In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00226-CR

DAVID ALAN ALFRED, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 80799-E-CR, Honorable Douglas R. Woodburn, Presiding

September 1, 2022

MEMORANDUM OPINION

Before QUINN, CJ., and PARKER and DOSS, JJ.

A jury found David Alan Alfred, appellant, guilty of aggravated robbery, a first-degree felony.[1] In three issues, appellant contends (1) he was denied effective assistance of counsel, (2) the court erred in denying his objection to the charge, and (3) he was denied his right to a fair trial. We affirm.

[1] *See* TEX. PENAL CODE ANN. § 29.03(a)(2).

BACKGROUND

The complainant, Oanh Nguyen, testified that she worked as a cleaner at an Amarillo business. One afternoon while she was cleaning the floor, appellant approached her, held a gun to her head, and told her to give him her money. Nguyen testified that appellant then took her purse, which held her money and her phone, and ran away. A nearby woman dialed 9-1-1 for her, and officers were dispatched to the location. Nguyen later identified appellant in a police line-up. Appellant was charged with aggravated robbery and tried by a jury, which found him guilty. After appellant pleaded true to the enhancement charge, the jury assessed punishment at twenty-seven years' imprisonment.[2]

ANALYSIS

Ineffective Assistance of Counsel

In his first issue, appellant maintains that he was denied effective assistance of counsel because his trial counsel failed to introduce any mitigating evidence during the punishment phase of trial. The record reflects that appellant's trial counsel presented no evidence during the punishment phase and that the only evidence offered by the State was the evidence of appellant's two prior convictions.

The right to reasonably effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI. To establish a claim based on ineffective assistance, an appellant must show that (1) his counsel's

[2] *See* TEX. PENAL CODE ANN. § 12.42(c)(1).

representation fell below the objective standard of reasonableness and (2) there is a reasonable probability that but for counsel's deficiency the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That is, an appellant must show that his trial counsel's performance was deficient and that he was prejudiced by the deficiency. *State v. Gutierrez*, 541 S.W.3d 91, 98 (Tex. Crim. App. 2017). There is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

The record must be sufficiently developed to overcome the strong presumption of reasonable assistance. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2002) (en banc). The lack of an explanation in the record on direct appeal for trial counsel's actions or inactions may preclude any valid consideration of whether counsel's performance was deficient. *Massaro v. United States*, 538 U.S. 500, 505, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).

Here, we are presented with a record that is silent as to why trial counsel failed to present any mitigating evidence in the punishment phase of trial. Because no motion for new trial was filed and no hearing conducted to develop counsel's trial strategy, the record is devoid of evidence of that strategy and the rationale that guided counsel's actions at trial. Moreover, appellant has not provided details or argument showing what mitigating evidence was available but not offered. Where the record is silent as to counsel's reasons for not offering evidence and where counsel's conduct could have been part of a reasonable trial strategy, we cannot conclude that the appellant has rebutted the presumption that trial counsel made his decisions in the exercise of reasonable

professional judgment. *See Garza v. State*, 213 S.W.3d 338, 347–48 (Tex. Crim. App. 2007); *Jones v. State*, 572 S.W.3d 841, 851 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *see also Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (en banc) (trial counsel not ineffective for not presenting more mitigating evidence in capital murder trial when defendant on appeal did not specify what evidence should have been presented). Accordingly, we cannot find counsel ineffective based on the asserted grounds. We overrule appellant's first issue.

Jury Charge Error

In his second issue, appellant contends that the trial court erred by denying his objection to the punishment charge. The charge to the jury required it to "assess defendant's punishment at confinement in the Texas Department of Criminal Justice, Institutional Division, for life or for any term of not more than ninety-nine (99) years or less than fifteen (15) years . . . ." During the charge conference, appellant objected to this language because it included the upper punishment limits of life and ninety-nine years at the beginning, suggesting a higher punishment range in the minds of the jurors. The trial court overruled appellant's objection.

We review alleged jury charge error in two steps: first, we determine whether error exists; if so, we then evaluate whether sufficient harm resulted from the error to require reversal. *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017); *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005) (en banc). Where, as here, the defendant preserved his complaint with a timely objection, jury charge error requires reversal if it caused "some harm" to the defendant. *Gonzalez v. State*, 610 S.W.3d 22,

27 (Tex. Crim. App. 2020); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Here, appellant pleaded true to the State's allegation that he had been convicted of another felony, burglary of a habitation, in 2007. Under the repeat felony offender statute, a defendant found guilty of committing a prior felony faces an increased punishment range. Section 12.42(c)(1) of the Texas Penal Code states the appropriate punishment range in terms of the maximum to the minimum, mandating that appellant be "punished by imprisonment . . . for life, or for any term of not more than 99 years or less than 15 years." TEX. PENAL CODE ANN. § 12.42(c)(1).

Appellant has provided no authority for the proposition that stating the upper limit of the punishment range before stating the minimum limit of the punishment range is erroneous. Furthermore, the language in the jury charge tracks the language of the statute. *See id*. "A jury charge which tracks the language of a particular statute is a proper charge on the statutory issue." *Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994) (en banc); *see also Morales v. State*, 357 S.W.3d 1, 5 (Tex. Crim. App. 2011) ("If a matter is contained within a relevant statute, the trial judge may appropriately instruct the jury on the wording of the statute."); *Hernandez v. State*, 340 S.W.3d 55, 61 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("As a general proposition, a jury charge that tracks the language of the relevant statute is sufficient and therefore not erroneous.").

Because the jury charge tracked the statutory language stating the appropriate range of punishment, we conclude that the trial court did not err in submitting the

complained-of charge to the jury. Having found no error, we need not analyze whether appellant was harmed. Appellant's second issue is overruled.

Motion for Mistrial

In his final issue, appellant asserts that he was denied his Sixth Amendment right to a fair trial when the trial court denied his motion for mistrial based on the trial court's interruption of defense counsel's closing argument. Appellant further argues that the trial court's comment was an improper comment on the weight of the evidence.

Appellant's complaint arises from statements made by the trial court during counsel's discussion of the evidence. Appellant's counsel emphasized that he, and not the State, had called Officer Jeremy Rios as a witness. Rios was the Amarillo Police Department's primary investigator on the case. Rios was quarantined due to COVID-19 exposure when the case was called for trial on Monday, September 27, 2021, and remained quarantined through the following day. On Tuesday, September 28, while the jury was out, the State informed the trial court of its intent to rest. The State declared that it was not going to call Rios. The trial court then indicated that Rios would be out of quarantine the following day and appellant's counsel stated that he "would prefer to have him live here tomorrow." The trial court then released the jury for the day. The next morning, the State announced that it rested, and appellant called Rios as a witness. During its cross-examination, the State elicited testimony from Rios that he was not called to testify on Monday or Tuesday because he had been in quarantine.

The complained-of statement by the trial court occurred during appellant's closing argument, as follows:

> Counsel: What does the Defense bring you? [. . .] What does he do? He brings you Officer Rios. Remember. That's not our witness. We get to cross. We get to lead. They didn't bring you their own cop. [. . .]
>
> Trial Court: I cannot let that stand. Officer Rios did not testify because he was under quarantine until this morning. That is the facts. So you may take that with it whatever you want to, but whether they would have called him or wouldn't have called him, I don't know. But that fact that he didn't testify was because he was under quarantine.
>
> Counsel: Thank you, Your Honor. And you saw Officer Rios show up in this courtroom and you saw these guys rest. They didn't call him. I did.
>
> State: Same objection, Your Honor.
>
> Trial Court: Yeah, I'll sustain your objection.

When the jury recessed, appellant's trial counsel moved for a mistrial, arguing that it was "highly improper, inappropriate for [the trial court] to interfere with the closing argument because I believe that it strikes at the heart of credibility and it was as though the Court took a personal position against Defense Counsel that they would miss – that the Defense would mislead the jury." The trial court denied appellant's motion.

We review the trial court's denial of a mistrial for an abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); *see also Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004) (when party fails to request curative instruction and requests only a mistrial, scope of review is limited to whether trial court erred in not granting mistrial). We will uphold the trial court's ruling on a motion for mistrial if the decision was within the zone of reasonable disagreement. *Archie*, 221 S.W.3d 699. A mistrial is appropriate only for highly prejudicial and incurable errors. *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003).

A trial judge must refrain from making any remark calculated to convey to the jury his opinion of the case. *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003). In addition, article 38.05 of the Texas Code of Criminal Procedure prohibits a trial judge from commenting on the weight of the evidence in criminal proceedings. TEX. CODE CRIM. PROC. ANN. art. 38.05. "The trial court improperly comments on the weight of the evidence if it makes a statement that implies approval of the State's argument, indicates disbelief in the defense's position, or diminishes the credibility of the defense's approach to the case." *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.). In addressing a complaint that the trial court impermissibly commented on the weight of evidence, courts tend to address whether the trial court's comments impermissibly tread upon a defendant's presumption of innocence. *See Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001).

Here, the trial court expressed dissatisfaction with appellant's characterization of Rios's absence and made a very brief statement explaining that Rios had been unavailable to testify earlier. Expressions of "impatience, dissatisfaction, annoyance, and even anger" do not demonstrate bias or impartiality. *Garcia v. State*, 246 S.W.3d 121, 147 (Tex. App.—San Antonio 2007, pet. ref'd). Judicial remarks that are critical of or hostile to counsel will not support a partiality challenge unless the comments display "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). The trial judge's actions taken as a whole do not show that he abandoned his neutral status. Thus, we cannot conclude that the statement demonstrated such favoritism toward the State as to deprive appellant of a fair trial.

We also disagree with appellant's related argument that the trial court's statement was an improper comment on the weight of the evidence. The trial court did not impart to the jury any information intended to shed light upon the merits of the issues. The comment was intended to clarify the reason for Rios's absence from trial. It is not improper for a trial judge to interject in order to correct a misstatement or misrepresentation of previously admitted testimony, to clear up a point of confusion, or to expedite the trial. *Jasper*, 61 S.W.3d at 421. Even if the trial court's comment was unnecessary, appellant has not shown that it was reasonably calculated to prejudice his rights or to benefit the State. *See Butts v. State*, No. 07-00-00299-CR, 2001 Tex. App. LEXIS 179, at *13–14 (Tex. App.—Amarillo Jan. 10, 2001, pet. denied) (per curiam). Therefore, we find no abuse of discretion in the trial court's denial of appellant's motion for mistrial. We overrule appellant's third issue.

CONCLUSION

For the reasons set forth above, we affirm the trial court's judgment.

Judy C. Parker
Justice

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