Affirmed and Memorandum Opinion filed January 11, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00689-CR

SHERMAN THEODORE LEWIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1161346

MEMORANDUM OPINION

A jury found appellant Sherman Theodore Lewis guilty of injury to an elderly person and the trial court sentenced him to 35 years' imprisonment. His sentence was enhanced by two prior felony convictions. Lewis appeals his conviction contending that: (1) his attorney rendered ineffective assistance at trial, and (2) there is insufficient evidence to support the prior felony convictions used to enhance his punishment. We affirm.

I

Sherman Theodore Lewis arrived at his parents' apartment, where he had been living since being paroled, around 1:00 a.m. on April 6, 2008. After knocking on the door to be let in, a verbal altercation broke out between the intoxicated Lewis and his father, Theodore Sherman, who was upset because Lewis had not used his key. The altercation soon turned physical. Lewis hit Sherman in the face, and when Sherman fell to the ground Lewis kicked and stomped on him. Shirley Sherman Lewis, Lewis's mother, attempted to intervene but Lewis either pushed her away or she fell to the ground. She then called police and was able to lock Lewis out of the apartment until officers arrived.

Both of Lewis's parents received injuries and were taken to the hospital. Sherman sustained a broken arm, bruises to his face, chest and side, a bloody nose, and was still unable to fully close his hand into a fist at trial. He also testified to breathing problems and "eye trouble" resulting from the blows he received to his face. Sherman was 78 at that time and, while not bound to a wheelchair, often used one because of back problems. Shirley Lewis sustained a cut to her foot that required stitches, but Lewis was charged with injury to an elderly person only as to his assault on Sherman.[1]

At trial, defense counsel elicited testimony about Lewis's troubled childhood and a strained relationship with his father that included Sherman allegedly shooting Lewis in the back with a shotgun or B.B. gun—an incident Sherman denied but which Lewis and the rest of the testifying members of the family agreed happened. Lewis testified in his own defense and admitted to the assault but said Sherman had pulled a knife on him.

During trial, defense counsel also elicited testimony from Sherman concerning Lewis's parole status. He did not object to Sherman mentioning Lewis's parole status, nor did he object when the responding police officer also testified as to Lewis's parole status. He also did not object when the prosecutor elicited testimony from Shirley Lewis

[1] Tex. Penal Code § 22.04.

concerning Lewis's childhood and adolescent criminal activity. These failures to object largely form the basis of Lewis's ineffective-assistance-of-counsel claim. Specifically, Lewis complains defense counsel (1) failed to object, request an instruction to disregard, and request a mistrial in response to the responding police officer's unresponsive testimony that Lewis was on parole; (2) introduced evidence to the jury that Lewis was a habitual offender despite no evidence other than his own admission that he was finally convicted of an offense; (3) opened the door to evidence of Lewis's childhood criminal activity; (4) failed to object to the prosecutor's mention of Lewis's criminal history during the State's closing argument; (5) agreed to stipulate to Lewis's prior convictions during the punishment phase without any evidence of judgments or sentences relating to the convictions; (6) failed to file a pretrial motion in limine as to Lewis's criminal history and extraneous acts of misconduct; and (7) expressly declined a jury charge on self-defense.

Lewis also complains there is insufficient evidence to sustain his habitual-offender status determined at the punishment stage of his trial. Although Lewis pleaded "true" to his two prior felony convictions, he now complains that because no judgments or sentences were entered into evidence it is unknown whether the convictions were final or if other objectionable grounds existed that would have warranted their exclusion.

II

An accused is entitled to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). In reviewing claims of ineffective assistance of counsel, we apply a two-prong test. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687). To establish ineffective assistance, an appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation fell below the standard of prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 687. If a criminal defendant can prove that trial counsel's performance was

deficient, he must still affirmatively prove that counsel's actions prejudiced him. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To demonstrate prejudice, a defendant must establish a reasonable probability that the result of the proceeding would have been different if trial counsel had acted professionally. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

When evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of each case. *Thompson*, 9 S.W.3d at 813. In making such an evaluation, any judicial review must be highly deferential to trial counsel and avoid the distorting effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (citing *Strickland*, 466 U.S. at 689). As such, there is a strong presumption that counsel's conduct fell within a wide range of reasonable representation. *Salinas*, 163 S.W.3d at 740. The appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson*, 9 S.W.3d at 813 (citing *Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984)). To overcome the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 814. Direct appeal is usually an inadequate vehicle for raising such a claim because the record is generally undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). When the record is silent as to trial counsel's strategy, we will not conclude that defense counsel's assistance was ineffective unless the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Even when an appeals court found that the record in an ineffective-assistance-of-counsel claim "reveal[ed] a total absence of advocacy skills and [that] even the minimum effort expended on appellant's behalf was misguided," the Court of Criminal Appeals refused to find ineffective assistance of counsel on direct appeal

because nothing in the record proved counsel's actions were not the product of an unreasoned or unreasonable strategy. *Bone v. State*, 77 S.W.3d 828, 834 (Tex. Crim. App. 2002).

We are unable to determine from the record that Lewis received ineffective assistance of counsel. Because the record is largely undeveloped in identifying what trial strategies, if any, were employed by defense counsel, we have no basis to say Lewis's attorney's performance fell outside the wide range of acceptable professional assistance. *See Salinas*, 163 S.W.3d at 740. The crux of Lewis's complaint is that defense counsel allowed evidence of Lewis's parole status, prior convictions, and childhood criminal activity into evidence without objection. The record reflects that Lewis's parole status became known to the jury through defense counsel's cross-examination of Sherman. When asked if Lewis was living with his parents at the time of the incident, Sherman responded, "When he got paroled that's where he got paroled to." Defense counsel did not object to this response, and, in fact, repeated it in his next question when he asked, "He was paroled to your house?" Lewis's parole status would later be raised by a testifying police officer, again without objection from defense counsel. Further, after defense counsel initiated lines of questioning about Lewis's childhood, the prosecutor asked Shirley Lewis about Lewis's childhood and adolescent criminal activity, which she said included "driving a stolen car," "robbing an ice cream truck" and stealing a wallet at the hospital where she was working. Defense counsel did not object.

It was not until Lewis testified that defense counsel would object to the attempted introduction of prior felony convictions, at which time the court appeared to express surprise by saying, "I kind of expected a motion in this regard before you ever started," and observed that "from the beginning of this case everybody's been talking about his parole and the fact that he has priors, and since I was kind of curious about why we were doing that, but that cat's out of the bag." Defense counsel did not offer any explanation for his

rationale in choosing not to file a motion in limine or in choosing not to object to previous mention of Lewis's parole status or criminal history.

The record provides some indication of defense counsel's strategy in supposedly opening the door to testimony of Lewis's childhood criminal activity. During an earlier bench conference following the prosecutor's objection to the relevance of defense counsel's questions to Shirley Lewis about Lewis's childhood, defense counsel told the court there was "a long history of violence in this family I'm trying to get into" in order to show that Sherman had "been abusive the entire time since this kid was [six] years old." While it cannot be inferred with certainty, this exchange tends to suggest defense counsel's strategy may have been to risk opening the door to Lewis's childhood criminal activity to gain the advantage of exploring a pattern of abuse directed toward Lewis throughout his life. But the record is not developed on this point and we will not speculate as to counsel's strategy.

The record also provides at least some insight into Lewis's complaint that defense counsel failed to request a jury charge on self-defense. The record in fact shows that defense counsel did not merely fail to request the charge but affirmatively declined it. During the charge conference, the prosecutor asked the court if a self-defense charge would be included, and defense counsel stated, "It is not my request to have that specifically included." While the record here does not reflect defense counsel's rationale for declining such an instruction, it does show defense counsel did not fail to request the instruction out of neglect. Rather, he made a conscious decision not to pursue the request. This obviously strategic choice requires we be highly deferential to trial counsel and avoid the deleterious effects of hindsight absent a clear showing of the rationale behind the choice. *See Ingham*, 679 S.W.2d at 509.

Although the record provides some hints about why defense counsel did not request the self-defense instruction, it does not decisively demonstrate defense counsel's thinking

or strategy. Moreover, the record is completely silent as to why he did not object to testimony concerning Lewis's parole status or the introduction of some of Lewis's prior criminal history and the prosecutor's mention of the same during the State's closing argument. It also does not address Lewis's complaint that defense counsel agreed to stipulate to Lewis's convictions during the punishment phase in the absence of evidence of any judgments or sentences relating to those convictions. Therefore, the evidence offered is insufficient to rebut the presumption that defense counsel's decisions were reasonable. *See Thompson*, 9 S.W.3d at 814. Lewis's first point is overruled.

III

Lewis next complains that the there is insufficient evidence to sustain the two prior felony convictions used to enhance his punishment as a habitual offender.[2] At trial, Lewis pleaded "true" to two enhancement paragraphs acknowledging prior felony convictions for robbery and credit-card abuse. Nonetheless, he now complains that "there is no proof of either enhancement and there is no evidence that either case was final before this instant case."

A defendant who enters a plea of "true" to an enhancement paragraph in an indictment cannot be heard to later complain the evidence is insufficient to support the prior convictions. *Harvey v. State*, 611 S.W.2d 108, 111 (Tex. Crim. App. 1981); *O'Dell v. State*, 467 S.W.2d 444, 447 (Tex. Crim. App. 1971). By pleading "true," Lewis

[2] Lewis complains the evidence is both legally and factually insufficient to sustain his status as a habitual offender for sentencing purposes. His appeal was filed before the Court of Criminal Appeals' decision in *Brooks v. State*, in which a majority of the judges determined that the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (Hervey, J., joined by Keller, P.J., Keasler, and Cochran, J.J.); *id.* at 926 (Cochran, J., concurring, joined by Womack, J.) (same conclusion as plurality). Accordingly, we review the evidence under the standard set out in *Jackson v, Virginia*, and we do not separately refer to legal or factual sufficiency. *See id.* at 912 (plurality op.); *Pomier v. State*, No. 14-09-00247-CR, ___ S.W.3d ___, 2010 WL 4132209, at *2 (Tex. App.—Houston [14th Dist.] October 21, 2010, no pet.).

relieved the State of its burden of proof to conclusively establish the existence and finality of the prior convictions. *See Harvey*, 611 S.W.2d at 111.

Lewis does not contest that he pleaded "true" to the two enhancement paragraphs. Instead, he argues we should ignore his pleas in light of two cases providing that a defendant should not be bound by his plea of "true" when the record affirmatively reflects that a prior conviction was not final or should not have been used for enhancement purposes. *See Sanders v. State*, 785 S.W.2d 445, 448 (Tex. App.—San Antonio 1990, no pet.) (holding a plea of "true" to an enhancement paragraph cannot be used to enhance punishment when the record affirmatively reflects a prior conviction was not final); *Cruz v. State*, No. 01-00-00463-CR, 2001 WL 1168273, at *2 (Tex. App.—Houston [1st Dist.] Oct. 4, 2001, no pet.) (not designated for publication) (holding a plea of "true" to an enhancement paragraph cannot be used to enhance punishment when the record affirmatively reflects the prior conviction was statutorily excluded from consideration as an enhancement offense).

Cruz is an unpublished case and has no precedential value. *Sanders* does not apply here because the record does not affirmatively demonstrate, nor does Lewis argue, that either of the prior convictions was not final or should not have been used to enhance his punishment. There is nothing on the face of the record in this case that affirmatively demonstrates Lewis's pleas of "true" could not be correct or that either of his prior convictions could not be used to elevate him to habitual offender status. His complaint, at its core, is that the State did not provide all the proof necessary to prove the enhancement paragraphs absent Lewis's plea of "true." However, Lewis's decision to plead "true" relieved the State of this burden. *See Harvey*, 611 S.W.2d at 111. Lewis's second point is overruled.

* * *

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown.

Do Not Publish — TEX. R. APP. P. 47.2(b).