Affirmed and Memorandum Opinion filed October 18, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00112-CR
NO. 14-15-00113-CR

JOSHUA FUSILIER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause Nos. 1390943 & 1452064

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

Joshua Fusilier appeals his convictions for sexual assault of a child and prostitution. Appellant challenges his convictions on the grounds of (1) actual innocence; (2) ineffective assistance of trial and appellate counsel; (3) insufficient evidence to support the convictions; (4) prosecutorial misconduct; (5) judicial misconduct; and (6) erroneous jury instruction. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with sexual assault of a child younger than 17 and prostitution. The probable cause affidavit reflects that appellant's DNA matched that of sperm recovered from a teenager forced into prostitution by another individual. Appellant was appointed trial counsel. Appellant was released on a pretrial bond, which was subsequently revoked.

A jury found appellant guilty and assessed punishment at eleven years in prison for sexual assault of a child, and 180 days in the Harris County Jail for prostitution. Following conviction, appellant's appointed trial counsel filed a timely notice of appeal. Appellant subsequently retained an attorney who filed a timely motion for new trial. Retained counsel filed a motion to withdraw in this court asserting that appellant "fired" him, creating a conflict between appellant and his counsel. This court granted retained counsel's motion to withdraw.

Because the court reporter for the 232nd District Court notified this court that no payment had been made for the reporter's record, on June 23, 2015, this court abated the appeals to determine whether appellant wanted to prosecute his appeals, whether he is indigent, and whether he was entitled to a free record and/or appointment of counsel on appeal.

On July 3, 2015, appellant filed his first pro se motion for appointment of counsel on appeal. On July 10, 2015, the trial court held a hearing pursuant to this court's abatement order. The trial court arranged a video conference to permit appellant to participate in the hearing. Officer Jeff Jacoway, a law library officer at the Texas Department of Criminal Justice, appeared at the hearing via video conference. Jacoway testified that he went to appellant's cell, informed appellant of the hearing, attempted to escort appellant to the law library to attend the hearing via video, but appellant refused to attend. Jacoway informed the court that

appellant was physically able to attend, but refused to attend the hearing. The trial court asked Jacoway if appellant gave a reason for failing to attend the video conference. Jacoway responded, "No ma'am. Just said he wasn't going to attend. They transferred him over from the Garza Unit to attend it and he refused. Said he wasn't going to come." Jacoway testified that appellant was transferred specifically for the purpose of attending the video conference on the issue of his indigence.

At the conclusion of the hearing, the trial court stated on the record that appellant posted $80,000 worth of cash bonds prior to his conviction. The trial court further noted that appellant's wife or girlfriend received a cash refund after appellant's conviction. The trial court noted that appellant received assistance of an appointed attorney at trial despite the court's finding that appellant was not indigent. The trial court found appellant was not indigent for purposes of a free record or appointment of an attorney on appeal.

On July 22, 2015, the trial court clerk filed the trial court's findings of fact and conclusions of law in both cause numbers pursuant to this court's abatement order. In those findings and conclusions, signed July 10, 2015, the trial court found that "[a]ppellant refused to participate in today's video-conference. Therefore, this Court finds that he does not desire to prosecute his appeal." The trial court further found "appellant posted cash bonds totaling $100,000 during the pendency of his cases in the 232nd, and those were refunded to him and his wife after his cases were resolved. Therefore, this Court finds that he is not indigent and concludes that he is not entitled to a free record or appointed counsel on appeal."

Appellant subsequently filed motions for appointment of counsel in this court. A hearing has already been held as required under Texas Rule of Appellate Procedure 38.8. Because the trial court had already held one hearing to make the findings required under Rule 38.8, and we could find nothing in the rules or case

law that requires this court to again send this matter back to the trial court, we declined to do so and ordered appellant to retain counsel or file a pro se brief. No reporter's record was filed. Appellant filed a pro se brief in which he raised seven issues for review.

II. ANALYSIS

An appellant has the burden to properly initiate the completion of a record sufficient to illustrate reversible error. *See* Tex. R. App. P. 35.3; *see also Perez v. State*, 261 S.W.3d 760, 764 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). If the appellant fails to do so, and an issue on appeal involves matters omitted from the record due to the appellant's failure to request or pay for the record, the appellant's actions will prevent the court of appeals from adequately addressing the dispute. *Id.* This failure to provide the record effectively waives any complaint on these issues. *Perez*, 261 S.W.3d at 764. Nonetheless, we may consider and decide those issues that do not require a reporter's record for a decision. *See* Tex. R. App. P. 37.3(c). We turn to the issues raised in appellant's brief.

A. Sufficiency of the Evidence to Support Appellant's Convictions

In issues one and three appellant argues he is actually innocent and that the evidence is insufficient to support his convictions. In reviewing the sufficiency of the evidence, we must consider "all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). Because we do not have a reporter's record from which to review the evidence we cannot conduct a sufficiency review. We overrule issues one and three.

B. Ineffective-Assistance-of-Counsel Claim

In issues two and seven appellant argues he received ineffective assistance of counsel at trial and on appeal.

1. Trial Counsel

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

To satisfy the first prong, appellant must prove by a preponderance of the evidence that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Id*. An appellant must overcome the presumption that trial counsel's actions fell within the wide range of reasonable and professional assistance. *See Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) ("Direct appeal is usually an inadequate vehicle for raising [an ineffective-assistance] claim because the record is generally undeveloped."). If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective-assistance claim. *Garza*, 213 S.W.3d at 348.

To satisfy the second prong, appellant must show that there is a reasonable probability—or a probability sufficient to undermine confidence in the outcome—that the result of the proceeding would have been different but for counsel's unprofessional errors. *Lopez*, 343 S.W.3d at 142. We consider the totality of the circumstances in determining whether counsel was ineffective. *Thompson*, 9 S.W.3d at 813. Failure to satisfy either prong of the *Strickland* test defeats an ineffective-assistance claim. *Strickland*, 466 U.S. at 697.

A reviewing court may not consider facts that were not developed in the record. *Whitehead v. State*, 130 S.W.3d 866, 874 (Tex. Crim. App. 2004). An appellate court may not consider factual assertions that are outside the record. *See Janecka v. State*, 937 S.W.2d 456, 476 (Tex. Crim. App. 1996) (an appellant could not raise a claim that he faced severe depression and stress while waiting for his case to be appealed because the appellant had failed to establish a factual record to support his claim). Without a reporter's record we are unable to undertake a *Strickland* review to determine whether appellant's trial counsel provided ineffective assistance of counsel. *Perez*, 261 S.W.3d at 768. We overrule appellant's second issue.

2. Appellate Counsel

In arguing that he received ineffective assistance of counsel on appeal appellant reiterates his argument that he was indigent and entitled to appointment of counsel on appeal.

A defendant is indigent for purposes of the appointment of appellate counsel if he is "not financially able to employ counsel." *McFatridge v. State*, 309 S.W.3d 1, 5 (Tex. Crim. App. 2010) (quoting Tex. Code Crim. Proc. Ann. art. 1.051). Indigence determinations are made at the time the issue is raised and are decided on a case-by-case basis. *McFatridge*, 309 S.W.3d at 5. The Court of Criminal

Appeals has adopted a two-step process to guide courts in making indigence determinations for purposes of a free record or appointment of counsel on appeal. *Id.* at 6. First, the defendant must make a prima facie showing of indigence. *Id.* Once the defendant satisfies this initial burden of production, the burden then shifts to the State to show that the defendant is not, in fact, indigent. *Id.*

In this case, appellant was afforded the opportunity to appear via video teleconference to make a prima facie case of indigence. Despite that accommodation, appellant refused to participate in the hearing on indigence. In his reply brief appellant argues he was not given notice of the hearing and was not bench warranted for purposes of appearance at the hearing. Appellant was not only given notice, he was transported to a correctional unit with video conference facilities, and requested to attend the video conference of the hearing on indigence. According to the hearing testimony, appellant was physically able to attend the hearing via video conference, but refused to do so. To obtain a free record, the defendant must exercise due diligence in asserting his indigence and must sustain his allegations at the hearing. *Whitehead*, 130 S.W.3d at 876. Appellant cites no authority, and this court has found none, that requires the trial court to bench warrant an inmate for a hearing rather than arrange a video conference with notice and an opportunity to attend.

The trial court's determination at the abatement hearing that appellant is not indigent is supported by evidence in the clerk's record and the trial court's findings. The trial court found that appellant had access to $100,000 from the return of his cash bonds. The clerk's record contains evidence of the return of appellant's bonds. The trial court is entitled to consider spousal income available to the defendant when making an indigence determination. *McFatridge*, 309 S.W.3d at 6. Moreover, appellant retained counsel for appeal, but subsequently terminated

counsel. The record before this court shows that the trial court reasonably concluded appellant was not indigent for purposes of a free record or appointed counsel on appeal. We overrule appellant's seventh issue.

C. Alleged Prosecutorial Misconduct

In his fourth issue appellant argues the prosecutor engaged in misconduct by allegedly suppressing evidence, making improper comments during closing argument, and commenting on appellant's right to remain silent.

We resolve allegations of prosecutorial misconduct on a case-by-case basis, and determine whether the prosecutor's conduct requires reversal on the basis of the probable effect on the minds of the jurors. *Stahl v. State*, 749 S.W.2d 826, 830 (Tex. Crim. App. 1988). To preserve a complaint about prosecutorial misconduct, an appellant must make a timely and specific objection in the trial court, request an instruction to disregard the matter improperly placed before the jury, and move for a mistrial; otherwise, his complaint is forfeited. Tex. R. App. P. 33.1(a); *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996).

Without a reporter's record we cannot determine whether appellant objected at trial. Because there is no record of the prosecutor's conduct or a record to show that appellant objected to the prosecutor's conduct, appellant has waived this complaint on appeal. *See Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008) ("[A]lmost all error—even constitutional error—may be forfeited if the appellant failed to object"). We overrule appellant's fourth issue.

D. Alleged Judicial Misconduct

In appellant's fifth issue he argues the trial court was biased against him, and complains about several rulings made during the course of the trial. Appellant asserts the trial court improperly found probable cause, revoked his bond, agreed to

the State's reset of the trial, and failed to grant a motion for mistrial. The clerk's record does not reflect objections to the actions of which appellant complains. As with the prosecutor's conduct, without a reporter's record we cannot reviewed alleged judicial misconduct or determine whether appellant objected at trial. *See* Tex. R. App. P. 33.1(a). Therefore, we hold appellant waived any error with regard to the alleged judicial misconduct and overrule appellant's fifth issue.

E. Erroneous Jury Instruction Argument

In his sixth issue appellant argues the trial court issued an erroneous jury instruction. Specifically, appellant complains of the instruction in the charge on guilt-innocence that instructed the jury:

> Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this cause and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

Appellant appears to argue that the instruction was erroneous because it confused the jury as to the presumption of innocence. We review claims of charge error under a two-pronged test. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g); *Rolle v. State*, 367 S.W.3d 746, 757 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). We first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Rolle*, 367 S.W.3d at 757. If error exists, we then evaluate the harm caused by that error. *Ngo*, 175 S.W.3d at 743; *Rolle*, 367 S.W.3d at 757. The degree of harm required for reversal depends on whether error was preserved in the trial court. When error is preserved in the trial court by timely objection, the record must show only "some harm." *Rolle*, 367 S.W.3d at 757. If a party asserts no objection, then the error must be "fundamental error" and requires reversal only if it was so egregious and created such harm that the defendant has not had a fair and impartial trial. *Id*. In this case, we have no

record of an objection to the jury charge. Therefore we review the charge for "fundamental error," if any.

Assuming for argument's sake that there was error in the charge, under the egregious-harm standard, we review alleged charge error by considering (1) the entirety of the charge itself, (2) the evidence, (3) the arguments of counsel, and (4) other relevant information revealed by the record. *See Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006); *Almanza*, 686 S.W.2d at 171. In this case, we do not have a record of the evidence or arguments of counsel. Because we do not have a complete record we cannot engage in an analysis under *Almanza*. We overrule appellant's sixth issue.

We affirm the trial court's judgments.

/s/ William J. Boyce
Justice

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