Affirmed and Memorandum Opinion filed March 22, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00955-CR

JOE LEE BOWDEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1422757

MEMORANDUM OPINION

We consider three issues in this appeal from a conviction for murder: (1) whether the trial court abused its discretion by admitting evidence of a remote prior conviction; (2) whether the trial court fundamentally erred by allowing one witness to testify about another witness's credibility, or in the alternative, whether defense counsel was ineffective for not objecting to such testimony; and (3) whether a portion of the consolidated court costs represents an unconstitutional taking. We overrule each issue and affirm the trial court's judgment.

BACKGROUND

The Death. The complainant suffered a single close-contact gunshot wound to her head. The bullet entered through her right temple, coursed through her brain, and lodged in the left side of her skull without exiting. Emergency medical personnel were able to resuscitate the complainant, but they quickly discovered that blood flow to her brain had ceased. The complainant died after a spending day in the hospital.

The medical examiner listed the manner of death as undetermined because the complainant's injuries could be indicative of either a suicide or a homicide. Appellant asserted that the complainant shot herself, but the State believed that appellant intentionally murdered her in a fit of anger.

The State's Case. The evidence at trial showed that appellant and the complainant were dating. They lived together in a fourplex, and they had an open relationship. On the night before the shooting, the complainant went on two dates, the first with an ex-boyfriend, and the second with another man who was not appellant. The complainant called appellant early the next morning, sometime after 2:00 a.m., asking appellant to meet her at a 24-hour burger joint. Appellant walked to the burger joint, which was only five or six blocks away.

At around 3:30 a.m., appellant and the complainant returned to the fourplex. There, they encountered one of their neighbors, who was out on the porch barbecuing and drinking. The neighbor testified that the complainant was her normal self, laughing and talking. The neighbor said that as she was visiting with the complainant, appellant produced a gun from his person, but he never said anything or threatened anyone.

The neighbor testified that she and the complainant went into the complainant's apartment, where they continued to visit. The complainant told the neighbor that her second date was with her "Sancho," who gave her $100 in twenty-dollar bills. The neighbor said that the complainant appeared happy, and that she must have had a good time.

Inside the apartment, the neighbor and the complainant drank, smoked crack, and watched a movie. The neighbor explained that appellant kept to himself during this time, but she could "feel the tension" between him and the complainant.

At 5:30 a.m., the neighbor went upstairs to her own apartment to put on a pair of pajamas. The neighbor intended to rejoin the complainant, but when she came back downstairs a few minutes later, the door to the complainant's apartment was locked. Appellant spoke to the neighbor through the door, telling her that the complainant was asleep.

The neighbor turned around and smoked a cigarette on the porch. She then heard appellant and the complainant arguing inside the apartment. According to the neighbor, appellant told the complainant, "Bitch, you think I'm stupid, ho?" The complainant responded, "Just leave me alone. You're tripping. Leave me alone."

The neighbor returned to her apartment because she did not want to get involved with the argument in the event that it spilled outside. After a few minutes, the neighbor heard a loud bang. Four minutes after that, appellant came outside screaming, "Help me, help me! She shot herself, she shot herself!"

The neighbor rushed back downstairs, where she found the complainant lying on her bed and wearing a baseball cap that the neighbor had never seen before. On the bed, the neighbor also saw the complainant's $100, which were bloody. To the left of the complainant's body was appellant's gun.

The neighbor dialed 911 as appellant paced back and forth. Before help arrived, appellant asked the neighbor frantically, "What do I do? What do I do? My fingerprints are all over this gun. What do I do?" The neighbor testified that appellant grabbed a bedsheet, wiped the blood off of the money, and then walked outside with the gun. Appellant did not return to the apartment until after first responders had cleared the scene and transported the complainant to the hospital.

In the hours after the shooting, appellant spoke with an officer and said that the complainant had been in an argument with her ex-boyfriend. Appellant also told the officer that the complainant must have been shot in the head when she went to the burger joint—i.e., before the complainant walked home and chatted with her neighbor for more than two hours.

A forensics expert tested the complainant's hands for gunshot residue, but none was found. The expert also tested the baseball cap that the complainant was wearing when the neighbor discovered her. The expert testified that the cap did not have a bullet hole, but there was gunshot residue on the exterior of the cap. The expert explained that the gunshot residue could have transferred to the cap from the shooter's hands.

Appellant's hands were never tested for gunshot residue. Although police searched around the neighborhood for the gun involved in the shooting, it was never recovered.

The Defense's Case. Appellant called two witnesses to the stand. The first witness was an officer who had interviewed the neighbor after the shooting. According to the officer, the neighbor said that when the complainant returned to the fourplex from the burger joint, she was bleeding from her ear and she was wearing the baseball cap. The officer wrote these statements in his report, but the

officer admitted that the report could have been an imprecise amalgamation of several things that the neighbor had said.

The second witness was appellant himself. He testified that the complainant pulled a gun out of her purse and shot herself in the head. Appellant could not explain why a purse was not found next to the complainant, or why the neighbor found the gun on the left side of the complainant's body when the complainant was right-handed and she had been shot in her right temple.

Appellant candidly admitted that he had lied to the officer when he initially reported that the complainant was shot at the burger joint. He explained that he was scared that others might try to blame him for the shooting.

Appellant denied ever having or displaying a gun. He asserted that all of the State's witnesses were liars.

The Verdict. The jury convicted appellant and assessed punishment at life imprisonment.

REMOTE CONVICTION

Before appellant took the stand, the trial court held a hearing outside the presence of the jury to determine the admissibility of appellant's prior convictions. The State gave notice that it intended to elicit testimony of five specific convictions: (1) a 2010 felony for delivery of a controlled substance, (2) a 1991 felony for possession of a controlled substance, (3) a 1989 felony for possession of a controlled substance, (4) a 1978 felony for aggravated robbery, and (5) a 1968 felony for burglary of a motor vehicle. For each of these convictions, the State identified the lengths of the sentence, but not the dates upon which appellant was discharged from prison.

Appellant conceded that evidence of the 2010 and 1991 felonies was admissible, but he challenged the admissibility of the remaining offenses as being too remote. The State argued that all of the offenses were admissible under the tacking doctrine.

Before it was rejected by this court in *Leyba v. State*, 416 S.W.3d 563 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd), and by the Court of Criminal Appeals in *Meadows v. State*, 455 S.W.3d 166 (Tex. Crim. App. 2015), the tacking doctrine provided that the admissibility of certain remote convictions could be assessed by Rule 609(a) of the Texas Rules of Evidence, rather than by Rule 609(b), which expressly governs all remote convictions. *Meadows* had not been decided by the time of appellant's trial, but *Leyba* had. However, the trial court cited the Rule 609(a) standard when it ruled on the admissibility of appellant's remote convictions, apparently embracing the State's improper reliance on the tacking doctrine. The trial court determined that evidence of appellant's 1989 conviction was admissible because "the probative value does outweigh the prejudicial nature" of the offense. As for the two oldest offenses, the trial court ruled that evidence of those convictions was inadmissible.

In his first issue on appeal, appellant argues that the trial court abused its discretion by admitting evidence of the 1989 conviction for felony possession of a controlled substance. The State responds that appellant forfeited this issue because it was defense counsel, rather than the prosecutor, who affirmatively elicited testimony about the remote conviction in front of the jury. Assuming without deciding that appellant did not forfeit this issue, we conclude that any error in the admission of the evidence would be subject to a harm analysis for nonconstitutional error, and under that standard, the error was harmless.

Nonconstitutional error must be disregarded unless it affects a defendant's substantial rights. *See* Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights when the error has a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the error had no or only a slight influence on the verdict, the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

When assessing harm, we consider "everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." *See Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). We also consider the jury instructions given by the trial court, the State's theory and any defensive theories, closing arguments, and even voir dire, if material to the defendant's claim. *Id.*

Considering the record as a whole, we hold that any error in the admission of the remote conviction did not have a substantial and injurious effect or influence on the jury's verdict. Appellant was only asked a single question about the remote conviction: whether he had been convicted in 1989 for the charged offense. No details about that offense were admitted into evidence, and neither side mentioned the remote conviction during closing arguments.

Furthermore, the State presented a strong case that appellant was guilty of murder. The evidence was undisputed that the complainant was shot when she was in her apartment. The only fact issue was whether appellant was a mere witness to the shooting or the shooter himself. The record showed that appellant was the only person with the complainant at the time of the shooting, and that he had been arguing with the complainant in the moments before the shooting. The record also showed that appellant possessed the gun that was used during the shooting, that he

expressed concern that his fingerprints were on the gun, and that he walked away with the gun before police could locate it. Appellant also admitted that he fabricated a story about the complainant's shooting because he did not want to be blamed for her death. In light of this evidence, the jury had a compelling reason to find that appellant had murdered the complainant and to reject his defensive theory that the complainant had committed suicide.

Appellant argues that evidence of the remote conviction was harmful because the jury asked to review the judgment of conviction during its deliberations. But the judgment of conviction was offered during the punishment stage of trial, not during the guilt stage. The jury's note to the trial court even specifies that the judgment was offered as an exhibit by the prosecutor, and the record reflects that the prosecutor never discussed or alluded to the remote conviction in front of the jury before the punishment stage.

Considering that the jury heard that appellant was convicted of two other drug-related offenses in 2010 and 1991, we cannot say that the jury would have placed any measureable significance on appellant's 1989 conviction for possession of a controlled substance when it was assessing appellant's guilt. *See Leyba*, 416 S.W.3d at 570. We therefore conclude that the trial court's error, if any, was harmless.

We overrule appellant's first issue.

CREDIBILITY TESTIMONY

The State elicited testimony during its case-in-chief that appellant had explained the shooting through an unusual sequence of events. According to one officer who spoke with appellant after the shooting, appellant claimed that the complainant was shot by her ex-boyfriend, and that the shooting happened at the

burger joint before the complainant had asked appellant to join her at the burger joint. The officer's testimony was as follows:

> A. So [appellant] said that he walked over to the [burger joint], met with [the complainant] and he said that she told him that she had gotten into an argument with [her ex-boyfriend]. And they were there talking and [appellant] placed an order to eat and that—I don't remember if he said whether she ate or anything, but basically she turned around and gave her order to a homeless person.
>
> Q. Let me pause right there. He's saying all this happened after she was shot by [her ex-boyfriend] at [the burger joint]?
>
> A. Yes, sir.
>
> Q. So she ordered food and then what did he say next?
>
> A. He said that she turned around and gave her order to a homeless man that was there.
>
> Q. Okay.
>
> A. And he said that they then walked back to [their apartment] and that they sat in there talking for a while and that is when he noticed blood dripping from her ear. He said that he then called out to the lady upstairs for help.
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> ***
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> Q. What was going through your mind about [appellant]?
>
> A. Yeah. He walked to this place after he received this call at 2:00 o'clock in the morning, met with the complainant and talked about the argument, ordered her something to eat, and then walking back and sitting for a while in the apartment before he noticed the bleeding.
>
> Q. How long have you been an investigator?
>
> A. Oh, 20-something years.
>
> Q. If you had to ballpark, how many murders have you investigated?
>
> A. Well over 300, sir.

Q. When you're hearing this come from the defendant, what is your impression about what he's saying?

A. It's not credible. It's not believable.

Appellant complains about this last line of testimony in his second issue on appeal. Although he acknowledges that he did not object to this testimony, appellant believes that the trial court committed fundamental error by allowing this testimony to be admitted, citing cases showing that witnesses should not opine about the truth or falsity of another witness's statements.

Presuming that there was error, we do not agree that the error would be fundamental and would obviate appellant's need to object. The Court of Criminal Appeals has "consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence." *See Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002) (discussing the "class of fundamental errors" but refusing to consider an unpreserved claim that testimony was inadmissible where the witness suggested that race or ethnicity was a factor in assessing a capital defendant's future dangerousness). Because appellant did not object, we conclude that error was not preserved. *See* Tex. R. App. P. 33.1.

Appellant argues in the alternative that counsel was ineffective because counsel did not object to the officer's testimony. We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986). Under *Strickland*, the defendant must prove that his trial counsel's representation was deficient, and that the deficient performance was so serious that it deprived him of a fair trial. *See Strickland*, 466 U.S. at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness. *Id.* at 688. A deficient performance will only deprive the defendant of a fair trial if

it prejudices the defense. *Id.* at 691–92. To demonstrate prejudice, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffectiveness. *Id.* at 697.

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that counsel's actions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When the record is silent as to counsel's strategy, we will not conclude that the defendant received ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In the majority of cases, the defendant is unable to meet the first prong of the *Strickland* test because the record on direct appeal is underdeveloped and does not adequately reflect the alleged failings of trial counsel. *See Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of counsel's performance for examination. *See Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Moreover, it is

not sufficient that the defendant show, with the benefit of hindsight, that counsel's actions or omissions during trial were merely of questionable competence. *See Mata*, 226 S.W.3d at 430. Rather, to establish that counsel's acts or omissions were outside the range of professional competent assistance, the defendant must show that counsel's errors were so serious that he was not functioning as counsel. *See Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

The record in this case does not affirmatively reveal counsel's reasons for not objecting to the officer's testimony. Appellant did not file a motion for new trial complaining of this issue, and defense counsel did not file an affidavit.

Nevertheless, appellant contends that there could be "no plausible strategic reason . . . to forgo the objection." We disagree. Counsel could have reasonably decided not to object because she knew that appellant would take the stand and admit that he had lied to the officer. Thus, a challenge to the officer's opinion would have been pointless. Counsel may have also forgone the objection so as not to draw additional attention to evidence that hurt appellant's case. *See Huerta v. State*, 359 S.W.3d 887, 894 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Appellant has not rebutted the strong presumption that counsel's failure to object was consistent with professional norms.

Even if appellant could demonstrate that counsel's performance was deficient, he cannot show a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different. As we have already stated, appellant admitted to lying about his story, which means that he could not have been harmed by the officer's opinion testimony that the story was not credible or believable.

We overrule appellant's second issue.

COURT COSTS

The trial court assessed $133 in consolidated court costs because appellant was convicted of a felony. *See* Tex. Loc. Gov't Code § 133.102(a)(1) ("A person convicted of an offense shall pay as a court cost, in addition to all other costs . . . $133 on conviction of a felony . . . ."). In his third issue, appellant challenges 5.5904% of those court costs (or roughly $7.44 if the court costs are paid in full), which are to be allocated by law to an emergency radio infrastructure account. *Id.* § 133.102(e)(11). Appellant contends that this fractional amount represents an unconstitutional taking in violation of both the United States and Texas Constitutions.

The State responds that this issue has not been preserved, citing our recent decision in *Johnson v. State*, 475 S.W.3d 430 (Tex. App.—Houston [14th Dist.] 2015, pet. filed). In that case, the defendant challenged a different portion of his court costs as violating the separation of powers under the Texas Constitution. *Id.* at 434. We held that the issue had not been preserved because the defendant did not make a constitutional objection at trial. *Id.* We also distinguished a pair of recent decisions from the Court of Criminal Appeals, which held that a defendant may challenge the trial court's assessment of court costs for the first time on appeal. *Id.* at 434–35 (citing *Johnson v. State*, 423 S.W.3d 385 (Tex. Crim. App. 2014) and *Cardenas v. State*, 423 S.W.3d 396 (Tex. Crim. App. 2014)). We explained: "In neither of these cases does the high court hold that a defendant who had an opportunity to present a challenge to the constitutionality of a statute imposing court costs in the trial court may raise his constitutional challenge for the first time on appeal." *Id.* at 435.

The challenged statute mandates that all persons convicted of a felony offense pay $133 in court costs, to be allocated in the manner specified in the

statute. *See* Tex. Loc. Gov't Code § 133.102(a)(1), (e)(11). Because these mandatory court costs are published in a Texas statute, all criminal defendants have constructive notice of them. *See Johnson*, 423 S.W.3d at 389. Therefore, when a jury convicted appellant of murder on November 13, 2014, appellant had notice that this statute would be applied to him and that he would have to pay $133 in court costs under this statute. *See id*. Despite being on notice in this respect, appellant did not take advantage of the opportunity to voice his constitutional complaint against this statute on November 14, 2014, whether before the punishment phase started, during the punishment phase, or after the punishment phase.

Appellant never objected to any portion of his court costs as an unconstitutional taking. Nor did he pursue any of the other avenues available to him, besides a direct appeal, for challenging his court costs. *See Perez v. State*, 424 S.W.3d 81, 87 (Tex. Crim. App. 2014) (Alcala, J., concurring) (explaining the different ways available for challenging court costs). Following this court's decision in *Johnson*, we therefore hold that appellant's complaint has not been preserved. *See Johnson*, 475 S.W.3d at 435.

We overrule appellant's third issue.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.
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