, appellant contends that he was denied effective assistance of counsel when his trial counsel failed to object to (1) improper opinion testimony and (2) the introduction of appellant's unrecorded custodial statements.[5]

---

[3] The lab reports reflected the test results for several types of synthetic marijuana and noted that the tested products tested negative for a number of banned substances, but not AM-2201. The products discussed in the lab reports were not among the packets recovered from appellant's store.

[4] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Ninth District of Texas to this Court pursuant to its docket equalization powers. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013) ("The supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer.").

[5] The State did not file an appellate brief in this case

A. 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). Under the *Strickland* two-step analysis, a defendant must demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687–88, 694, 104 S. Ct. at 2064, 2068; *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Andrews*, 159 S.W.3d at 101.

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, 813 (Tex. Crim. App. 1999). "[A]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id.* at 814 (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance is within a wide range of

reasonable professional assistance and trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006); *Thompson*, 9 S.W.3d at 813. 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.

B. Analysis

Appellant first contends that his trial counsel was ineffective when he failed to object to testimony by Brian Nacu, a Department of Public Safety forensic chemist. During questioning by the State, Nacu testified as follows:

> Q. In general, in lay terms, can you tell the members of the jury what Penalty Group 2-A proscribes without getting too hypertechnical?
>
> A. Sure. Essentially, Penalty Group 2-A are a group of substances that became controlled because the goal was to create something that mimics the effects of marijuana and, more specifically, the active ingredient THC. So these are substances that are created in a laboratory.
>
> They were originally designed to try to have the pain-fighting aspects of marijuana without having the psychoactive aspects but, unfortunately, the majority of these substances that were created are much more potent than marijuana and give more psychoactive effects. So, generally, 2-A covers these substances that mimic the effects of marijuana but don't have the active ingredient THC.
>
> Q. When you describe some of the psychoactive effects of the synthetic marijuana, is it your understanding that some of those are hallucinogenic?
>
> A. I believe so, yes.
>
> Q. LSD-type effects?

> A. I don't know that they are as potent as LSD; but there are, I believe, some hallucinogenic effects.

Appellant argues that although Nacu was qualified to testify about the chemical analysis of the substances tested, his background in chemistry and forensic science did not qualify him to testify about the pharmacological effects of AM-2201 upon an individual. Appellant contends that his trial counsel's failure to object allowed the jury to hear testimony that equated the psychoactive effects of synthetic marijuana with those of LSD, a well-known and powerful hallucinogen.

Contrary to appellant's assertion, Nacu did not equate the psychoactive effects of synthetic marijuana and LSD. Rather, Nacu's testimony actually suggested that the effects were *less* potent than those of LSD. Further, the objected-to testimony was related to his previous statements explaining the original purpose behind the creation of Penalty Group 2-A substances (i.e, to have the pain-fighting aspects of marijuana without having the psychoactive aspects). That trial counsel did not object to this testimony does not constitute conduct so outrageous that no competent attorney would have engaged in it. *Andrews,* 159 S.W.3d at 101.

Moreover, even if the record affirmatively demonstrated counsel's deficiency, appellant has failed to show that, but for his trial counsel's error, the result of the proceeding would have been different. *Lopez v. State*, 343 S.W.3d

137, 142 (Tex. Crim. App. 2011). In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel. *See Robertson*, 187 S.W.3d at 483; *Thompson*, 9 S.W.3d at 813. Here, trial counsel conducted a thorough voir dire, cross-examined the prosecution witnesses developing reasonable doubt where he could, presented a plausible mistake-of-fact defense (i.e., that appellant believed that the products he sold were legal),[6] and requested and obtained an instruction on mistake of fact. In support of the defense, trial counsel also effectively cross-examined Nacu by making the point that whether a product contains AM-2201 can only be determined through scientific testing and not simply by looking at it. Having concluded that appellant failed to establish both elements of an ineffective assistance claim, we overrule appellant's first point of error.

In his second point of error, appellant argues that he received ineffective assistance when his trial counsel failed to object to the admission of appellant's statements to Lieutenant Lowrie because the statements were made in the course of

---

[6] Appellant was charged with possession with intent to deliver a controlled substance. *See* HEALTH & SAFETY CODE § 481.113. The statute provides that "a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 2 or 2-A." *Id.* Under the Texas Penal Code, "[i]t is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense." TEX. PENAL CODE ANN. § 8.02(a) (West 2011).

a custodial interrogation and the record does not show that appellant received the required *Miranda* warnings[7] or that his statements were electronically recorded.

Lieutenant Lowrie testified that when he asked appellant during the search why he continued selling the products despite the warning he had received from the sheriff's department, appellant told him that his customers wanted the products and that he believed they were legal. Lieutenant Lowrie also testified that appellant gave him documents that he had received from the vendor that appellant believed proved that the products were legal.

Assuming without deciding that appellant made these statements while in custody, appellant has not rebutted the strong presumption that his trial counsel's performance was within the range of reasonable professional assistance. *See Lopez*, 343 S.W.3d at 142; *Robertson*, 187 S.W.3d at 483; *Thompson*, 9 S.W.3d at 813. In order for us to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record. *Thompson*, 9 S.W.3d at 813. When, as here, such direct evidence is not available, an appellate court "will

---

[7] In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), the United States Supreme Court determined that an accused, held in custody, must be given certain required warnings prior to questioning. *See Jones v. State*, 19 S.W.3d 766, 772 (Tex. Crim. App. 2003). The failure to comply with the *Miranda* requirements results in forfeiture of the use of any statement obtained during that interrogation by the prosecution during its case-in-chief. *Id.*

assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."[8] *Lopez*, 343 S.W.3d 143.

"In regard to making objections, advocates must be free to choose not to make them even if they have a legal basis for doing so." *McKinny v. State*, 76 S.W.3d 463, 473 (Tex. App.—Houston [1st Dist.] 2002, no pet.). An attorney may strategically decide to allow the other side to introduce otherwise inadmissible evidence because it does not hurt the client's case or, in fact, may help it. *Id*. Here, trial counsel's failure to object to admission of appellant's statement to Lieutenant Lowrie that he continued to sell the products because his customers demanded it did not hurt his case. Further, his statement that he believed that the products were legal based on the documentation the vendor had given to him supported his mistake-of-fact defense. *See id*. at 475 (concluding counsel's failure to object to prosecution's use of defendant's oral statement to police, to emphasize difference between defendant's and co-defendant's statement, did not constitute ineffective assistance because "this was exactly the point defendant's trial counsel was trying to establish through cross-examination").

---

[8] In his motion for new trial, appellant argued only that the verdict was contrary to the law and evidence, and did not raise an ineffective assistance claim in the motion.

"[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *See State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). Based on the record before us, appellant has not rebutted the strong presumption that his trial counsel's performance was trial strategy within the range of reasonable professional assistance. *See Lopez*, 343 S.W.3d at 142; *Robertson*, 187 S.W.3d at 483; *Thompson*, 9 S.W.3d at 813. Because failure to make the required showing of either prong under *Strickland* defeats an ineffectiveness claim, we overrule appellant's second point of error. *See Williams*, 301 S.W.3d at 687.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Bland, Brown, and Lloyd.

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