In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00012-CR

GARY CHRISTOPHER MORROW, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 336th District Court
Fannin County, Texas
Trial Court No. CR-13-24716

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Gary Christopher Morrow appeals his conviction of aggravated sexual assault,[1] for which he received a forty-year sentence.[2] He contends that (1) counsel was ineffective for failing to investigate facts that (a) could be used in mitigation of punishment and (b) could lead to a potential insanity defense, (2) the trial court erred in failing to conduct an informal competency evaluation on counsel's request, (3) the trial court erred in the admission of hearsay evidence during the guilt/innocence trial, and (4) the trial court erred in the admission of hearsay evidence of bad acts during the punishment trial.

We addressed each of these issues in detail in our opinion of this date on Morrow's appeal in cause number 06-15-00013-CR. For the reasons stated therein, we likewise conclude that error has not been shown in this case. We separately address, however, Morrow's ineffective assistance of counsel claim as it relates to the failure to investigate facts that could be used in mitigation of punishment. As in our opinion in cause number 06-15-00013-CR, and for the reasons articulated in that opinion, we conclude that counsel was deficient in his failure to make such an investigation.

We likewise conclude that Morrow was not prejudiced by counsel's deficient performance under the second prong of *Strickland*.[3] For the punishment phase, our inquiry is whether there is a

[1]*See* TEX. PENAL CODE ANN. § 22.021(West Supp. 2015).

[2]We address Morrow's related appeals from his convictions of (1) burglary with intent to commit a felony in our cause number 06-15-00013-CR; (2) aggravated assault with a deadly weapon in our cause number 06-15-00014-CR; (3) aggravated assault with a deadly weapon in our cause number 06-15-00015-CR; (4) aggravated assault with a deadly weapon in our cause number 06-15-00016-CR; and (5) aggravated kidnapping in our cause number 06-15-00017-CR.

[3]*See Strickland v. Washington*, 466 U.S. 668 (1984).

reasonable probability that the assessment of punishment would have been less severe in the absence of defense counsel's deficient performance. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Lair v. State*, 265 S.W.3d 580, 595 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). Prejudice is established if the probability that the outcome would have been different is "sufficient to undermine confidence in the outcome" of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

General factors to be considered in the evaluation of "whether a defendant has established *Strickland* prejudice during the punishment phase of non-capital cases as a result of deficient attorney performance of any kind" include whether the defendant received the maximum sentence, any disparity between the sentence imposed and the sentence requested by the respective parties, the nature of the offense charged and the strength of the evidence presented at trial, the egregiousness of the error, and the defendant's criminal history. *Lampkin v. State*, 470 S.W.3d 876, 922 (Tex. App.—Texarkana 2015, pet. ref'd). "Where deficient performance arises from counsel's failure to investigate and introduce mitigating evidence," we likewise consider

> the nature and degree of other mitigating evidence actually presented to the jury at punishment, . . . the nature and degree of aggravating evidence actually presented to the jury by the State at punishment, . . . whether and to what extent the jury might have been influenced by the mitigating evidence, . . . whether and to what extent the proposed mitigating evidence serves to explain the defendant's actions in the charged offense, and . . . whether and to what extent the proposed mitigating evidence serves to assist the jury in determining the defendant's blameworthiness.

Id.

Here, Morrow was sentenced to forty years' confinement for his conviction of aggravated sexual assault.[4] Neither the State nor Morrow argued for any particular sentence. This sentence is significantly less than the substantial sentence Morrow could have received for his violent crime.

The evidence shows that Morrow broke into the home of his estranged wife in the early hours of the morning—brandishing a gun and a knife—and threatened to kill her. He forced Gina and Marissa onto the outside porch, all the while pointing a gun at Gina. Morrow told Gina that he was going to kill her and kill himself. At that point, Marissa bravely stepped between Morrow and Gina and pleaded with Morrow not to kill her mother. Morrow did not react, other than to punch Gina with his fist. Morrow then told Gina to walk away from Marissa so that he could speak with Gina. Gina, fearful for her life, refused. Morrow then leaned over and whispered in Gina's ear, "I want you to suck my . . . ." Morrow was still pointing the gun at Gina, and told her that, if she did everything he asked of her, nothing bad would happen. Gina understood Morrow to mean that he would kill her unless she did everything that he told her to do. Morrow than told Gina to get in the truck, and although she tried to make excuses for refusing this directive, she ultimately got into the truck at gunpoint. Once inside the truck, Morrow again told Gina that, if she did everything she was told, nothing bad would happen. He then demanded that Gina perform oral sex on him. Gina begged Morrow not to have to do that, and stated that she was "thinking of all the ways that I [could] stay alive . . . I was fearful that now that I was away from Marissa, that he was going to kill me and that he was going to go back in and kill her and the kids." Gina,

[4]The punishment range for this first degree felony is imprisonment "for life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE ANN. § 12.32(a) (West 2011).

therefore, acceded to Morrow's demand.[5] When Morrow saw flashing police lights, he forced Gina from the truck, pointed the gun at her, and told her that he was going to kill her. Gina pleaded for her life, and Morrow ran off in the dark.

Clearly, the State's evidence developed at trial regarding the commission of aggravated sexual assault was strong. Such weighs against a finding of prejudice.

The egregiousness of the error is another factor we must weigh. This essentially means "the relationship between the amount of effort and resources necessary to have prevented the error as compared to the potential harm from that error." *Id.* at 919. One asserted failure of counsel is not obtaining Morrow's medical records, which were in possession of Parkland Hospital and the Medical Center of McKinney. Counsel could have easily obtained these records with a subpoena or a medical authorization signed by Morrow. Consequently, the effort and resources required to obtain this evidence was minimal. The records contained mitigating evidence, and were admissible.[6] This factor weighs in favor of a finding of prejudice.

Even though the records were not obtained and were not evaluated by an expert for possible trial testimony,[7] there was not a complete absence of mitigating evidence. Seven witnesses were called at the punishment trial on Morrow's behalf. These witnesses variously described Morrow as responsible, hardworking, and a good father. This mitigating evidence was slight, though, when

[5]Gina described the oral sex as Morrow's penis in her mouth.

[6]Article 37.07 of the Texas Code of Criminal Procedure allows for the introduction by either the State or the defendant of "any matter the court deems relevant to sentencing." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2015).

[7]Appellate counsel requested the appointment of an expert to evaluate Morrow's mental health records. The trial court denied that request.

contrasted with the aggravating evidence introduced by the State in the form of testimony from each of Morrow's three former wives. Each described Morrow—at least sporadically—as an abusive and violent person. One former wife described a particularly violent episode in which she was holding her three-year-old sick child when Morrow choked her, causing her to pass out. She later escaped Morrow by leaving their home through a window, as he had threatened to kill her. In addition to this testimony, there were other similar incidents of violent and abusive behavior described by these witnesses. The State also offered evidence of Morrow's criminal history, which was minimal, and did not include conviction of any felony offenses. These factors weigh in favor of a finding of prejudice.

To the extent possible, we are to likewise determine whether—and how much—the jury might have been influenced by the mitigating evidence. The jury may well have been influenced by this evidence, as it reveals a long and unfortunate history of depression, suicidal tendencies and attempts, as well as a dependence on alcohol. Beyond that, this evidence reveals a young Morrow who attempted to solicit medical help for what he perceived to be a "chemical imbalance," "Hi[gh]s" and "Lows," decreased appetite, weight loss, worry, and insomnia. Even as early as 1996, Morrow admitted to having problems with depression for most of his life. The evidence further reveals that Morrow never received any type of lasting medical or psychological help for his problems, which appeared to have grown increasingly onerous over time. There is a good chance the jury might have viewed this evidence, at least to some extent, as providing a useful and meaningful context in which to evaluate Morrow's actions in the charged offense. These factors weigh in favor of a finding of prejudice.

Given the overall more or less even balance of the factors analyzed, and in particular light of the fact that Morrorw did not receive the lengthy sentence authorized by statute for this violent offense, we cannot say there is a reasonable probability that the assessment of punishment would have been less severe in the absence of defense counsel's deficient performance. *See Wiggins*, 539 U.S. at 534. Accordingly, we overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: January 11, 2016
Date Decided: February 19, 2016

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