Affirmed and Memorandum Opinion filed April 7, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00472-CR

CHRISTOPHER ANDREW JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1322772

M E M O R A N D U M O P I N I O N

Appellant Christopher Andrew Jackson was convicted by a jury of murder. *See* Tex. Penal Code Ann. § 19.02 (West 2011). On appeal, he challenges his conviction in two issues. First, he asserts that he received ineffective assistance of counsel at trial. Second, he argues the trial court erred in denying his motion to suppress. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was indicted and tried for the murder of Chase Hawkins. At trial a witness, Major Simmons, testified that he was present when the complainant was shot. During his testimony, Simmons claimed to have trouble remembering exactly what happened during the incident. The State attempted to refresh Simmons's recollection by playing a recording of his past statement to the police. In that statement, Simmons said that he saw appellant shoot Hawkins in the head after Hawkins had fallen to the ground. After listening to the recorded statement outside the presence of the jury, Simmons said he still could not remember what happened. Simmons never denied making the statement or claimed it was untrue. The State then sought to impeach Simmons by playing the prior recorded statement in the presence of the jury. At the time the statement was played, defense counsel did not request a limiting instruction that the jury could consider the statement for impeachment purposes only and not as substantive evidence. The State called two other witnesses who testified that they saw appellant and Simmons right after the complainant was shot. Both witnesses testified that appellant told them he had killed Hawkins.

Appellant filed a motion to suppress. Among other things, the motion sought exclusion of the statement appellant made to police on October 7, 2011. The trial court carried the motion to suppress with the trial and held a hearing outside the presence of the jury. The trial court denied the motion, admitting the statement into evidence. The trial court later filed written findings of fact and conclusions of law in support of the ruling. The jury found appellant guilty and assessed punishment at 45 years' confinement. Appellant timely appealed.

II. ANALYSIS

A. Ineffective Assistance of Counsel

Appellant contends he received ineffective assistance at trial because his counsel failed to request a limiting instruction regarding the introduction of Simmons's prior inconsistent statements for impeachment purposes.

To prove ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688–92 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective. *Lopez*, 343 S.W.3d at 142.

When evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of the case without the benefit of hindsight. *Id.* at 143; *McCook v. State*, 402 S.W.3d 47, 51 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). There is a strong presumption that trial counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). It is not sufficient that an appellant show his counsel's actions or omissions during trial were merely of questionable competence. *Lopez*, 343 S.W.3d at 142–43. Instead, in order for an appellate court to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record and the court must not engage in retrospective speculation. *Id.* at 142.

Absent specific explanations for counsel's decisions, a record on direct appeal will rarely contain sufficient information to evaluate this aspect of an ineffective-assistance claim. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "When direct evidence is not available, we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." *Lopez*, 343 S.W.3d at 143. "Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (internal quotations omitted). If trial counsel is not given that opportunity, then the appellate court should not find deficient performance 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)).

Although appellant filed a motion for new trial in this case, he did not raise the issue of ineffective assistance of counsel. No evidence was developed regarding trial counsel's strategy. In the absence of a record, we cannot conclude that counsel's action in failing to request a limiting instruction for the admission of Simmons's prior statements was so outrageous that no competent attorney would have engaged in it. *See Aldaba v. State*, 382 S.W.3d 424, 433 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). An attorney is not necessarily ineffective for failing to request a limiting instruction for impeachment evidence. *See id.*; *see also McKinny v. State*, 76 S.W.3d 463, 475 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Even if, in hindsight, the court were to conclude that a limiting instruction was warranted, it is reasonable that counsel was motivated by sound trial strategy. For example, counsel might have made a strategic decision to forgo an instruction because he did not wish to focus the jury's attention on or emphasize the witness's prior statements. *See Aldaba*, 382 S.W.3d at 433.

The record does not reflect trial counsel's reasons for not requesting the limiting instruction. There is no basis for concluding trial counsel did not exercise reasonably professional judgment. *See id.* Because appellant has failed to meet his burden on the deficient performance prong, we cannot hold that counsel's representation was ineffective. We overrule appellant's first issue.

B. Motion to Suppress

Appellant contends the trial court abused its discretion by failing to suppress his October 7, 2011 statement to police. Appellant asserts that he made the recorded statement during a custodial interview prior to being given his *Miranda* warnings. The trial court denied appellant's motion, admitted the statement, and filed written findings of fact and conclusions of law. The court specifically found that: (1) appellant was not under arrest until near the end of the interview when he was formally arrested and read his rights; (2) appellant was not in custody prior to his formal arrest; and (3) appellant gave his statement freely and voluntarily.

1. Standard of Review

A trial judge's ultimate "custody" determination presents a mixed question of law and fact. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). Therefore, "[i]n reviewing a trial court's ruling on a *Miranda*-violation claim, an appellate court conducts a bifurcated review: it affords almost total deference the trial judge's rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor, and it reviews *de novo* the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor." *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012). The objective determination of custody is made on an ad hoc basis, considering the totality of the circumstances. *Herrera*, 241 S.W.3d at 532.

2. Custodial Interrogation

Miranda warnings and article 38.22 requirements are mandatory only when there is a custodial interrogation. *Herrera*, 241 S.W.3d at 526; Tex. Code Crim. Proc. Ann. § 38.22 (West Supp. 2015). The meaning of "custody" is the same for purposes of *Miranda* and article 38.22. *Herrera*, 241 S.W.3d at 526. The defendant bears the initial burden to prove that a statement was the product of a custodial interrogation. *Id.*

Generally, a person is considered to be in custody when (1) the person is formally arrested, or (2) the person's freedom of movement is restrained to the degree associated with a formal arrest. *Nguyen v. State*, 292 S.W.3d 671, 677 (Tex. Crim. App. 2009); *Sloan v. State*, 418 S.W.3d 884, 889 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Since appellant was not formally under arrest, the question turns on whether a reasonable person would have felt that he was not at liberty to terminate the interview and leave. *See Nguyen*, 292 S.W.3d at 678; *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996) (citing *Stansbury v. California*, 511 U.S. 318, 322, 325 (1994)). Under the "reasonable person" standard, we assume that person is innocent. *Dowthitt*, 931 S.W.2d at 254. When we review whether a person was in custody, our review includes an examination of all of the objective circumstances surrounding the questioning. *Herrera*, 241 S.W.3d at 525–26 (citing *Stansbury*, 511 U.S. at 322–25).

The Court of Criminal Appeals has established four general situations which may constitute custody: (1) if the suspect is physically deprived of his freedom in any significant way; (2) if a law-enforcement officer tells the suspect not to leave; (3) if a law-enforcement officer creates a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; or (4) there is probable cause to arrest the suspect and the law-enforcement officer

did not tell the suspect he is free to leave. *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009). In all four situations, there must be a restriction of freedom of movement that is tantamount to an arrest. *See Dowthitt*, 931 S.W.2d at 255. In the fourth circumstance, an officer's subjective intent to arrest is not relevant to our examination unless that intent was somehow conveyed to the suspect. *Id.* Additionally, courts have emphasized that stationhouse questioning does not, in and of itself, constitute custody. *Turner*, 252 S.W.3d 571, 576–77 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (citing *Dowthitt*, 931 S.W.2d at 255).

"[W]hen a person voluntarily accompanies police officers, who are then only in the process of investigating a crime, to a certain location, and he knows or should know that the police officers suspect he may have committed or may be implicated in committing a crime, we are unable to hold that under the circumstance such person is in custody." *Turner*, 252 S.W.3d at 579–80 (citing *Dancy v. State*, 728 S.W.2d 772, 778–79 (Tex. Crim. App. 1987)). If police invite or request a person to speak with them, and the person is acting on this request of his own accord without force, threat, or coercion, then the act is voluntary and the person is not in custody. *Id.* at 580.

During the hearing on the motion to suppress, Officer Abbondandolo recounted that he and his partner went to appellant's workplace and requested that he come to the station to talk with them. Abbondandolo testified that he told appellant he did not have to come with him and appellant voluntarily agreed to go with them. Furthermore, appellant rode to the station in an unmarked patrol car and was not placed in handcuffs. Abbondandolo testified that it was not until after appellant was unable to offer a plausible alibi and made other suspicious

statements that Abbondandolo decided he had probable cause to place appellant under arrest.

The record supports the trial court's finding that the statement was not the product of custodial interrogation. Appellant was informed he was not under arrest, was never handcuffed, voluntarily accompanied the officers to the station in an unmarked car, and was interviewed for just over an hour prior to the officers formally arresting him. The trial court did not abuse its discretion in concluding from these facts that appellant was not in custody at the time he made the admitted statements, but rather was being interviewed in order for officers to determine if they had probable cause to arrest him for complainant's murder. *See Turner*, 252 S.W.3d at 582 (holding the accused was not in custody when officers arrived at his home during the day, asked if he would accompany them to answer questions, he voluntarily agreed to go with them, he was informed that he was not under arrest, and he was handcuffed only during the car ride to the station). We overrule appellant's second issue.

III. CONCLUSION

Having overruled both appellant's issues, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Busby, and Brown.
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