

Opinion issued December 29, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-15-00764-CR
NO. 01-15-00765-CR
NO. 01-15-00766-CR

COREY NICKERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case Nos. 1404004, 1416652, & 1459622**

MEMORANDUM OPINION

Appellant Corey Nickerson pleaded guilty, without an agreed recommendation as to punishment, to three charges of aggravated robbery with a deadly weapon. Following the preparation of a presentence investigation (“PSI”)

report and a punishment hearing, the trial court sentenced Nickerson to 20 years' confinement for each count with the sentences to run concurrently. In a single issue raised in all three appeals, Nickerson contends that his trial counsel rendered ineffective assistance of counsel by failing to object to three of five unadjudicated extraneous offenses included in the PSI report. We affirm.

Background

Nickerson pleaded guilty to three counts of aggravated robbery with a deadly weapon occurring on September 22, 2013, October 6, 2013, and January 31, 2014. Prior to sentencing, Nickerson submitted a letter to the trial court judge in which he admitted committing each of the three charged aggravated robberies and expressed his hope that the trial judge would sentence him to probation. At the punishment hearing, the PSI report was admitted into evidence without objection.

The PSI report detailed the charged offenses. According to the PSI report, on October 6, 2013, the AT&T store at 10650 Northwest Freeway was robbed by two black men. One of the robbers wore a red hat and carried a gun. The two robbers ordered customers and employees to the inventory area in the back of the store, where they demanded cell phones be loaded into a bag. An employee managed to also place a GPS tracking device into the bag. Relying on the tracking device, officers located and apprehended Nickerson and his co-defendant,

Deshawn Gibson, driving a beige 2012 Buick LTU with a stolen temporary license plate. Officers observed many iPhone, iPad, and Galaxy phones in unopened boxes in plain view in the car. Officers returned Nickerson and Gibson to the scene of the robbery, where complainants positively identified the men by their clothing.

The second charge stems from the aggravated robbery of a Kwik Trip gas station on Airline Drive by two men on January 31, 2014. One of the robbers wore a red bandana and carried a gun. As he held a customer at gunpoint, the second robber stole cash from the register. At some point, the customer began wrestling with the robber holding him at gunpoint, and, in the course of that struggle, the robber dropped his cell phone and gun. Both robbers then fled in a red Pontiac Grand AM with a temporary license plate.

Finally, the third charge concerns the aggravated robbery of a Verizon store by two black men on September 22, 2013. The store's manager watched as the two men exited a 2012 or 2013 gold Buick Lacrosse wearing bandanas and entered the store. One man had a black pistol in his left hand, which he pointed at customers and employees in the store as he ordered them to the inventory room. Once there, the men loaded expensive cell phones into a blue gym-type bag.

The PSI report further detailed five extraneous offenses—all aggravated robberies of area Verizon stores occurring on September 10, 2013,

September 15, 2013, September 20, 2013, September 30, 2013, and January 4, 2014. Based on eyewitness accounts and surveillance video, in all five offenses, the suspects wore bandanas over their faces and one carried a gun. In the September 10 and September 20 robberies, the pair fled in a newer model gold Buick Lacrosse; in the September 15 and September 30 robberies, the pair fled in a Chevrolet sedan bearing a temporary license plate; and in the January 4 robbery, the pair fled in Chrysler sedan. The temporary plate used in the September 30 robbery was later recovered inside the gold Buick LaCrosse after Nickerson's arrest on October 6.

Nickerson's trial counsel did not object to the PSI report in any regard and did not object to a law enforcement officer's testimony concerning the extraneous offenses. Instead, during closing argument, Nickerson's trial counsel complained that the State failed to show beyond a reasonable doubt that Nickerson committed the unadjudicated extraneous offenses.

Discussion

In his sole issue, Nickerson contends that trial counsel rendered ineffective assistance of counsel by failing to object to three of the five unadjudicated extraneous offenses included in the presentence investigation report.

A. Standard of Review

We consider claims of ineffective assistance of counsel under the two-prong test adopted in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Hernandez v. State*, 988 S.W.2d 770, 770 & n.3 (Tex. Crim. App. 1999). To prevail on an ineffective assistance of counsel claim, appellant must show that (1) counsel's performance was deficient—meaning that it fell below an objective standard of reasonableness—and (2) the deficiency prejudiced the defendant—meaning that there was a reasonable probability that, but for the counsel's deficient performance, the results of the trial would have been different. *Ex parte Napper*, 322 S.W.3d 202, 246, 248 (Tex. Crim. App. 2010); *see Hernandez*, 988 S.W.2d at 770 & n.3. A reasonable probability is a probability sufficient to undermine confidence in the outcome; counsel's errors must be so serious that they deprive appellant of a fair trial. *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009).

As we review appellant's claim of ineffective assistance, we “must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (internal quotation marks omitted). Rather than judging trial counsel's decisions

with the benefit of hindsight, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686; 104 S. Ct. at 2064.

B. Analysis

Nickerson complains that his trial counsel was deficient because he failed to object to the inclusion of three of five extraneous offenses in the PSI report: Verizon store robberies occurring on September 15, 2013, September 30, 2013, and January 4, 2014. Nickerson contends that there was not sufficient evidence that he was involved these three extraneous offenses and trial counsel should have objected to their inclusion in the PSI.

Pursuant to article 42.12, section 9(a) of the Code of Criminal Procedure, a judge shall direct a community supervision officer to prepare a PSI report prior to sentencing by the trial court in a felony case, and the trial court is permitted to consider the PSI report. TEX. CODE CRIM. PROC. art. 42.12, § 9(a). The trial court shall allow the defendant or his counsel to review and comment on the PSI report and, with leave of the court, proffer evidence as to any factual inaccuracies therein. *See id.* art. 42.12, § 9(d), (e). An allegation that the PSI report includes a factual inaccuracy does not render it inadmissible. *Stancliff v. State*, 852 S.W.2d 630, 632 (Tex. App.—Houston [14th Dist.] 1993, pet. ref’d). Rather, the PSI report is

rendered inadmissible upon proof that the included information is materially inaccurate and that the judge relied upon it. *Id.*

Should the PSI report contain extraneous offenses, “Section 3(a)(1) of Article 37.07 does not prohibit a trial court, as a sentencing entity, from considering extraneous misconduct evidence in assessing punishment just because the extraneous misconduct has not been shown to have been committed by the defendant beyond a reasonable doubt, if that extraneous misconduct is contained in a PSI.” *Smith v. State*, 227 S.W.3d 753, 763 (Tex. Crim. App. 2007). Rather, the trial court may consider extraneous acts contained in a PSI not proven beyond a reasonable doubt if there is some “evidence from any source from which it could be rationally inferred that the defendant had any criminal responsibility for that extraneous misconduct.” *Id.* at 764.

When a claim of ineffective assistance of counsel is based on a failure to object to evidence, counsel’s performance may be deemed deficient only if the trial court would have erred in overruling the objection, had it been made. *See Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002). Because Nickerson has not shown that the trial court would have erred in overruling an objection to the extraneous misconduct evidence in the PSI, we conclude that he has failed to demonstrate that counsel’s performance fell below an objective standard of reasonableness and constituted

deficient performance. Because we conclude that Nickerson has not satisfied the first prong of *Strickland*, we need not consider whether he has satisfied the requirements of the second prong. *See Lopez v. State*, 343 S.W.3d 137, 144 (Tex. Crim. App. 2011). Accordingly, we overrule his sole issue.

Conclusion

We affirm the trial court's judgment.

Rebeca Huddle
Justice

Panel consists of Justices Massengale, Brown, and Huddle.

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