Affirmed as Reformed and Memorandum Opinion filed January 24, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00477-CR

FREDY HENRIQUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 13-DCR-064877A

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

A jury convicted Fredy Henriquez of aggravated assault of a public servant and sentenced him to confinement for life. On appeal, he claims he received ineffective assistance of counsel and the trial erred in instructing the jury during the punishment phase. We affirm.

BACKGROUND

The record reflects Stafford Police Officer Ann Carrizales was patrolling at night on October 26, 2013, when she conducted a traffic stop. Appellant was driving the vehicle. When Carrizales approached the vehicle and asked appellant for identification she was shot twice by a passenger in the vehicle. Appellant sped away. As Carrizales followed appellant's car, five more shots were fired at her. Appellant was charged with aggravated assault against a public servant and, as noted above, convicted of that offense and given a life sentence.

INEFFECTIVE ASSISTANCE

In his first issue, appellant claims trial counsel failed to provide effective assistance of counsel. Appellant asserts trial counsel failed to provide any mitigation evidence during the punishment phase. Appellant further contends trial counsel failed to object and properly preserve the record in numerous instances during the guilt-innocence phase.

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, 104 S.Ct. 2052, 2064–67, 80 L.Ed.2d 674 (1984). Moreover, 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).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions 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, as in this case, no proper evidentiary record is developed at a hearing

on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). If there is no hearing or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. *Stults v. State*, 23 S.W.3d 198, 208–09 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The Court of Criminal Appeals has stated that it should be a rare case in which an appellate court finds ineffective assistance on a record that is silent as to counsel's trial strategy. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). On such a silent record, we can find ineffective assistance of counsel only if 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) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Although a motion for new trial was filed in this case, it did not raise ineffective assistance of counsel. We have no record or affidavit regarding counsel's trial strategy.

Appellant first complains trial counsel failed to present any mitigating evidence and notes the trial court asked counsel if he would be calling appellant's mother or girlfriend to testify, both of whom were present throughout the trial. The record before this court does not reflect that any mitigating evidence existed. Nor does the record show that if such evidence existed, trial counsel could not have reasonably determined that the potential benefit of such evidence outweighed the risk of unfavorable counter-testimony. The mere presence of appellant's girlfriend and mother at trial does not establish otherwise. Because the record itself does not affirmatively demonstrate there was mitigating evidence that trial counsel failed to present, appellant has failed to satisfy the first prong of *Strickland. See Bone v. State*, 77 S.W.3d 828, 834 (Tex. Crim. App. 2002).

Appellant further claims trial counsel was ineffective for failing to object to certain statements by the trial court as they constituted a comment on the weight of the evidence. Appellant also asserts trial counsel failed to object to leading questions asked during the re-direct examination of Carrizales.

Regarding trial counsel's failure to object, appellant has waived any contention that the result would have been different because he failed to address *Strickland's* second prong in his brief on appeal. *See* Tex. R. App. P. 38.1(h); *Bessey v. State*, 199 S.W.3d 546, 555 (Tex. App.—Texarkana 2006), *aff'd*, 239 S.W.3d 809 (Tex. Crim. App. 2007) (finding briefing waiver where appellant made no effort to show how the record demonstrated prejudice under *Strickland's* second prong); *Peake v. State*, 133 S.W.3d 332, 334 (Tex. App.—Amarillo 2004, no pet.) (overruling appellant's ineffective assistance of counsel claim due to inadequate briefing); *see also Thomas v. State*, No. 14-06-00540-CR, 2008 WL 596228, at *5 (Tex. App.—Houston [14th Dist.] Mar. 6, 2008, no pet.) (mem. op.) (not designated for publication). Appellant makes no argument, much less the required showing, that the result of the proceeding would have been different but for trial counsel's failure to object to either the trial court's comments or the leading questions. Accordingly, he cannot prove ineffective assistance.

In summary, we conclude appellant failed to establish the first prong of *Strickland* regarding trial counsel's failure to present mitigating evidence. We further conclude appellant's complaints regarding trial counsel's failure to object were waived as to the second prong. For these reasons, appellant's first issue is overruled.

CHARGE ERROR

Appellant's second issue asserts the trial court erred in overruling his objection to the trial court's charge during the punishment phase by not providing a line on the verdict form for the jury to find the enhancement allegation "not true." Appellant complains the charge stated the jury was to find the allegation "true" and only provided for an enhanced punishment range of fifteen to 99 years or life, rather than a range of five to 99 or life if the jury found the allegation "not true."

After the jury found appellant guilty, he was arraigned on the enhancement allegation. When asked whether he pled "true or not true," appellant answered, "Yes." The court then stated, "That would be interpreted as a plea of true." The jury was

subsequently instructed that the defendant entered a plea of true to the enhancement alleged in the indictment and to find the allegation true.

The record reflects no objection was raised to the trial court's interpretation of appellant's "Yes" answer as a plea of true. There was also no objection to the charge's instruction to the jury to find the enhancement allegation "true." In his closing argument, defense counsel informed the jury that "our range of punishment in this case is now 15 to 99," it was obvious appellant had a prior felony conviction, and that the jury had heard evidence to that effect. Counsel stated the range of punishment "already changed from 5 to 99 to 15 to 99 . . . because the legislature already takes into consideration prior felonies."

Counsel did object to the charge after the jury retired for deliberations:

> Judge, my objection is simply in the format of the verdict where it states after the "We, the jury, having found him guilty, further find that the enhancement allegation as alleged in the indictment is -- and there's a space for them to, I guess, put an initial or checkmark, followed by "true" or "not true," and then after that, there's one sentence: "And hereby assesses his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of," and there's a space for them to fill in a number, Judge, followed by a blank, you know, years, and then in parenthesis, "15 years to 99 years or" -- and then there's a second line and a blank space where they would initial or check off -- life imprisonment." . . ..
>
> My objection would be that if they checked off "true" and then proceeded to give him 15 or more years, there would not be any confusion. We see what they're doing.
>
> What should we do or what would happen if they did not check off "true" but then still assessed him a punishment of 15 years or more because even if it'd be by accident -- I mean, it would seem that it would have to be by accident, Judge. They do not check off "true." Then what follows would then be an incorrect statement of their possibility of incarceration because if they don't find it true -- Now, you know, then it changes, so I'm . . .–
>
> THE COURT: Are you finished with your objection?
>
> [DEFENSE COUNSEL]: Yes, I am.
>
> THE COURT: Overruled.

. . .

[DEFENSE COUNSEL]: Judge, are [we] still on the record?

THE REPORTER: Do you want --

THE COURT: Do you want it on the record?

[DEFENSE COUNSEL]: Yeah, we might as well.

. . . I'm a little bit confused about what the State is talking about, something whited out.

THE COURT: What was whited out was the "not true" portion of it which is not appropriate to submit because he's already entered an admission of true to the enhancement paragraph. There's no confusion. I'm not confused. We're finished and off the record.

The verdict form reads as follows:

Further find that the enhancement allegation as alleged in the indictment is:

_____ True

Appellant's brief claims the trial court erred in not including an option for the jury to find the enhancement allegation "not true" because he did not enter a plea of "true." Because he did not plead "true," appellant argues, the State failed to satisfy its burden to prove the enhancement allegation and the jury should have been given the option to find the allegation "not true."[1]

The record reflects, however, that appellant never contested the trial court's interpretation of his "yes" answer as a plea of true. Although appellant had ample opportunity to inform the trial court that he had intended to plead "not true" to the enhancement allegation, he never did so. *See James v. State*, No. 14-94-00919-CR, 1997 WL 59332, *3 (Tex. App.—Houston [14th Dist.] Feb. 13, 1997, pet. ref'd) (not designated for publication) (overruling defendant's claim that he did not enter a plea of true to an enhancement allegation when he answered "yes" to question whether it was "true or not true?"). Moreover, appellant's "yes" answer was sufficient to constitute a plea of "true." *See Jones v. State*, 857 S.W.2d 108, 111 (Tex. App.—Corpus Christi

[1] Because appellant's brief does not raise the issue presented to the trial court, that the form of the verdict was erroneous, we do not address it here.

1993, no pet.) (concluding defendant's "yes" answer to the trial court's question regarding whether the charges and allegations in the indictment were "true and correct" was a judicial confession sufficient by itself to support the plea of guilty). By answering "yes," appellant pled "true" and relieved the State of its burden to prove a prior conviction alleged for enhancement purposes. *See Manning v. State*, 112 S.W.3d 740, 744 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (citing *Harvey v. State*, 611 S.W.2d 108, 111 (Tex. Crim. App. 1981)). Accordingly, the trial court did not err in instructing the jury to find the allegation "true." Appellant's second issue is overruled.

The judgment in this case states "N/A" for both "Plea to Enhancement Paragraph(s)" and "Findings on Enhancement." The State requests we reform the judgment to reflect appellant pled true. As noted above, the record reflects appellant pled true to the enhancement allegation and the jury found the allegation true. Accordingly, we reform the judgment to reflect the "Plea to Enhancement Paragraph(s)" was "true" and the "Findings on Enhancement" was "true."

As reformed, we affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Busby, Donovan and Brown.
Do Not Publish — Tex. R. App. P. 47.2(b).