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

No. 06-15-00014-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-13-24718

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

Gary Christopher Morrow appeals his conviction of aggravated assault with a deadly weapon,[1] for which he received a twenty-year sentence.[2] He contends (1) that counsel was ineffective for failing to investigate facts that (a) could have been used in mitigation of punishment and (b) could have potentially supported an insanity defense; (2) that the trial court erred in failing to conduct an informal competency evaluation on counsel's request; (3) that the trial court erred in admitting hearsay evidence during the guilt/innocence phase of trial; and (4) that the trial court erred in admitting hearsay evidence of bad acts during the punishment phase of 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 have been 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 determine 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

[1]*See* TEX. PENAL CODE ANN. § 22.02(a)(2) (West 2011).

[2]We address Morrow's related appeals from his convictions of burglary with intent to commit a felony in our cause number 06-15-00013-CR, aggravated sexual assault in our cause number 06-15-00012-CR, two additional counts of aggravated assault with a deadly weapon in our cause numbers 06-15-00015-CR and 06-15-00016-CR, and aggravated kidnapping in our cause number 06-15-00017-CR.

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

a 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*, 466 U.S. at 694.

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 twenty years' confinement for his conviction of aggravated assault with a deadly weapon, a second degree felony.[4] Morrow's victim was his estranged wife, Gina Morrow. Neither the State nor Morrow argued for any particular sentence, and twenty years' imprisonment is the maximum sentence Morrow could have received for this crime. This factor weighs in favor of a finding of prejudice.

The State's evidence developed at trial regarding the commission of this crime was strong. These facts are discussed at length in our opinion of this date in cause number 06-15-00013-CR. This factor 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. Morrow's medical records 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. As previously discussed, the records contained mitigating evidence and were admissible.[5] This factor weighs in favor of a finding of prejudice.

[4]The punishment range for this second degree felony is imprisonment "for any term of not more than 20 years or less than 2 years." TEX. PENAL CODE ANN. § 12.32(a) (West 2011).

[5]Article 37.07 of the 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).

Yet, even though counsel failed to obtain and utilize Morrow's medical records, 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 contrasted with the aggravating evidence introduced by the State in the form of testimony from each of Morrow's three former wives. Each former wife described Morrow as a sporadically abusive and violent person. One former wife described a particularly violent episode in which she was holding her three-year-old child, who was sick, 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, the former wives described other similar incidents of violent and abusive behavior. The State also offered evidence of Morrow's criminal history, which was minimal and included no prior felony convictions. This factor weighs in favor of a finding of prejudice.

If possible, we are also to determine whether and to what extent the mitigating evidence (1) might have influenced the jury (2) serves to explain the defendant's actions in the charged offense, and (3) might have assisted the jury in assessing Morrow's blameworthiness. The jury may well have been influenced by this evidence, as it reveals a long and unfortunate history of depression, including several suicide attempts, as well as a long history of alcohol dependence. Beyond that, the evidence reveals that as a young man, Morrow sought medical help for what he described as a "chemical imbalance." He described his symptoms as highs and lows, decreased appetite, weight loss, worry, and insomnia. Even as early as 1996, Morrow admitted to having

had 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 would 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.

Although, on balance, the factors we have discussed weigh slightly in favor of a finding of prejudice, we cannot discount the fact that Morrow was tried for seven violent crimes in a single trial and was convicted of six of those crimes. *See* TEX. PENAL CODE ANN. § 3.02(a) (West 2011) (defendant may be prosecuted in single criminal action for offenses arising out of same criminal episode). And, although Morrow received the maximum sentence authorized by law for the offense, the sentence he received here was consistent with sentences he received in cause numbers 06-15-00017-CR (thirty years' imprisonment for aggravated kidnapping), 06-15-00016-CR (twenty years' imprisonment for aggravated assault with a deadly weapon), 06-15-00015-CR twenty years' imprisonment for aggravated assault with a deadly weapon), 06-15-00013-CR (twenty years' imprisonment for burglary of a habitation with intent to commit a felony), and 06-15-00012-CR (twenty years' imprisonment for aggravated sexual assault). Two of these offenses, cause numbers 06-15-00017-CR and 06-15-00012-CR, were first degree felonies with a punishment range of from five to ninety-nine years or life imprisonment. Accordingly, it is just as likely that the jury intended to impose consistent sentences in all of the offenses tried instead of simply imposing the maximum penalty available for this offense.

Also, Morrow did have the right, which was not exercised here, to a severance of the offenses. *See* TEX. PENAL CODE ANN. § 3.04 (West 2011). When we consider the sentence in this case in light of the sentences imposed in all seven cases, we cannot say to a degree beyond speculation or conjecture that the introduction of the proposed mitigating evidence would have influenced the jury's punishment verdict. *See Lampkin*, 470 S.W.3d at 918. Accordingly, Morrow has not established with any degree of reasonable probability that, given the fact that the jury found beyond a reasonable doubt that Morrow committed six different violent crimes, his sentence for this single offense 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.

Ralph K. Burgess
Justice

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

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