# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-21-00165-CR

THE STATE OF TEXAS, APPELLANT

V.

DAVID DELCE, APPELLEE

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2018-414,636, Honorable John J. "Trey" McClendon III, Presiding

June 17, 2022

## MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

In this interlocutory appeal, the State of Texas appeals from the trial court's order granting the *Motion for New Trial* filed by Appellee, David Delce.[1] A jury convicted Delce of aggravated robbery, and the trial court pronounced sentence in open court upon that conviction. It subsequently granted him a new trial after concluding that defense counsel

[1] Pursuant to article 44.01 of the Texas Code of Criminal Procedure, following a trial on the merits, the State is entitled to appeal an order of a court in a criminal case if the order grants a new trial. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(3).

denied him effective assistance. Through its sole issue, the State argues that the court abused its discretion in so ruling because there was neither deficient performance nor prejudice. We reverse.

***Background***

The prosecution arose from the armed robbery of a game room. Two individuals committed it during the wee hours of the morning. Delce, an employee, was present when it occurred. Eventually, investigating officers interviewed him. During one such recorded interview, the topic of his submitting to a polygraph arose. The detective's explanation of the procedure and Delce's acknowledgments to the explanation were also recorded. The State wanted to play aspects of that exchange at trial but knew referencing a polygraph required redaction. So, efforts at redaction ensued. Their product, however, omitted certain pivotal contextual statements. Without them, one could interpret the doctored exchange as containing an omission by Delce that he knew the identity of the robbers. Defense counsel was afforded prior opportunity to review the redaction but passed on it. Not until the jury heard the clip did defense counsel realize he made a mistake in forgoing the opportunity. Effort to correct the circumstance soon followed. Their sum consisted of the trial court instructing the jury that the clip had been edited and admitting into evidence another redaction containing the prefatory statement needed to place Delce's response in proper context.

Defense counsel's failure to review the initial clip prior to its admission formed the basis of Delce's claim of ineffective assistance. He asserted the matter in a post-conviction motion for new trial, which motion the trial court granted.

***Law and Application***

We review a trial court's grant or denial of a motion for new trial under an abuse of discretion standard. *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016). It obligates us to afford the trial court wide latitude in determining factual issues. Thus, our obligation is to view the evidence in the light most favorable to its ruling and give almost total deference to its findings of fact. *Id.* So too must we defer to its credibility choices and presume that all reasonable fact findings in support of the ruling were made. *Id.* Yet, like deference is not afforded application of the law to those facts. The standard of review allows us to assess that de novo. *Diamond v. State*, 613 S.W.3d 536, 544–45 (Tex. Crim. App. 2020).

Next, to succeed on a claim of ineffective assistance, the complaint must establish, by a preponderance of the evidence, that counsel's performance was both deficient and prejudicial. *Prine v. State*, 537 S.W.3d 113, 116–17 (Tex. Crim. App. 2017); *Sauseda v. State*, No. 07-17-00100-CR, 2018 Tex. App. LEXIS 7811, at *3–4 (Tex. App.—Amarillo Sept. 25, 2018, no pet.) (mem. op., not designated for publication). The claim fails upon the failure to prove either. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010); *Bellar v. State*, No. 07-18-00059-CR, 2018 Tex. App. LEXIS 9383, at *4 (Tex. App.—Amarillo Nov. 16, 2018, pet. ref'd) (mem. op., not designated for publication). And, to be prejudicial, the deficiency at issue must give rise to a reasonable probability that, but for it, the result would have differed. *Bellar*, 2018 Tex. App. LEXIS 9383, at *4.

Our focus lies on the second element, that is, prejudice. Whether the circumstances illustrate it constitutes a question of law is reviewed de novo. *Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005) (stating that "[w]hile the ultimate

question of prejudice under *Strickland* is to be reviewed de novo, the trial court should be afforded deference on any underlying historical fact determinations"); *Baughman v. State*, No. 14-18-00009-CR, 2019 Tex. App. LEXIS 5265, at *15 (Tex. App.—Houston [14th Dist.] June 25, 2019, pet. ref'd) (mem. op., not designated for publication) (stating that "[w]e review de novo the trial court's ultimate decision on the prejudice prong of the *Strickland* test, while giving deference to the trial court's implied resolution of underlying factual determinations").

We begin with noting the general rule that the presence of substantially the same evidence admitted elsewhere at trial ameliorates harm arising from the improper admission of evidence. *Standerfer v. State*, No. 07-19-00257-CR, 2020 Tex. App. LEXIS 4355, at *2 (Tex. App.—Amarillo June 11, 2020, pet. ref'd) (mem. op., not designated for publication). Though *Standerfer* does not involve a claim of ineffective assistance, the reasoning underlying the rule nonetheless applies. Simply put, the effect of proving X through a mistake and proving it through a legitimate formula remains the same; X is proven. The X at bar consisted of illustrating that Delce knew who committed the robbery. According to Delce, it was mistakenly proven via defense counsel's failure to peruse the initial redacted clip prior to its admission into evidence. Yet, the State proved the same thing through cell phone records and evidence of the robber/acquaintance visiting Delce as the latter sat in jail.

To the foregoing, we add defense counsel conceding the issue of an acquaintanceship during closing argument. It occurred when arguing: (1) "[s]o [Delce] starts texting with Dexter [one of the robbers], which you saw from the stuff, ***they knew each other***"; (2) Delce "continued to keep in contact with Dexter and let him know he's

running late, and the State showed you all of those calls and texts and all that stuff"; (3) "[c]overed in masks and hoodies, [Delce] ***knew the voice of Dexter***" as the robbery transpired; (4) "[a]s soon as [Delce] left, angry and scared about being set up, [Delce] immediately tried to call Dexter several times"; and (5) Delce "didn't want to help the police." (Emphasis added). Now, Delce attempts to minimize the effect of defense counsel's argument. He does so by referring us to the trial court's instruction that "statements by lawyers [were] not evidence." In other words, defense counsel's utterances at closing should be trivialized because they are not evidence. We find the proposition somewhat ironic. Indeed, it is the State's reference to the video clip ***during its closing argument*** that he deems supremely harmful. We know of no rule that says detrimental statements uttered by the defense in closing must be afforded less impact than those of the prosecutor uttered in closing. Nor did Delce cite us to any such rule. As Bobby Rush sang in his blues tenor: "no matter where I'm going I won't ask ya where you been . . . she said . . . what's good for the goose is good for the gander too."[2] In the final analysis, we either assign weight to both arguments or to neither. If it is the latter, then Delce's claim of prejudice diminishes in like amount.

Finally, one must remember that the trial court admitted the second redaction. It provided the missing context of Delce's reply and clarified its substance. That, defense counsel's closing, and the other admissible evidence establishing the acquaintanceship between Delce and a robber lead us to our conclusion, as a matter of law. We find, under the uncontested historical facts, no reasonable probability that the result would have

[2] BOBBY RUSH, *What's Good for the Goose is Good for the Gander*, *on* WHAT'S GOOD FOR THE GOOSE IS GOOD FOR THE GANDER (Ardent Recording Studios 1985).

differed but for defense counsel eschewing the chance to review the clip before its admission.

Delce failed to carry the burden assigned one when claiming ineffective counsel. Thus, the trial court abused its discretion in granting the motion for new trial and erred. We reverse that decision and affirm the conviction for aggravated robbery and concomitant sentence pronounced in open court.

Brian Quinn
Chief Justice

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