Affirmed and Memorandum Opinion filed May 3, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00530-CR

RAPHEL DONTE PARKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1443342

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

Raphel Donte Parker pleaded guilty without a sentencing recommendation to aggravated robbery with a deadly weapon, enhanced by one felony conviction. The trial court sentenced him to 20 years' imprisonment and certified his right to appeal. In one issue, appellant asserts he received ineffective assistance of counsel due to his lawyer's advising him to plead guilty. We affirm.

BACKGROUND

Over the course of 21 minutes in the early hours of September 20, 2013, three men robbed four people at gunpoint at three apartment complexes. The men were appellant, Branden Banks, and Caleb Mouton.

Appellant drove the getaway car for each robbery. Banks sat in the front passenger seat. Mouton was in the back seat. The record is unclear whether appellant got out of the car during any of the robberies. It is undisputed that at least one man got out of the car and pointed a gun at each person who was robbed.

Following the third robbery, police officers located the car as it was being driven. The driver committed a traffic violation, so the officers tried to effect a traffic stop. The driver did not pull over, though, and instead led police on a short chase until the car crashed. All three men fled the vehicle after it crashed. Patrol officers recovered the victims' property from the car as well as a black, pneumatic handgun or pellet gun that resembled a Glock pistol.

Appellant was arrested on October 30, 2013, in connection with the first robbery, and charged with aggravated robbery with a deadly weapon. The indictment contained two "manner or means" paragraphs alleging aggravated robbery, each naming a different deadly weapon. In the first paragraph, the deadly weapon is alleged to be a firearm; in the second, a pneumatic handgun.

On the morning trial was set to begin, appellant waived his right to a jury trial and pleaded guilty without a sentencing recommendation, both in writing and orally on the record. A sentencing hearing was held three months later. Appellant and several of his relatives testified at the hearing, and a presentence investigation report was admitted into evidence. After hearing closing arguments by appellant and the State, the trial court sentenced appellant to 20 years in prison. This appeal followed.

ANALYSIS

I. Legal standards for ineffective assistance of counsel

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). Under *Strickland*, the defendant must prove (1) his trial counsel's representation was deficient, and (2) the deficient performance was so serious that it deprived him of a fair trial. *Id.* at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness. *Id.* at 688. A deficient performance deprives the defendant of a fair trial only if it prejudices the defense. *Id.* at 691–92. To show prejudice, appellant must demonstrate there was 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. This test is applied to claims arising under both the United States and Texas Constitutions. *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986).

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that counsel's actions were reasonably professional and 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 the defendant received ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). 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 many 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 counsel's acts or omissions were outside the range of professionally competent assistance, the defendant must demonstrate 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).

II. No showing of ineffective assistance

Appellant asserts his lawyer should not have advised him to plead guilty because the State would not have been able to prove a firearm was used in the robberies. Without that proof, he says, he could not be convicted for aggravated robbery, a first-degree felony, but only for robbery, a second-degree felony. The record is silent on counsel's strategy regarding the plea, so appellant must establish his lawyer's advising him to plead guilty was "so outrageous that no competent attorney" would not have so advised him. *Goodspeed*, 187 S.W.3d at 392.

To prove a person committed aggravated robbery, the State must show he committed robbery and he (1) caused serious bodily injury to another; (2) used or

exhibited a deadly weapon; or (3) caused bodily injury to another person or threatened or placed another person in fear of imminent bodily injury or death, if the person was: (A) 65 years of age or older; or (B) a disabled person. Tex. Penal Code Ann. § 29.03(a); *see also id.* § 29.02(a) (definition of robbery). It is proper for the State to plead multiple "manner or means" of the offense when proof of any one "manner or means" will support a conviction. *Lehman v. State*, 792 S.W.2d 82, 84 (Tex. Crim. App. 1990); *Johnson v. State*, 187 S.W.3d 591, 604 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

In this case, the State alleged two deadly weapons: a firearm and a pneumatic handgun. Firearms are deadly weapons. Tex. Penal Code Ann. § 1.07(a)(17)(A). Appellant is correct there is no evidence a firearm was used in the robberies. However, Texas courts have recognized that a pneumatic gun, such as a pellet gun, may be a deadly weapon. *Adame v. State*, 69 S.W.3d 581, 582 (Tex. Crim. App. 2002) (BB gun); *Corte v. State*, 630 S.W.2d 690, 692 (pellet gun). In fact, in *Daughtery v. State*, relied upon by appellant, the Eastland Court of Appeals concluded Daughtery's "nonverbal threat when the gun was pointed at the clerk was sufficient evidence that the gun was used as a deadly weapon." 62 S.W.3d 913, 917 (Tex. App.—Eastland 2001, pet. ref'd).

We do not know trial counsel's strategy regarding the pellet gun found in the car. For example, we do not know what discussions appellant may have had with his lawyer about the likelihood the finder of fact would determine the pellet gun was a deadly weapon. Nor do we know if his lawyer advocated foregoing an argument about the nature of the pellet gun in favor of the time-honored strategy of pleading guilty, accepting responsibility, and asking for mercy in sentencing. Under these circumstances, an evidentiary record as to strategy is necessary:

> We ordinarily need to hear from counsel whether there was a legitimate trial strategy for a certain act or omission. Frequently, we can conceive potential reasonable trial strategies that counsel could have been pursuing. When that is the case, we simply cannot conclude that counsel has performed deficiently.

Andrews v. State, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005).

Appellant did not file a motion for new trial, so there was no hearing at which a record as to the lawyer's strategy could be developed. *Aldaba v. State*, 382 S.W.3d 424, 431 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Without a record, an affidavit from counsel is almost vital to the success of a claim of ineffective assistance. *Id.* No such affidavit is in the record. We cannot conclude on this silent record that counsel's performance was deficient.

We conclude appellant has not met his burden to establish his lawyer could not have had a valid trial strategy for advising him to plead guilty or that the lawyer's performance was "so outrageous that no competent attorney" would have advised him to plead guilty. Because he has not met his burden to establish deficient performance, we do not reach the question of whether appellant has shown he was prejudiced. *See Strickland*, 466 U.S. at 697. We overrule appellant's sole issue.

CONCLUSION

We affirm the judgment of the trial court.

/s/ Sharon McCally
Justice

Panel consists of Justices Christopher, McCally, and Busby.
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