Opinion issued June 15, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00256-CR

DAVID RICHARD WILSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Case No. 1445860

MEMORANDUM OPINION

A jury convicted appellant, David Richard Wilson, of sexual assault of a child, and, after appellant pleaded true to an enhancement alleging a previous conviction for sexual assault of a child, assessed punishment at confinement for life. In four issues on appeal, appellant contends the trial court erred by (1) failing

to conduct a balancing test before determining that Human Immunodeficiency Virus ["HIV"] evidence was not substantially more prejudicial than probative; (2) allowing the prosecutor to commit misconduct by "repetitively eliciting testimony concerning HIV and AIDS"; (3) failing to rule on appellant's pro se motion to dismiss counsel that he now contends was ineffective; and (4) allowing cumulative errors that denied appellant due process. We modify, and as modified, affirm.

BACKGROUND

When Jane[1] was in middle school and appellant was 32, she began a sexual relationship with him. Jane knew appellant as her little brother's father, and he had lived with her family on and off through the years. Jane had an on-going sexual relationship with appellant, which continued even after he separated from her mother. When Jane became pregnant, her grandmother suspected that appellant was the father, which Jane denied, claiming that she was involved with a boy at her school.

When Jane was three months pregnant, she miscarried. As a result of her miscarriage, the doctors performed surgery on her, at which time they saved some fetal tissue. The fetal tissue was compared to appellant's DNA, and he could not

[1] The pseudonym "Jane" will be used for the child victim in this case. *See* TEX. R. APP. P. 9.10(a)(3); *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel. Op.] 1982).

be excluded as the father. At trial, the State also presented evidence that both appellant and Jane were infected with HIV.

ADMITTING HIV EVIDENCE IN VIOLATION OF RULE 403

In his first point of error on appeal, appellant contends that "[t]he trial court abused its discretion by allowing evidence regarding HIV during guilt innocence without performing the required rule 403 balancing test" to determine whether the relevancy of the HIV evidence was substantially outweighed by a danger of unfair prejudice. *See* TEX. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ."). Specifically, appellant argues that "[t]he trial court failed to perform the necessary rule 403 balancing test when it made the decision to allow HIV evidence into the guilt innocence phase of trial[,]" and "the record does not reflect that the trial court engaged in the proper balancing test before ruling on the admissibility of the HIV evidence."

In *Howland v. State*, 966 S.W.2d 98, 103 (Tex. App.—Houston [1st Dist.] 1998, *aff'd*, 990 S.W.2d 274 (Tex. Crim. App. 1999), this Court considered what the record must reflect regarding a 403 balancing test, stating as follows:

> Appellant first complains the trial court erred in refusing to conduct a rule 403 balancing test. The trial court must perform a rule 403 balancing test if requested. *See* [*Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997)]. However, it need not conduct a formal hearing or even announce on the record that it has mentally conducted this balancing test. *Yates v. State*, 941 S.W.2d 357, 367 (Tex. App.—

> Waco 1997, pet. ref'd); *Luxton v. State*, 941 S.W.2d 339, 343 (Tex. App.—Fort Worth 1997, no pet.). Here, appellant objected on rule 403 grounds after brief argument, the trial court overruled the objection, appellant then requested the trial court to conduct a rule 403 balancing test, and the trial court again denied the objection and request to balance. By overruling appellant's rule 403 objection the first time, the trial court necessarily conducted the balancing test by considering and overruling the objection. *Yates*, 941 S.W.2d at 367; *Sparks v. State*, 935 S.W.2d 462, 466 (Tex. App.—Tyler 1996, no pet.). That is, we may presume from the record before us that the trial court conducted the balancing test and found the evidence more probative than prejudicial. *Luxton*, 941 S.W.2d at 343; *Sparks*, 935 S.W.2d at 466.

Id.

Here, appellant filed a motion in limine, asking that before the State offered HIV evidence, it approach the bench to discuss its relevancy. Specifically, appellant objected:

> It is my position that evidence is not relevant. And even if it were relevant, its prejudicial effect far outweighs its probative value in this particular case.
>
> * * * *
>
> I think that is just not relevant. And even if it were relevant, it's too prejudicial—it is so prejudicial that it—the prejudice far outweighs its probative value.

After appellant's objection, and hearing arguments thereon, the trial court took the issue under advisement, and at the next hearing overruled appellant's relevancy objection. Appellant then stated, "I also ask you at this time to make a

ruling as to whether or not . . . the prejudicial effects of that particular evidence . . . outweighs its probative value." The trial court then ruled as follows:

> Okay. The Court finds that the probative value of evidence that the defendant was infected with HIV and showing that the defendant had sexual contact with the victim, who was infected with the same disease, is not substantially outweighed by the danger of unfair prejudice. And that's Rule 403.

In *Howland*, this Court presumed that the trial court had performed the balancing test because it overruled the defendant's Rule 403 objection. *Id.* at 103. Here, no such presumption is necessary because the trial court specifically states that it has performed the balancing test and concluded that the HIV evidence "is not substantially outweighed by the danger of unfair prejudice." The trial court was not required to provide details in the record regarding how it arrived at its conclusion. *See Yates*, 941 S.W.2d at 367. By overruling appellant's Rule 403 objection, the trial court necessarily conducted the balancing test when it considered the objection. *Id.* A trial court is presumed to have conducted the proper balancing test if it overrules a 403 objection, regardless of whether it conducted the test on the record. *See Williams v. State*, 958 S.W.2d 186, 195–96 (Tex. Crim. App. 1997); *Wilson v. State*, No. 01-11-01125-CR, 2015 WL 1501812, at *7 (Tex. App.—Houston [1st Dist. Mar. 31, 2015, pet. ref'd) (not designated for publication).

Because the trial court properly conducted a Rule 403 balancing test and was not required to give further reasons for overruling appellant's Rule 403 objection, we overrule appellant's first issue on appeal.

PROSECUTORIAL MISCONDUCT

In his second issue on appeal, appellant contends that "[t]he prosecution's conduct was calculated to prejudice the appellant and deny him a fair trial." Specifically, appellant alleges (1) that "[t]he prosecution repetitively emphasized HIV & AIDS in a manner reasonably calculated to prejudice the appellant and deny him a fair trial[;]" (2) "[t]he Prosecutor's improper bolstering of the complainant was conduct calculated to deny the Appellant a fair trial[;]" (3) "[t]he religious emphasis of the complainant's testimony improperly bolstered her credibility and prejudiced the Appellant's due process rights[;]" (4) "[t]he Prosecutor improperly bolstered the complainant's credibility when the complainant was allowed to wear a Junior ROTC uniform during the trial[;]" (5) "[t]he Prosecution's response to evidentiary objections raised by the trial counsel reveal the intent of the prosecution to bypass the rules of evidence and procedure in order to elicit improper testimony during trial[;]" and (6) "[t]he cumulative effect of the Prosecution's conduct during the trial denied the appellant the right to a fair trial." In support of his allegations of prosecutorial misconduct, appellant points to several passages of testimony in the record.

Prosecutorial misconduct is an independent basis for objection that must be specifically urged to preserve error. *Hajjar v. State*, 176 S.W.3d 554, 566 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd); *see also Temple v. State*, 342 S.W.3d 572, 603 n.10 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013) (same); *Perkins v. State*, 902 S.W.2d 88, 96 (Tex. App.—El Paso 1995, pet. ref'd) (holding appellant's failure to object on the basis of prosecutorial misconduct waived that asserted error on appeal).

In none of the passages relied on by appellant in this point of error does he object based on prosecutorial misconduct. To preserve a prosecutorial misconduct complaint, a defendant must make a timely and specific objection, request an instruction to disregard the matter improperly placed before the jury, and move for a mistrial. *Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995). Appellant did none of this, thus error is waived. *See Clark v. State*, 365 S.W.3d 333, 340 (Tex. Crim. App. 2012) (holding that evidentiary objections at trial did not present trial court with opportunity to rule on due process claim raised on appeal, thus due process claim was waived.).

While acknowledging "that [he] failed to properly preserve many errors," appellant, relying on *Rogers v. State*, 725 S.W.2d 350 (Tex. App.—Houston [1st Dist.] 1987, no pet.), contends that preservation was not required. *Rogers* involved flagrant and repeated misconduct by the prosecutor, who repeatedly made side-bar

remarks and suggested inflammatory facts that lacked evidentiary support. *Id.* at 358–61. The Court concluded that the prosecutor acted in bad faith and that her behavior "could serve no purpose other than to inflame and prejudice the minds of the jurors." *Id.* at 360. Based on these facts, the defendant was allowed to raise prosecutorial misconduct as a point of error on appeal, even though he failed to preserve the point of error. *Id.* at 359–60. In so holding, this Court stated:

> Whe[n] there is serious and continuing prosecutorial misconduct that undermines the reliability of the fact[–]finding process or, even worse, transforms the trial into a farce and mockery of justice, as occurred here, resulting in deprivation of fundamental fairness and due process of law, the defendant is entitled to a new trial even though few objections have been perfected.

Id.

We cannot say that the prosecutor's conduct in this case was the sort of flagrant repeated misconduct at issue in *Rogers*, or that it deprived appellant of fundamental fairness or due process of law. As such, appellant's failure to object to prosecutorial misconduct waives that issue.

We overrule appellant's second issue on appeal.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his third issue on appeal, appellant contends that he received ineffective assistance of counsel. Specifically, he complains that (1) the trial court did not conduct a hearing on his pro se motion to dismiss counsel[;] and that trial counsel was deficient for failing to (2) "re-urge his pre-trial 403 objection to HIV

testimony, or ask for a running objection to the mentioning of HIV[;]" or (3) reasonably investigate the case in preparation of trial.

Standard of Review

Strickland v. Washington sets the standard of review for claims of ineffective assistance of counsel. 466 U.S. 668, 687–96, 104 S. Ct. 2052, 2064–69 (1984); *accord Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). To prevail, an appellant must first show that his counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Bone*, 77 S.W.3d at 833. Specifically, an appellant "must prove, by a preponderance of the evidence, that his counsel's representation fell below the objective standard of professional norms." *Bone*, 77 S.W.3d at 833. Second, an appellant "must show that this deficient performance prejudiced his defense," meaning that he "must show a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Thus, the "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." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064.

In assessing counsel's performance, we consider the entire representation, indulging a strong presumption that the attorney's performance falls within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d

808, 813 (Tex. Crim. App. 1999). If we can imagine any strategic motivation for counsel's conduct, we presume that counsel acted for strategic reasons. *Thompson v. State*, 445 S.W.3d 408, 411 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citing *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Further, a claim of ineffective assistance must be firmly supported in the record. *Thompson*, 9 S.W.3d at 813.

Hearing on appellant's pro se motion to dismiss trial counsel

On September 28, 2015, several months before trial, appellant filed a pro se motion to substitute counsel. The motion did not request a hearing, and there is nothing in the record to indicate that it was ever presented to the trial court or that appellant ever requested a hearing. Nonetheless, appellant contends that the trial court erred by not having a hearing and ruling on his motion to substitute counsel.

However, a trial court is not required to hold such a hearing sua sponte. *See Malcom v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982); *Hill v. State*, 666 S.W.2d 663, 667 (Tex. App.—Houston [1st Dist.] 1984), *aff'd*, 686 S.W.2d 184 (Tex. Crim. App. 1985). Appellant has waived this issue on appeal by failing to request a hearing on his pro se motion to substitute counsel. *Malcom*, 628 S.W.2d at 792.

Accordingly, we overrule appellant's third issue as it relates to the trial court's failure to hold a hearing on his motion to substitute counsel.

Counsel's failure to pursue ruling on rule 403 objection to HIV evidence

Appellant also contends that his trial counsel was ineffective because, even though he filed a motion in limine to have the State approach the bench each time it mentioned the subject of HIV evidence, he did not re-urge his rule 403 objection during trial. Specifically, appellant states that "[d]uring the trial on the merits, of the fifty-five times HIV or AIDS was mentioned, trial counsel did not re-urge his pre-trial 403 objection to HIV testimony, nor ask for a running objection to the mentioning of HIV."

However, it is not ineffective to fail to object to admissible evidence. *See McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992) (holding not ineffective assistance to fail to object to admissible evidence). The HIV evidence was relevant under rule 401 because evidence that the defendant and Jane had the same sexually transmitted disease was probative of appellant's guilt for sexual assault. *See Steadman v. State*, 280 S.W.3d 242, 249 (Tex. Crim. App. 2009) (finding evidence that child had same sexually transmitted disease as appellant probative of guilt for aggravated sexual assault); *Franklin v. State*, 986 S.W.2d 349, 356 (Tex. App.—Texarkana 1999) ("Evidence that [the defendant] is infected with a disease commonly spread by sexual contact and that the victim is infected with the same disease makes it more likely that he had sexual contact with her.

Thus, it is relevant."), *rev'd on other grounds*, 12 S.W.3d 473 (Tex. Crim. App. 2000).

And, any prejudice caused by admission of the HIV evidence did not substantially outweigh its probative value. *See* TEX. R. EVID. 403. A rule 403 balancing test includes consideration of four factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Mechler v. State*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005). Here, the evidence had probative value because appellant and Jane both had the same sexually transmitted disease. *See Steadman*, 280 S.W.3d at 249. While the HIV evidence may have been prejudicial, it was not *unfairly* prejudicial. *See Mechler*, 153 S.W.3d at 440 (stating that rule 403 focuses on the danger of unfair prejudice). The HIV evidence directly related to the charged offense, and it was not offered as evidence of appellant's bad character, but as circumstantial evidence that appellant's sexual organ had contacted Jane's sexual organ. The HIV evidence did not substantially delay the State's presentation of the case, but was admitted through witnesses, such as Jane, her grandmother, the detective, and Jane's doctor, all of whom were also testifying for other reasons. Finally, the State needed the circumstantial evidence of sexual contact because defense counsel's strategy at trial was to attack the fetal tissue DNA evidence it had suggesting that appellant

was the father of the Jane's child. The additional circumstantial evidence of sexual contact provided by the HIV evidence strengthened the State's case, which was necessary because of appellant's attack on the DNA evidence. As such, the trial court did not abuse its discretion by concluding that rule 403 did not require exclusion of the relevant HIV evidence.

Because the HIV evidence was properly admitted, defense counsel was not ineffective for failing to object to it. *McFarland*, 845 S.W.2d at 846. Accordingly, we overrule appellant's third issue as it relates to appellant's claim that defense counsel was ineffective for failing to pursue a rule 403 objection to the HIV evidence.

Counsel's failure to reasonably investigate to prepare for trial

Appellant also contends that his trial counsel's "failure to conduct a reasonably substantial investigation" deprived him of effective assistance of counsel at trial. Specifically, appellant points to counsel's failure to "request investigatory and expert witness fees from the trial court," or to "independently interview the prosecution's witnesses . . . or treating doctors[.]" Appellant also claims that trial counsel "barely spent time conferring with the Appellant outside of court, nor did he do any research on the relevant law involved in the case."

A claim for ineffective assistance based on trial counsel's general failure to investigate the facts of a defendant's case is insufficient absent a showing of what

the investigation would have revealed that reasonably could have changed the result of the case. *Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *Cooks v. State*, 240 S.W.3d 906, 912 (Tex. Crim. App. 2007)); *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (holding that trial court did not abuse its discretion in denying hearing on motion for new trial because defendant "failed to say why counsel's investigation was deficient, or what further investigation would have revealed."). "Likewise, a claim for ineffective assistance based on trial counsel's failure to interview a witness cannot succeed absent a showing of what the interview would have revealed that reasonably could have changed the result of the case." *Stokes*, 298 S.W.3d at 432.

Appellant has not shown what a further investigation by defense counsel would have revealed, nor has he shown what an expert or other witnesses would have testified to had defense counsel spoken to them. As such, appellant has not shown a reasonable likelihood that but for the alleged failures, the results of the trial would have been different. *See Stokes*, 298 S.W.3d at 432; *Jordan*, 883 S.W.2d at 665. Accordingly, we overrule appellant's third issue as it relates to the appellant's claim that defense counsel was ineffective for failing to adequately investigate before trial.

Conclusion

Having rejected all three arguments raised by appellant in his multifarious third issue, we overrule his third issue on appeal.

CUMULATIVE ERROR

In his fourth issue on appeal, appellant contends that "[t]he number of errors, clear from the record as a whole, was harmful to the appellant in their cumulative effect." Because we have found no error, however, there can be no cumulative error. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999), ("[W]e are aware of no authority holding that non-errors may in their cumulative effect cause error.").

Accordingly, we overrule appellant's fourth issue on appeal.

REFORMATION OF THE JUDGMENT

In a cross-issue on appeal, the State asks this Court to reform the judgment to show that appellant pleaded "true" to an enhancement alleging a prior conviction. At the beginning of the punishment hearing, the following exchange took place:

> [THE STATE]: The State of Texas versus David Richard Wilson. The State further presents: In the name and by authority of the State of Texas, before the commission of the offense alleged above, on March 31st of 2005, in Cause No. 0976146, in the 230th District Court of Harris County, Texas that the defendant was convicted of the felony offense of sexual assault of a child.
>
> Against the peace and dignity of the State. Signed Foreman of the Grand Jury.

[THE COURT]: How do you plead, Mr. Wilson?

[APPELLANT]: Guilty

[THE COURT]: True or not true?

[APPELLANT]: True.

[THE COURT]: All right. You may be seated. The Court takes judicial notice of the clerk's file and the evidence in the guilt or innocence phase. You may proceed.

The trial court then admitted State's Exhibits 20 and 21, which were certified copies of Judgments and Sentences, including the prior conviction alleged in the indictment.

The court's written judgment, however, contains "N/A" in the spaces for "Plea to 1st Enhancement Paragraph," and "Findings on 1st Enhancement Paragraph." The State contends, correctly, that the trial court's judgment does not accurately reflect the events that occurred in the trial court. As the State notes, "appellant pled true to the enhancement paragraph, and the jury found that paragraph true." *See Donaldson v. State*, 476 S.W.3d 433, 439 (Tex. Crim. App. 2015) (recognizing appellant's plea of "true" to an enhancement allegation is sufficient to satisfy State's burden of proof for enhancement, and "in the absence of any other evidence that the [factfinder] rejected the State's proof on the enhancement or that enhancement would be improper," would also support implied finding of "true" by factfinder). The jury's verdict specified that it "further find[s]

the allegations in the Enhancement Paragraph are true and assess[es] his punishment at confinement in the institutional division of the Texas Department of Criminal Justice for life."

We have the authority to "correct and reform a judgment of the court below to make the record speak the truth when [we have] the necessary data and information to do so." *Asbury v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd); TEX. R. APP. P. 43.2(b) ("The court of appeals may modify the trial court's judgment and affirm it as modified."). "The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court." *Asbury*, 813 S.W.2d at 529.

Accordingly, we grant the State's request that we reform the judgment to reflect that appellant pleaded "true" to the enhancement and that the jury found it "true."

CONCLUSION

We affirm the trial court's judgment as modified.

Sherry Radack
Chief Justice

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

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