Affirmed and Memorandum Opinion filed February 18, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00774-CR

JOSEPH LEE FIEDOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1415457

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

Appellant Joseph Lee Fiedor pleaded guilty to an intoxication assault that rendered the complainant, a deputy with the Harris County Constable's Office, paralyzed from the neck down, unable to talk, and on dialysis for kidney failure. Appellant opted for the trial court to assess punishment. Accordingly, a probation officer prepared a presentence investigation (PSI) report, and the trial court held a

PSI hearing where the report was admitted into evidence along with live testimony. The trial court assessed punishment at the maximum of twenty years' confinement.

Appellant did not file a motion for new trial. He challenges his sentence in three issues, alleging ineffective assistance of counsel because his trial counsel failed (1) to object, based on Texas Rule of Evidence 403, to a description of a prior offense contained in the PSI report; (2) to object to "unsworn testimony" in the PSI report; and (3) to adduce additional mitigation testimony.

We affirm.

I. INEFFECTIVE ASSISTANCE

First, we review the general standards for a claim of ineffective assistance of counsel. Then, we address each of appellant's issues.

A. General Standards

To prevail on an ineffective assistance claim, an appellant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness; and (2) counsel's deficiency caused the appellant prejudice—there is a probability sufficient to undermine confidence in the outcome that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010). An appellant must satisfy both prongs by a preponderance of the evidence. *Perez*, 310 S.W.3d at 893.

Trial counsel's explanation for the allegedly deficient conduct is usually a crucial issue of fact that must be elicited in a trial court. *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). "Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas*

v. State, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). "A reviewing court will rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective assistance claim." *Id.* "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." *Id.* (quotation omitted).

If an appellant cannot show in the record that counsel's conduct was not the product of a strategic 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." *State v. Morales*, 253 S.W.3d 686, 696–97 (Tex. Crim. App. 2008) (quotation omitted); *see also Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) (explaining that to overcome the "difficult hurdle" of establishing deficient performance in a direct appeal, "the record must demonstrate that counsel's performance fell below an objective standard of reasonableness as a matter of law, and that no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of his or her subjective reasoning").

B. Issue 1: Rule 403 Objection

In his first issue, appellant contends his counsel should have objected, based on Rule 403 of the Texas Rules of Evidence, to prejudicial descriptions of prior offenses—in particular, descriptions of appellant "leaping on another student in a sexual manner" and a medical exam of the complainant's foster sister having "dried blood around the anal area" after appellant sexually assaulted her.[1]

[1] According to the PSI report, the assault occurred when appellant was eleven and the complainant was nine. He received five years' probation but violated his probation and received a second charge for sexual assault of a child. Ultimately, he was confined for six years.

"To show ineffective assistance of counsel for the failure to object during trial, the [appellant] must show that the trial judge would have committed error in overruling the objection." *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004). An appellant cannot satisfy this burden when there is no case law clearly supporting the claim. *Vaughn v. State*, 931 S.W.2d 564, 566–67 (Tex. Crim. App. 1996).

Appellant concedes that descriptions of prior offenses are generally admissible, and he cites no case law clearly supporting the merits of a Rule 403 objection in this context. In fact, the Court of Criminal Appeals has held that "the Rules of Evidence do not apply to the contents of a PSI." *Stringer v. State*, 309 S.W.3d 42, 46 (Tex. Crim. App. 2010) (citing *Fryer v. State*, 68 S.W.3d 628, 631 (Tex. Crim. App. 2002)); *see also Smith v. State*, 227 S.W.3d 753, 761 (Tex. Crim. App. 2007) (noting that "otherwise-objectionable matters may now be properly considered by the court using the pre-sentence report to determine punishment" (quotation omitted)).

Given the lack of authority supporting appellant's position, appellant has failed to show that trial counsel's failure to object to the PSI report based on Rule 403 was so outrageous that no competent attorney would have engaged in it.

Appellant's first issue is overruled.

C. Issue 2: Unsworn Testimony Objection

In his second issue, appellant contends his counsel should have objected to unsworn "victim impact statements" under Article 42.03 of the Texas Code of Criminal Procedure because letters were contained in the PSI report and admitted prior to the trial court (1) assessing punishment; (2) announcing the terms and

conditions of the sentence; and (3) pronouncing sentence. *See* Tex. Code Crim. Proc. Ann. art. 42.03, § 1(b).

The only case appellant cites in support this argument is *Gifford v. State*, 980 S.W.2d 791 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). But *Gifford* concerned an unsworn statement made in person at the sentencing hearing, not letters contained in a PSI report. *See id.*

In *Fryer*, the Court of Criminal Appeals held that Article 42.03 did not restrict a PSI report from containing the victim's unsworn statements—specifically, the victim's views on punishment. *See* 68 S.W.3d at 632–33. Article 42.03 has "nothing to do with the PSI at all," does not "restrict a trial court's ability to obtain information through other statutorily authorized methods," and is "inapposite in interpreting the meaning of the PSI statutes." *Id.*; *see also Jagaroo v. State*, 180 S.W.3d 793, 799 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("[N]othing in the text of article 42.03 suggests it was intended to prohibit the consideration of victim impact evidence in punishment."); *cf. State v. Hart*, 342 S.W.2d 659, 676 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (holding that there was no error for the trial court to consider 180 letters submitted with the PSI report because a PSI report may contain hearsay).

Given the lack of authority supporting appellant's position, appellant has not shown that trial counsel's failure to object to the PSI report based on Article 42.03 was so outrageous that no competent attorney would have engaged in it.[2]

Appellant's second issue is overruled.

[2] Indeed, the record affirmatively demonstrates trial counsel's strategy supporting the admission of unsworn letters. At the conclusion of appellant's defense, counsel asked the court to include in evidence letters that had been submitted as part of the record. The trial court admitted the letters. About fifteen letters supportive of appellant are included in the record.

D. Issue 3: Mitigation Testimony

In his third issue, appellant contends his counsel should have adduced more mitigating evidence. Appellant concedes his counsel presented a defense, but appellant notes that the PSI report refers to appellant being "diagnosed with Bipolar and Depression for which he was prescribed [medication] until the age of 8 or 10 years old." Appellant argues that an "expert witness able to discuss these mental diseases and his traumatic childhood and their possible role in the actions of Appellant would have been critical to providing to the Court a better idea of what the proper sentence would be."

"To obtain relief on an ineffective assistance of counsel claim based on an uncalled witness, the applicant must show that [the witness] had been available to testify and that his testimony would have been of some benefit to the defense." *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004); *see also King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). Generally, an appellant cannot prove trial counsel was deficient for adducing inadequate mitigation evidence when there is nothing in the record to show that "other witnesses or evidence were available" or that "other mitigating evidence existed." *See Bone v. State*, 77 S.W.3d 828, 834–35 (Tex. Crim. App. 2002).

Appellant's trial counsel presented some mitigation evidence in the form of live testimony and letters from friends, family members, and an employer. Counsel also asked spectators in the courtroom to stand and show their support for appellant, rather than subject them to cross-examination. Based on this record, we cannot speculate about potential mitigation evidence that counsel should have presented. *See id.* Regardless, "[e]ven if such evidence existed, defense counsel could have reasonably determined that the potential benefit of additional witnesses or evidence was outweighed by the risk of unfavorable counter-testimony." *Id.* at

835. Appellant has not shown that trial counsel's failure to present additional mitigating evidence was so outrageous that no competent attorney would have engaged in it.

Appellant's third issue is overruled.

II. CONCLUSION

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

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise.
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