Affirmed and Memorandum Opinion filed September 20, 2022.

In The

Fourteenth Court of Appeals

NO. 14-20-00788-CR

ALIZE RENE ESQUIVEL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1609813

MEMORANDUM OPINION

Appellant, Alize Rene Esquivel, pleaded guilty to the second-degree felony offense of indecency with a child,[1] and the trial court assessed his punishment at three years' confinement. On appeal, Appellant complains that the trial court abused its discretion by denying him a hearing on his motion for new trial. We affirm.

[1] *See* Tex. Penal Code Ann. § 21.11(a), (d).

BACKGROUND

Appellant was charged with committing the offence of indecency with a child against Complainant. Appellant was released from custody on a surety bond; two of the bond conditions prohibited Appellant from "having contact with person(s) younger than seventeen years of age" and using drugs. He hired trial counsel and pleaded guilty to the offense without a punishment recommendation in December 2019. The trial court reset the case for sentencing after a pre-sentence investigation. In November 2020, the trial court held a PSI hearing, at which Complainant, her mother, Appellant, and Appellant's mother testified.

Complainant, who was 17 years old at the time of the hearing, testified via Zoom that Appellant (her paternal cousin) had been abusing her repeatedly since she was eight or nine years old. Complainant testified that Appellant usually touched her "in places you're not supposed to touch . . . without permission" but, one time, he forced her to have sexual intercourse. Shortly before Thanksgiving in 2017 when Complainant was about thirteen or fourteen years old, Appellant sent Complainant text messages soliciting sexual contact and intercourse, which left her "crying in the corner" of her room. She "felt like [she] couldn't tell anybody" and "the whole time [she] was just panicking because [she] knew that whenever [she] saw him it might happen again." Complainant testified that a few days later at her family's Thanksgiving celebration, Appellant grabbed her butt while everyone was taking a family photo.

Two days later, Complainant attempted suicide by overdose and was hospitalized in a behavioral center. She stated that she finally outcried to a therapist at the behavioral center and then to her mother ("Mother"). She testified: "I finally had to tell them what was wrong with me because I was ending up in this place so many times because I tried to kill myself because I just was tired of

picturing this in my head all the time and always remembering what happened to me." She testified that, after the outcry, most of her paternal family stopped speaking to her and she felt she had lost her family because she spoke out about the abuse. Complainant recalled seeing Appellant recently at her paternal grandfather's funeral and being surprised that Appellant was a pallbearer. She testified: "It made me feel really bad. I, like, froze and I couldn't really function when I saw him and I just kept wanting to cry. . . . Because every time I see him, it kind of just makes me feel really uneasy."

Complainant's mother also testified at the hearing via Zoom, confirming that her daughter tried to commit suicide shortly after Thanksgiving and had to be taken to a mental hospital. Mother stated she was sad and angry when Complainant told her Appellant had been sexually abusing her. She testified that in hindsight, she noticed several signs. Mother remembered taking Complainant to the pediatrician because she would touch her private part "a lot" but the pediatrician told Mother it was "normal for little kids to explore." In third grade at eight years old, Complainant "wasn't as happy and playful, and she was distracted easily" and could not concentrate in school. Mother took her to the doctor and psychiatrist. Mother testified that "throughout the years she became angry and sad. And she became distant from us — from me. And she was never like that. She was always really nice, really friendly with me, and we would get along really good. But she — she grew angry throughout the years." Mother also stated that Complainant had seen medical professionals because she was cutting herself.

Mother confirmed that only a few paternal family members still speak to Complainant because "they're upset at her for speaking up." Mother testified that her daughter seems to feel worse after speaking out because she lost a lot of her paternal family. She testified that Complainant has a therapist and psychiatrist

since the outcry and takes several medications daily. According to Mother, her daughter would be very upset if Appellant got probation and "she will not feel like she got justice."

Appellant's trial counsel called Appellant's mother, Concha, to testify on her son's behalf. She stated that Appellant did well in school but had difficulty reading. He was diagnosed with attention deficit hyperactivity disorder (ADHD) when he was ten years old but received no special classes or tutoring in school to help him improve. Concha testified that after the family moved to the Alief school district, Appellant started hanging "around the wrong crowd there" and eventually quit school when he was fifteen or sixteen years old. Appellant used to work at Burger King but quit that job because it "wasn't giving him a lot of hours," transportation was a problem, "and then he was getting in the wrong mix with his old friends." Concha also testified that she suggested Appellant should leave the job and stay home because Complainant and her friends knew where Appellant worked and would go to that Burger King. She stated that Appellant "didn't want any issues with anyone."

Concha testified that Appellant is not allowed to leave the house while staying with her and her fiancé, and Appellant no longer "run[s] around with druggies or harmful people." According to Concha, Appellant "has remained clean" at her house. Concha confirmed that Appellant was suicidal while he was in Harris County jail in 2018 and that he was diagnosed with bipolar disorder at the time. She acknowledged that the trial court revoked Appellant's bond on July 31, 2019, after he attended a party for his older brother at Concha's sister's house. Concha explained that she made Appellant go to the party because she wanted all her children to be present when her oldest son made an announcement to the family he was joining the Army. One of Appellant's bond conditions was to not

have contact with persons under the age of seventeen years. Because there were minors present at the party, the trial court revoked Appellant's bond. Concha never mentioned whether she or Appellant attempted to ask trial counsel if it was advisable that Appellant attend the party.

Concha testified that Appellant spent 25 days in jail after his bond violation and, while in jail, Appellant decided to change his life. Concha also stated that Appellant has "changed his whole life"; "[h]e doesn't go out and about. He doesn't do anything. He takes care of the house. He makes — actually he makes dinner. He's not a trouble child." Concha testified that Appellant "apologized to his whole family" and is truly sorry for what he has done. She stated that she would support Appellant, help him participate in all programs the trial court deems necessary, and make sure he does not associate with "bad people" and "drug users" anymore.

Finally, the trial court heard from Appellant, who was 22 years old at the time of the hearing. Appellant admitted he had two misdemeanor cases pending against him at the time of the hearing. He testified he did not finish high school because he "was hanging around the wrong people and they were taking [him] on a different path." He claimed he had "problems with reading, science, and — it was math, too." He remembered being diagnosed with attention deficit disorder (ADD) when he was ten years old but "felt like [he] always had it." Appellant also stated he was suicidal and was diagnosed with bipolar disorder when he was in jail in 2018. Appellant testified that he left his job at Burger King because "on [his] paper it said that [he] can't be nowhere near somebody under 17." According to Appellant, he told his mother that he needed to quit because "a lot of people are coming here under 17, so [he's] not trying to have one of their people come in here and take a picture and send it back to the court."

Appellant admitted testing positive for marijuana in March and April 2019 while he was on bond and also testing positive for cocaine. But he claimed he thereafter completely stopped "to run with [his] buddies or do drugs." He acknowledged that the trial court revoked his bond on July 31, 2019, because he went to his brother's party at which minors were in attendance. Appellant testified that he did not "know why those people showed up" at his brother's party. He also testified that he did not want to go to the party because he "knew something was going to happen" but his mother and brother wanted him to attend. Appellant stated that he told his mother he was afraid someone would take a photo of him and he would be back in jail. According to Appellant, that is what happened and he ended up in jail a day after the party.

Appellant testified that, while he was in jail for 25 days, he had time to reflect and decided to change his life. Upon his release he "went home and stayed there" and "got rid of the drugs." At the hearing, he agreed that he pleaded guilty to the charged offense because he is guilty. He stated he was "truly sorry" for what he has done, for the "inconvenience and the sorrow" he "dumped on [his] relatives," and for the messages he sent to Complainant. He stated: "I apologize. I'm sorry to everybody in this room and my family and — for wasting y'all's time. I'm really sorry. It's just hard. It's hard. I'm sorry." Appellant assured the trial court that "anything like this would ever happen again" and that he would fulfill all conditions if the trial court placed him on deferred adjudication.

Appellant acknowledged attending his grandfather's funeral despite his bond conditions prohibiting him "to be around kids under 17," but he explained that children were "nowhere near me. I was — they had me in the corner. They had me by myself the whole time. You can ask my mom. They had me — they had a picture of me in the corner by myself. Like, my stepdad stood in front of the

doorway and let nobody in."

After considering the witnesses' testimony and a lengthy PSI packet, the trial court assessed Appellant's punishment at three years' confinement,[2] providing the following reasoning:

> Mr. Esquivel, I've heard the P.S.I., I've read the evidence, I heard the witnesses' testimony. What I find in the P.S.I. that I find very uncomfortable is that you always talk about yourself, your family, things of that nature, but you forget to mention [Complainant].
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> * * *
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> And that's what troubles me the most. When I put people out on bond, I monitor them to see how they would do on a probation. And you actually did very horrible on my probation. I sentence you to three years in the Texas Department of Corrections.
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> * * *
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> [Trial counsel], you've done all you could on this case. The evidence is very clear that your client just lacks the — he didn't show remorse for [Complainant]. And that's what's troubling. He didn't — while he was out on bond he continued how he wanted to live his life, but failed to mention her, failed to mention her family, her feelings. Obviously this has impacted the complaining witness a tremendous amount, an amount that I cannot ever measure. But I will not forget [Complainant].

The trial court signed a judgment on November 19, 2020. Appellant filed a motion for new trial on December 21, 2020, asserting "he was denied effective assistance of counsel by trial counsel's failure to investigate the facts necessary to present a defense or mitigate any punishment." In his motion, Appellant provided almost no argument and mainly quoted his parents' affidavits in their entireties, which he also attached to the motion. Additionally, Appellant filed a motion to extend the deadline to file his affidavit to January 19, 2021, stating that he could not visit with

[2] Indecency with a child is a second degree felony with a punishment range of two to 20 years. *See* Tex. Penal Code Ann. §§ 12.33, 21.11(a), (d).

his new counsel due to Covid restrictions. On December 23, 2020, the trial court signed an order granting Appellant's Motion to Extend the Deadline to File Affidavit on Defendant's Motion for New trial. Appellant filed his affidavit in support of his motion for new trial on January 13, 2021. The trial court did not hold a hearing on Appellant's motion for new trial, and the motion was overruled by operation of law. Appellant filed a timely notice of appeal.

ANALYSIS

In one issue, Appellant complains that the trial court abused its discretion in not holding a hearing on his motion for new trial and asks us to abate the appeal and remand this case to the trial court for a hearing on his motion.

I. Standard of Review and Applicable Law

The purpose of a hearing on a motion for new trial is to decide whether the cause should be retried and to complete a record for appeal in the event the motion is denied. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009); *Smith v. State*, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009). However, such a hearing is not an absolute right. *Hobbs*, 298 S.W.3d at 199; *Smith*, 286 S.W.3d at 338. To be entitled to a hearing, the movant must raise matters not determinable from the record and establish reasonable grounds showing he could be entitled to relief. *Hobbs*, 298 S.W.3d at 199. "This second requirement limits and prevents 'fishing expeditions.'" *Id*. The motion must be supported by an affidavit specifically setting out the factual basis for the claim. *Id*.; *Smith*, 286 S.W.3d at 339. Affidavits that are conclusory in nature and unsupported by facts do not provide the requisite notice of the basis for the relief claimed. *Hobbs*, 298 S.W.3d at 199; *Smith*, 286 S.W.3d at 339.

We review a trial court's denial of a hearing on a motion for new trial for an

abuse of discretion. *Hobbs*, 298 S.W.3d at 199; *Smith*, 286 S.W.3d at 339. We reverse only when the trial court's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Smith*, 286 S.W.3d at 339. To be entitled to a hearing on his motion for new trial alleging ineffective assistance of counsel, a defendant must allege sufficient facts from which a trial court could reasonably conclude both that counsel failed to act as a reasonably competent attorney and that, but for counsel's failure, there is a reasonable likelihood that the outcome of the proceeding would have been different. *Hobbs*, 298 S.W.3d at 200; *Smith*, 286 S.W.3d at 340-41 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (requiring defendant seeking to challenge counsel's representation to establish counsel's performance was deficient and prejudiced his defense)).

II. Motion for New Trial Hearing

With these standards in mind, we turn to whether Appellant showed he was entitled to a hearing on his motion for new trial. Appellant argues he was denied effective assistance of counsel because his trial counsel failed to present mitigating evidence and failed to give advice.

1. Failure to Present Mitigating Evidence

We begin by addressing Appellant's contention that his trial counsel was deficient because he failed to present mitigating evidence, and failure to "present mitigating evidence is a proper claim that can be raised in a motion for new trial." In that regard, Appellant states in his brief:

> The State presented extensive testimony concerning the effect Appellant's conduct had on the complainant and the impact his release on bond had on the complainant. No evidence was presented that mitigated against the harm caused by Appellant's conduct on bond, his child development, any mental health issues involved or trial

> counsel's own failure to respond to Appellant's call for help. . . . Here, trial counsel did not present any evidence of mitigating factors for the trial court to weigh against the aggravating factors presented by the State despite available witnesses who were willing to provide mitigating evidence.

However, Appellant did not assert in his motion for new trial that his trial counsel was deficient for failing to *present* mitigating evidence. Instead, Appellant only asserted that "he was denied effective assistance of counsel by trial counsel's failure to *investigate* the facts necessary to . . . mitigate any punishment." (emphasis added). Without further explanation or elaboration in the motion, Appellant stated that his "counsel failed to investigate the background of the complainant and her relationship to her parents and their relationship." Appellant even acknowledges in his brief that the "affidavits that accompanied the motion for new trial that was filed allege that Appellant's attorney did not communicate with him and that he did not *investigate* mitigating evidence against him." (emphasis added).

Thus, Appellant's contention in his motion for new trial is different from what he now argues on appeal. Because Appellant did not complain in his motion that his counsel failed to present mitigating evidence, he has forfeited this complaint on appeal. *See* Tex. R. App. P. 33.1 (stating that to preserve error for appeal record must show that complaint was made to trial court and that trial court ruled on request or refused to rule, and that "complaining party objected to the refusal"); *Keeter v. State*, 175 S.W.3d 756, 759-61 (Tex. Crim. App. 2005) (holding that appellant failed to preserve for appellate review his complaint that the trial court erred in failing to grant his motion for new trial on the basis of a *Brady* violation because he did not mention *Brady* in his motion or during the hearing on the motion); *Pitman v. State*, 372 S.W.3d 261, 264 n.2 (Tex. App.—Fort Worth 2012, pet. ref'd) (determining that defendant forfeited his complaint on appeal

alleging that he should have been given new trial based on newly-discovered evidence when he "did not raise this issue in his new-trial motion or at the new-trial hearing"); *McCarley v. State*, 763 S.W.2d 630, 632 (Tex. App.—San Antonio 1989, no pet.) (complaint forfeited because argument on appeal differed from ground in motion for new trial).

We note that Appellant does not complain on appeal, as he did in his new-trial motion, that his trial counsel was deficient because he "failed to investigate the background of the complainant and her relationship to her parents and their relationship." Even if such an argument could be discerned from Appellant's brief, it would fail because a claim for ineffective assistance based on trial counsel's failure to investigate generally fails absent a showing of what the investigation would have revealed that reasonably could have changed the result of the case. *See Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *Cooks v. State*, 240 S.W.3d 906, 912 (Tex. Crim. App. 2007)). Here, neither Appellant's motion nor the attached affidavits state what an investigation would have revealed that reasonably could have changed the result of this case. Therefore, Appellant's complaint presents nothing for our review.

2. Failure to Give Advice

We next address Appellant's ostensible contention that his trial counsel was deficient because he failed to give advice regarding whether Appellant should attend his brother's party and his grandfather's funeral. In that respect, Appellant states in his brief:

> The affidavits from Appellant's parents suggested that they tried to obtain assistance from trial counsel with issues that arose during the pendency of the case. They used poor judgment in allowing Appellant to attend a family party and a funeral. They sought advice from counsel but got no answer or assistance. This Court recognized

> the problems arising with Appellant while on bond as a basis for rejecting his request that he be granted community supervision.

Read liberally, Appellant complained in his motion for new trial that (1) he "contacted his attorney to ask about attending [his brother's party] but got no response"; and (2) his "mother repeatedly attempted to contact trial counsel [regarding Appellant attending his grandfather's funeral] but got no response." There is no support in any attached affidavit that Appellant ever asked his trial counsel for advice. Instead, in his affidavit, Appellant stated: "For both of these events, my mom called my lawyer and asked him what to do. My lawyer never gave any advice. We left messages and did not get a return call." Concha's affidavit provided: "For both events[,] I called [trial counsel] and asked his advice. I spoke to his secretary or the person who answered the phone and told her the situation. I got no response." Appellant's father's affidavit did not contain any statements regarding trial counsel's failure to provide advice. Father only averred that (1) Concha insisted on Appellant going to his brother's party; (2) Appellant is immature, so Concha "makes decisions for him and tells him what to do"; and (3) Concha "discussed [Appellant]'s attendance at the funeral" with Complainant's father and he "did not object."

Besides the above quoted statements from his appellate brief, Appellant makes no attempt to develop a proper argument with appropriate citations to authorities. *See* Tex. R. App. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Appellant does not cite any authority that supports finding a trial counsel's conduct deficient for not giving advice to the mother of an adult client regarding whether the client should attend events that would foreseeably violate his bond conditions. Additionally, the affidavits do not contain any information regarding how often and when Concha called trial counsel to seek

advice.

Further, with respect to the prejudice prong, Appellant seemingly asserts that the omitted evidence of his trial counsel's failure to give advice (about whether Appellant should have attended the party and funeral) was material to the trial court's decision to not grant Appellant community supervision. However, when the defendant in *Smith* similarly argued that he should be entitled to a hearing on his motion for new trial because the omitted testimony and evidence in that case were material to the trial judge's determination of his sentence, the Court of Criminal Appeals disagreed and stated:

> the decision of what punishment to assess after adjudicating the defendant guilty is a purely normative process, not intrinsically factbound, and is left to the unfettered discretion of the trial judge. Only the trial judge in this case could have known what factors he took into consideration in assessing the original punishment, and only he would know how the defendant's testimony, if allowed, might have affected that assessment. When the trial judge declined to hold a hearing on the appellant's motion for new trial, we presume that he knew from the affidavits what the appellant's testimony at a hearing would be, and that, even assuming any such testimony to be accurate and reliable, knew that it would not have influenced his ultimate normative judgment. In that event, the trial court could have concluded, without the necessity of a hearing, that the appellant suffered no prejudice from any deficiency on his trial counsel's part with respect to the assessment of punishment for the original offense.

Smith, 286 S.W.3d at 344-45. Here, the trial court, while declining to hold a hearing, knew from the affidavits that (1) Appellant went to his brother's party because his mother insisted on his attendance and his trial counsel did not answer requests for advice; and (2) Appellant went to his grandfather's funeral because Complainant's father did not object to Appellant's attendance and trial counsel did not answer requests for advice. The trial court also knew, without a hearing, that the contentions made in the motion for new trial and the evidence presented in the

affidavits would not have influenced its normative judgment, so that it could have concluded that Appellant suffered no prejudice from his trial counsel's alleged incompetence with regard to the assessed punishment. *See id.*; *Arriaga v. State*, 335 S.W.3d 331, 337 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). In that regard, we further note that the trial court's decision to not grant Appellant community supervision was based on Appellant's lack of remorse, lack of concern for Complainant, and sole care for himself and his family.

We determine that Appellant did not establish reasonable grounds showing he could, under *Strickland*, prevail on his ineffective assistance of counsel claim and, thus, be entitled to a new punishment hearing. Under the circumstances of this case, we conclude that the trial court did not abuse its discretion in failing to hold a hearing on his motion for new trial. Accordingly, we overrule Appellant's issue.

CONCLUSION

We affirm the trial court's judgment

/s/ Meagan Hassan
Justice

Panel consists of Justices Jewell, Zimmerer, and Hassan.

Do Not Publish — Tex. R. App. P. 47.2(b).