Affirmed and Memorandum Opinion filed November 17, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00714-CR

BRICE BLANKENSHIP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 506th Judicial District Court
Waller County, Texas
Trial Court Cause No. 16-05-15629

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

Appellant Brice Blankenship was charged with aggravated sexual assault of a child. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B). A jury found Appellant guilty of the charged offense and the trial court assessed punishment at 40 years' confinement.

Appellant raises two issues on appeal and asserts that (1) the trial judge made a remark in front of the jury that constitutes fundamental error, and (2) the appeal should be abated for a hearing on an untimely motion for new trial. For the

reasons below, we overrule Appellant's issues and affirm the judgment.

BACKGROUND

Appellant was charged with "intentionally and knowingly caus[ing] the penetration of the mouth of [Complainant], a child who was then and there younger than 6 years of age, by [Appellant's] sexual organ." Appellant pleaded not guilty to the charged offense and proceeded to a jury trial.

Eight witnesses testified at Appellant's trial. Complainant was the fifth witness to testify and, at the time of trial, was ten years old. After Complainant was sworn in and sat in the witness box, the trial judge made the following comment to the jury: "Ladies and gentlemen, the County's victims and witness coordinator is just sitting behind there as a support item for the witness. And with that you may proceed."

After the close of evidence, the jury deliberated and found Appellant guilty of the charged offense. The trial court assessed punishment at 40 years' confinement. Appellant timely appealed.

ANALYSIS

In two issues, Appellant argues:

1. the trial judge committed fundamental error by informing the jury that "the County's victims and witness coordinator" was sitting behind Complainant while she testified; and
2. the appeal should be abated for a hearing on an untimely motion for new trial because Appellant was denied effective assistance of counsel during the 30-day period to file a new trial motion.

We address these issues below.

I. The Trial Judge's Comment Regarding "the County's Victims and Witness Coordinator"

Citing article 38.05 of the Texas Code of Criminal Procedure, Appellant argues that the trial judge's comment "improperly informed the jury" that the trial judge "considered [Complainant] to be a 'victim' of sexual abuse [and] that Waller County, as an entity, supports the 'victims' of sexual abuse while they testify." Appellant asserts that this error entitles him to a new trial.[1]

Article 38.05 states as follows:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Tex. Code Crim. Proc. Ann. art. 38.05.

In evaluating an asserted violation of article 38.05, we first determine whether the trial judge's comments were, in fact, improper. *Moore v. State*, 624 S.W.3d 676, 681 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). If we determine that the comments were improper, we turn to whether the comments were material. *Id*. If the comments were both improper and material, we address harm under the standard for non-constitutional error. *Id*. (citing Tex. R. App. P. 44.2(b); *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017)).

Here, because we conclude the challenged statement was not improper, we

[1] Appellant did not raise this objection in the trial court. However, in *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017), the Court of Criminal Appeals held that the right to be tried in a proceeding devoid of improper judicial commentary is a right that will not be considered waived on appeal unless the record clearly reflects that the appellant "plainly, freely, and intelligently" waived that right at trial. *Id*. at 801. Here, Appellant did not waive this right at trial. Accordingly, he may raise his article 38.05 issue for the first time on appeal. *See id*.

need not proceed to the other steps in the analysis.

A trial judge is a neutral party and should not give any indication to the jury about his own beliefs about the credibility or weight of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.05; *Kim v. State*, 331 S.W.3d 156, 160 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). A trial judge improperly comments on the evidence if he makes a statement that (1) implies approval of the State's argument; (2) indicates any disbelief in the defense position; or (3) diminishes the credibility of the defense's approach to the case. *Kim*, 331 S.W.3d at 160.

The trial judge's statement that "the County's victims and witness coordinator is just sitting behind there as a support item for the witness" is not an improper comment on the weight of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.05; *Kim*, 331 S.W.3d at 160. "[V]ictims and witness coordinator" is the title given to a position created by statute:

> The district attorney, criminal district attorney, or county attorney who prosecutes criminal cases shall designate a person to serve as victim assistance coordinator in that jurisdiction.

Tex. Code Crim. Proc. Ann. art. 56A.201. Telling the jury this person's statutory title did not convey to the jury that the trial judge considered Complainant a "victim." Rather, it informed the jury as to each person's role in the proceedings they were observing and kept them from speculating as to why an unidentified person was sitting with the Complainant as she testified — an activity that witnesses typically undertake alone. Moreover, the trial judge did not refer to Complainant as a "victim"; instead, the trial judge referred to Complainant using the more neutral term "witness".

In sum, the trial judge's comment did not express any opinion on the case. The trial judge did not imply approval of the State's argument, indicate disbelief in

the defense's position, or diminish the credibility of the defense's approach to its case. *See Kim*, 331 S.W.3d at 160. Therefore, we conclude that the trial judge's comment was not improper. *See* Tex. Code Crim. Proc. Ann. art. 38.05; *Kim*, 331 S.W.3d at 160.

We overrule Appellant's first issue.

II. Abatement for an Untimely New Trial Motion

Before we summarize Appellant's argument on this point, we begin with a brief overview of the relevant facts.

Appellant's judgment of conviction was signed by the trial court on December 6, 2021. Two days later, Appellant's trial counsel filed a notice of appeal. The trial court appointed Zach Coufal as Appellant's appellate attorney on December 20, 2021. Coufal timely filed a new trial motion on January 4, 2022, asserting that (1) the verdict was contrary to the law and evidence, and (2) the trial court erred in admitting certain witness testimony. On May 17, 2022, this court granted Appellant's motion to substitute Randy Schaffer as his appellate attorney.

On appeal, Schaffer asserts that, when he filed the motion to substitute appellate counsel, he called Appellant's trial counsel to obtain Appellant's file. According to the brief, trial counsel informed Schaffer that, shortly after Appellant's trial concluded, trial counsel was told by an assistant district attorney that the State had failed to disclose that one of its witnesses previously had been convicted of misdemeanor theft. Schaffer said trial counsel did not volunteer this information to Coufal nor did Coufal contact trial counsel about Appellant's case.

Based on these events, Appellant contends that "there was no meaningful communication between [trial counsel] and Coufal during the 30-day period to file a motion for new trial; if there had been, [trial counsel] would have told Coufal

what he told [Schaffer], and Coufal presumably would have raised the issue in the motion for new trial." Asserting that this constitutes ineffective assistance of counsel, Appellant asks that we abate the appeal so he can pursue the issue via an untimely new trial motion.

To abate an appeal for the filing of an untimely new trial motion, an appellant must satisfy two burdens: first, he must show that the trial court deprived him of counsel during the 30-day period for filing a new trial motion; and second, he must show that the deprivation resulted in harm. *Cooks v. State*, 240 S.W.3d 906, 911-12 (Tex. Crim. App. 2007). Our analysis focuses on the first prong.

The 30-day time period for filing a new trial motion is a critical stage in a criminal proceeding and a defendant has a constitutional right to counsel during that time. *Id*. at 910. If a defendant was represented by counsel at trial, there is a rebuttable presumption that trial counsel continued to represent the defendant after trial. *Id*. This presumption is rebutted if the record affirmatively shows that the defendant was not adequately represented by counsel during the time period for filing a motion for new trial. *Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998) (en banc).

The burden to produce evidence to rebut this presumption is on the appellant. *See id*. This presumption is not rebutted when nothing in the record suggests that the appellant was unrepresented by counsel during the time period in question. *See Smith v. State*, 17 S.W.3d 660, 662-63 (Tex. Crim. App. 2000); *Nguyen v. State*, 222 S.W.3d 537, 540 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

Here, the record does not affirmatively show that Appellant was denied counsel during the 30-day period for filing a motion for new trial. The record shows that Appellant was represented by trial counsel through the signing of the

final judgment. The record does not show that trial counsel filed a motion to withdraw from representation. The record also shows that Coufal was appointed as appellate counsel well before the expiration of the 30-day period for filing a motion for new trial and that a motion for new trial was timely filed. Therefore, the record does not rebut the presumption that Appellant was adequately represented by counsel during the time period for filing a motion for new trial. *See Smith*, 17 S.W.3d at 662-63; *Nguyen*, 222 S.W.3d at 540.

As set out above, Appellant asserts that Coufal's failure to discover that the State did not disclose a witness's criminal history shows he received ineffective assistance of counsel during the 30-day period to file a new trial motion. But there is nothing in the record to support this contention; rather, Appellant relies on evidence attached to his previously-filed motion to abate to substantiate this argument.[2] However, "an appellate court may not consider factual assertions that are outside the record." *Jack v. State*, 149 S.W.3d 119, 121 n.1 (Tex. Crim. App. 2004) (per curiam); *see also Calhoun v. State*, No. 14-18-01066-CR, 2021 WL 1684024, at *2 (Tex. App.—Houston [14th Dist.] Apr. 29, 2021, pet. ref'd) (mem. op., not designated for publication) (in considering the appellant's request that the appeal be abated on grounds that she was not represented by counsel during the period for filing a new trial motion, we stated that we "may not consider factual assertions that are outside the record"). Accordingly, we cannot rely on this evidence to conclude that Appellant received ineffective assistance during the 30-day period to file a new trial.

However, as Appellant notes in his brief, the issues he seeks to develop can properly be raised in a post-conviction writ of habeas corpus. *See Jimenez v. State*, 240 S.W.3d 384, 413 (Tex. App.—Austin 2007, pet. ref'd) ("in most ineffective

[2] This court denied the motion on May 24, 2022.

assistance claims, a writ of habeas corpus is essential to gathering the facts necessary to adequately evaluate such claims"); *Pettway v. State*, 4 S.W.3d 390, 391 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (per curiam) (noting that an "appellant may raise the issue of ineffective assistance of counsel in a post-conviction habeas corpus"); *see also*, *e.g.*, *Ex parte Lalonde*, 570 S.W.3d 716, 724-26 (Tex. Crim. App. 2019) (analyzing in a habeas proceeding whether the State's failure to disclose certain evidence violated the appellant's right to due process of law).

Because the record does not show that Appellant was deprived of effective assistance of counsel during the 30-day period to file a new trial motion, we decline Appellant's request that we abate the appeal so he can pursue an untimely motion for new trial. We overrule Appellant's second issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Wise and Hassan.
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