Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00037-CR

Kevin Jon **WARNKEN**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 81st Judicial District Court, Atascosa County, Texas
Trial Court No. 19-02-0029-CRA
Honorable Russell Wilson, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: October 20, 2021

AFFIRMED

Kevin Jon Warnken appeals a judgment adjudicating guilt for aggravated assault with a deadly weapon and a judgment revoking community supervision for unlawful restraint, exposure to serious bodily injury. Warnken argues he received ineffective assistance of trial counsel. We affirm.

BACKGROUND

In February 2019, a grand jury indicted Warnken for aggravated assault with a deadly weapon and unlawful restraint, exposure to serious bodily injury. Pursuant to a plea bargain,

Warnken pled guilty to both counts; the trial court placed Warnken on deferred adjudication for the assault offense; and the trial court convicted Warnken of the unlawful restraint offense, sentenced him to ten-years confinement, and suspended his sentence. For both offenses, the trial court imposed conditions of community supervision.

In June 2019, the State filed motions to revoke Warnken's community supervision and proceed to an adjudication of guilt. The State alleged Warnken violated multiple conditions of his community supervision by, among other actions, fleeing from a peace officer, consuming alcohol, and failing to complete his community service hours. Warnken entered a plea of true to these allegations, but not true as to others. The State presented evidence regarding the allegations to which Warnken pled not true. After hearing the evidence and closing arguments, the trial court revoked Warnken's community supervision as to both offenses and pronounced a sentence of twenty-five years' confinement for the assault offense and ten-years' confinement for the unlawful restraint offense, to run concurrently. Warnken appeals the judgment adjudicating guilt and the judgment revoking community supervision.

INEFFECTIVE ASSISTANCE OF COUNSEL

Warnken presents two issues for appeal. In his first issue, Warnken contends he received ineffective assistance of counsel during the initial plea proceedings, which rendered his plea unknowing and involuntary. In his second issue, Warnken contends trial counsel was ineffective during the revocation proceedings.

A. Applicable Law and Standard of Review

"To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate two things: deficient performance and prejudice." *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). A defendant must show that: (1) his trial counsel's representation fell below the objective standard of reasonableness, and (2) a reasonable probability exists that but for

counsel's deficiency the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *see also Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986) (applying *Strickland* to an ineffective assistance claim under the Texas Constitution). A defendant bears the burden of proving both elements by a preponderance of the evidence. *Thomas v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* A court need not address both elements of an ineffective assistance of counsel claim when the defendant makes an insufficient showing as to either element. *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* When evaluating an ineffectiveness claim, courts consider the totality of the evidence. *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010).

B. Initial Plea Proceedings

In his first issue, Warnken argues he received ineffective assistance of trial counsel during the initial plea proceedings. However, "an appeal from a probation revocation does not include a review of the original conviction, but is limited to the propriety of the revocation." *Rojas v. State*, 943 S.W.2d 507, 509 (Tex. App.—Dallas 1997, no pet.); *see also Wright v. State*, 506 S.W.3d 478, 481 (Tex. Crim. App. 2016) ("The general rule is that an attack on the original conviction in an appeal from revocation proceedings is a collateral attack and is not allowed."). Accordingly, we overrule Warnken's first issue.

C. Punishment Phase of Revocation Proceedings

In his second issue, Warnken argues he received ineffective assistance of counsel during the revocation proceedings. As to the first element—deficient performance—Warnken alleges his counsel failed to: (1) object to evidence of his biker gang affiliations; (2) object to victim impact

testimony elicited from the victim's mother;[1] (3) allow Warnken to review the State's discovery file; (4) object to the State's exhibits; (5) further investigate Warnken's mental health; (6) move for recusal of the trial judge; and (7) introduce additional mitigating evidence. As to the second element—prejudice—Warnken does not explain in his appellate briefing, much less prove by a preponderance of the evidence, that a reasonable probability exists that, absent trial counsel's alleged errors, the outcome of the revocation proceedings would have been different.

We resolve Warnken's ineffective assistance claim based on the prejudice element. To establish the prejudice element, a defendant is required to prove that a reasonable probability exists that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.'" *Perez*, 310 S.W.3d at 894 (quoting *Strickland*, 466 U.S. at 694). It is not enough for the defendant to show that trial counsel's errors had "some conceivable effect" on the trial's outcome. *Perez*, 310 S.W.3d at 894. Instead, the defendant must show that there is a reasonable probability that, absent the errors, the proceedings would have turned out differently, resulting in a shorter sentence. *Strickland*, 466 U.S. at 694; *see also Glover v. United States*, 531 U.S. 198, 200 (2001) (holding an appellant establishes prejudice under *Strickland* if an increased prison term flowed from trial counsel's error).

[1] Warnken complains that the victim's mother should not have been allowed to testify because her testimony constituted an improper victim impact statement under former article 56.03 of the Texas Code of Criminal Procedure and she is not a victim of the crime. Former article 56.03 "authorize[d] the trial court to consider, before sentencing, the information provided in *written* impact statements, made on a form authorized by article 56.03, that the court has already received." *Aldrich v. State*, 296 S.W.3d 225, 259 (Tex. App.—Fort Worth 2009, pet. ref'd) (emphasis in original). In contrast, "victim-impact evidence may be admissible at the punishment stage of a criminal trial when that evidence has some bearing on the defendant's personal responsibility and moral culpability." *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002); *see also Brown v. State*, 54 S.W.3d 930, 932–33 (Tex. App.—Corpus Christi–Edinburg 2001, pet. ref'd) (holding testimony of a victim's mother regarding the impact the crime had on the victim is admissible during the punishment phase of the trial).

Because Warnken pled true to several violations of his community supervision, we review his complaints as they pertain to the punishment phase of the revocation proceedings. Warnken argues he would have received a shorter sentence had his trial counsel objected to certain evidence, moved to recuse the trial judge, and provided additional evidence regarding his mental health. Without citing any additional mitigating evidence that could have been presented to the trial court, Warnken also complains that his trial counsel did not provide enough mitigating evidence during the punishment phase of the proceedings.[2] Warnken fails to explain how, absent any of these alleged errors, there is a reasonable probability that Warnken would have received a shorter sentence.

Here, the trial court watched video evidence of Warnken fleeing from law enforcement in a high-speed chase. The trial court also saw pictures of the victim's injuries in the underlying offenses and heard testimony that Warnken has assaulted other people on two different occasions. When the trial court pronounced Warnken's sentence, it cited these instances when it concluded Warnken has a disregard for the safety of others, and "[he] can be very dangerous."

Considering the totality of the evidence, we conclude trial counsel's alleged errors do not undermine the confidence in the outcome of the revocation proceedings. Warnken has failed to prove a reasonable probability exists that, absent trial counsel's alleged errors, he would have received a shorter sentence for his offenses.[3] Accordingly, Warnken has not met his burden to prove the prejudice element and his claim of ineffective assistance of trial counsel must fail. *See Strickland*, 466 U.S. at 694–95; *Perez*, 310 S.W.3d at 897. We overrule Warnken's second issue.

[2] In addition to Warnken testifying on his own behalf, Warnken's trial counsel presented—as mitigating evidence—the testimony of: (1) Dr. Jo Ann Murphey; (2) Matthew Louderback; (3) Jeremy Watson; (4) Nelda Moore; (5) Christine Garison; and (6) Warnken's father, Kurt Gerald Warnken.

[3] Moreover, a ten-year sentence for the unlawful restraint offense had already been assessed in the initial plea hearing.

CONCLUSION

The judgments of the trial court are affirmed.

Irene Rios, Justice

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