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

No. 06-17-00071-CR

CHRISTOPHER DALE JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 354th District Court
Hunt County, Texas
Trial Court No. 31461

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

MEMORANDUM OPINION

When Christopher Dale Jones attacked Jonathan Lewis in the darkened apartment of Jonathan's mother, Jonathan and his brother, Devon, wrestled Jones to the ground. After the lights came on, Latosha Johnson[1] alerted them that Jones had a knife, and they dislodged the knife from Jones' grasp. However, before the knife was removed from his possession, Jones managed to stab or cut Jonathan, Devon, and their mother, Katrina Lewis. As a result, Jones was charged in three separate cases for aggravated assault with a deadly weapon.[2] In the case appealed here, a Hunt County jury convicted Jones of aggravated assault with a deadly weapon, and sentenced him to fifty years' imprisonment for his assault on Jonathan.[3]

In a consolidated brief addressing all three appeals, Jones contends that the trial court erred in admitting a letter he sent to one of the victims and that he received ineffective assistance of counsel at trial. We find (1) that Jones did not preserve the complaint asserted on appeal regarding the admission of the letter and (2) that he has not shown that his trial counsel's assistance was ineffective. However, since the trial court erroneously assessed the fees of Jones' appointed counsel as costs, we will modify the trial court's judgment to remove the attorney fees assessment and affirm its judgment, as modified.

[1]Johnson is Jonathan and Devon's sister.

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

[3]In cases arising from the same incident, Jones was also convicted of two other counts of aggravated assault with a deadly weapon. Those convictions have also been appealed to this court and are addressed in opinions released the same date as this opinion in our cause numbers 06-17-00072-CR and 06-17-00073-CR.

I. Background

Jones and Katrina had been sharing an apartment for about three months before the night of the assaults. However, their relationship had soured, and about two weeks before the incident, Katrina had asked him to move out. Although he argued with her, Jones ultimately agreed he would move out of the apartment on November 1, 2016. On October 23, 2016, Katrina left the apartment around 4:45 p.m. to have dinner at Johnson's house, where she was joined by Jonathan and Devon. After dinner and an evening of family activities, Jonathan, Devon, and Johnson accompanied Katrina to her apartment, arriving shortly before midnight.

As they entered the apartment, it was dark, and Katrina went upstairs to turn on the breaker controlling the lights. Jonathan entered the apartment and went by a couch when he noticed a dark figure, who turned out to be Jones, coming at him. The two men began struggling, Devon joined the fray, and the two brothers shortly pinned Jones on the stairs. By that time, Katrina had turned on the lights, and Johnson alerted her brothers to the presence of the knife. While on the stairs, Jones told the brothers that, if they let him up, he would kill them. Meanwhile, Katrina came down the stairs, stepped over the men, and was stabbed in the back of her leg. The brothers managed to take the knife from Jones, and Devon remained on top of Jones until the police arrived. When Jonathan got up, he realized he had been stabbed in his side. After the police arrived, Devon got off of Jones and realized that he, too, had been cut on his hand.

In three separate cases, Jones was indicted for the aggravated assaults, with a deadly weapon, of Jonathan, Devon, and Katrina. The cases were consolidated for trial, and Jones was convicted on all three counts.

II. Jones' Evidentiary Complaint Was Not Preserved

In his first issue, Jones asserts that the trial court abused its discretion in admitting a letter[4] sent by him to Katrina because its probative value was substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. In his brief, Jones complains that State's Exhibit 13B should not have been admitted because it makes references to Jones having a drug and alcohol problem and to him using and selling "Meth or Ice."[5] Since these statements show extraneous bad acts or crimes, he argues, they would not be admissible under Section 404(b) of the Texas Rules of Evidence to prove his character and that he acted in accordance with that character on this occasion. *See* TEX. R. EVID. 404(b)(1). Thus, he reasons, this evidence was highly prejudicial

[4]Although Jones' issue complains of "certain letters" admitted by the trial court, his argument only addresses the trial court's admission of a single letter, State's Exhibit 13B. At trial, Jones made a global objection to additional letters sent by him to Katrina, State's Exhibits 13A, 13B, 14A, 14B, 15A, 15B, 16A, 16B, 17A, 17B, and 17C. The Texas Rules of Appellate Procedure require an appellant to present "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i); *In re Estate of Curtis*, 465 S.W.3d 357, 379 (Tex. App.—Texarkana 2015, pet. dism'd). "Bare assertions of error, without argument or authority, waive error." *Curtis*, 465 S.W.3d at 379 (quoting *McKellar v. Cervantes*, 367 S.W.3d 478, 484 n.5 (Tex. App.—Texarkana 2012, no pet.)). Jones has made no argument with appropriate citation to authority regarding any of these letters, except State's Exhibit 13B. Therefore, to the extent this issue seeks to complain of the admission of any letter besides State's Exhibit 13B, it is waived.

[5]The letter read:

> Sister Katrina,
> How are you? I pray that you're in the best of health spiritual[l]y, mental[l]y, and physical[l]y Me. [sic] I'm kool just missing you. For the past couple of days all I've been doing is thinking of you. It makes me happy when I think of the times when you had a smile, but it hurts when I think how it was cut short. Katrina I really cared for you. I still do. At the time I know I didn't love you right, but I was sick. I had a drug problem, alc[o]hol problem, and ego problem. It took me coming in here drying out to really see it. You really can't think when you're high. The same drug I was trying to sell, I was also using. I wanted to come to you, but I didn't know how, I was ashamed. Meth or Ice yes, I'm guilty. I'm so sorry Katrina. Anyway, I'm walking with God now.
> Isaiah 54 vs 17:
> No weapon formed against me shall prosper.
> P.S. Write Me.
> I miss you so much
> Pray for me; I pray for you everyday
> Chris.

because it had a tendency to suggest the jury made its decision on an improper basis, to confuse the issues, and to be given undue weight by the jury.

However, at trial, Jones initially objected to the admission of the eleven exhibits containing letters he sent to Katrina, stating, "They're highly prejudicial, more prejudicial than probative. They do not, in my opinion, bear a relationship to whether or not this event occurred." Regarding Exhibit 13B, the following exchange took place:

> THE COURT: So 13B, what is your objection to 13B?
>
> [Defense Counsel]: Well, Judge, you know, it doesn't say he's guilty of this offense. It just says, I'm guilty. So he could be guilty of a lot of different things. There is no context. And so, therefore, it's highly -- if he would have said, Ms. Lewis, I am guilty of stabbing you people, it would be one thing. He could be guilty of stealing from her, which has nothing to do with this.
>
> THE COURT: And then that would go to weight, not admissibility.
>
> [Defense Counsel]: Judge, we would say it's highly prejudicial, more prejudicial than probative of the offense and it should be kept out.
>
> THE COURT: And it also talks about him being violent towards her as well in this letter; is that correct? 13B.
>
> [State's Counsel]: Yes, I believe it is.
>
> THE COURT: All right. 13B will be admitted and 13A as well.

A "point of error on appeal must comport with the objection made at trial." *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *see Swain v. State*, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005). As stated in *Resendez v. State*, 306 S.W.3d 308 (Tex. Crim. App. 2009),

> Rule 33.1(a) of the Texas Rules of Appellate Procedure provides that a complaint is not preserved for appeal unless it was made to the trial court "by a timely request, objection or motion" that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court

> aware of the complaint, unless the specific grounds were apparent from the context."

Id. at 312 (quoting TEX. R. APP. P. 33.1(a)(1)(A)). "The purpose of requiring a specific objection in the trial court is twofold: (1) to inform the trial judge of the basis of the objection and give him the opportunity to rule on it; (2) to give opposing counsel the opportunity to respond to the complaint." *Id.* As explained in *Resendez*,

> Although there are no technical considerations or forms of words required to preserve an error for appeal, a party must be specific enough so as to "let the trial judge know what he wants, why he thinks himself entitled to it, and do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it."

Id. at 312–13 (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)).

Although Jones complained at trial that Exhibit 13B was more prejudicial than probative, he never advised the trial court how the exhibit was prejudicial, never complained of the references to using and selling drugs, and never objected that it contained impermissible character evidence. Since he did not do so, the trial court was deprived of the opportunity to do something about it. Likewise, the State was deprived of the opportunity to redact the objectionable statements or to offer a different ground for the admissibility of the exhibit. Therefore, because his complaint on appeal does not comport with his objection at trial, we find that Jones has not preserved this complaint for our review. We overrule his first issue.

III. Ineffective Assistance of Counsel Has Not Been Shown

In his second issue, Jones complains that his appointed trial counsel rendered ineffective assistance. Jones argues that his trial counsel's performance was deficient because he failed to request a mistrial under circumstances that would have entitled him to a mistrial. We disagree.

As many cases have noted, the right to counsel does not mean the right to errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*. 466 U.S. 668, 687–88 (1984); *see also Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009). The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. This requirement can be difficult to meet since there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "This measure of deference, however, must not be watered down into a disguised form of acquiescence." *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (finding ineffective assistance where counsel failed to request medical records and relied on court-appointed competency examination when he knew client had escaped from mental institution).

When a claim of ineffective assistance of counsel is raised for the first time on direct appeal, the record "is in almost all cases inadequate to show that counsel's conduct fell below an objectively reasonable standard of performance." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). Moreover, where the reviewing court "can conceive potential reasonable trial strategies that counsel could have been pursuing," the court "simply cannot conclude that counsel has performed deficiently." *Id*. at 103. When a defendant raises an ineffective assistance of counsel claim for the first time on direct appeal, he must show that, "under prevailing professional norms," *Strickland*, 466 U.S. at 690, no competent attorney would do what trial counsel did or no competent attorney would fail to do what trial counsel failed to do. *Andrews*, 159 S.W.3d at 102.

The second *Strickland* prong, sometimes referred to as "the prejudice prong," requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id*. Thus, in order to establish prejudice,

> an applicant must show "that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result was reliable." [*Strickland*, 466 U.S.] at 687 . . . . It is not sufficient for Applicant to show "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693 . . . . Rather, [he] must show that "there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." *Id.* at 695 . . . .

Ex parte Martinez, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).

The appellant has the burden to prove ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Allegations of ineffectiveness "must 'be firmly founded in the record.'" *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) (quoting *Thompson*, 9 S.W.3d at 813). The *Strickland* test "of necessity requires a case-by-case examination of the evidence." *Williams v. Taylor*, 529 U.S. 362, 382 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment)). A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003).

In this case, during voir dire, the State received no response when it asked whether any person on the jury panel knew any of the victims, naming each one. Well into the trial, when Katrina was testifying, one of the jurors notified the trial court that he knew her, and the following exchange took place:

[Juror Gavin]: I didn't recognize her name but I know her.

THE COURT: Does your knowledge -- will your knowledge of her, will that cause you to not be fair and impartial in this case?

[Juror Gavin]: No, ma'am.

THE COURT: Do you think you can set aside your outside knowledge of her and base this case solely on the testimony you hear in the trial?

[Juror Gavin]: Yes.

THE COURT: All right. Do you have any concerns about that at all?

[Juror Gavin]: No.

THE COURT: All right. Very good.

[Defense Counsel]: How does he know her?

THE COURT: How do you know her?

[Juror Gavin]: We used to work together at Wal-Mart.

THE COURT: Okay. Perfectly fine.

[Defense Counsel]: Never dated or anything or anything like that?

THE COURT: That's the only relationship you had with her, was she was a coworker?

[Juror Gavin]: (Nods head.)

THE COURT: All right. Thank you, sir. We'll proceed. Thank you for letting us know.

To be entitled to relief, such as a mistrial, when a juror withholds information during voir dire, the complaining party must show, at a minimum, that the information withheld by the juror

was material[6] and that the information was withheld despite the due diligence of the complaining party. *See Scott v. State*, 419 S.W.3d 698, 702 (Tex. App.—Texarkana 2013, no pet.) (citing *Franklin v. State* (*Franklin II*), 138 S.W.3d 351, 355–56 (Tex. Crim. App. 2004). When the information withheld is the juror's relationship to a party or a witness, to be material, the relationship must be one that has a tendency to show bias. *Id.* (citing *Franklin II*, 138 S.W.3d at 356); *see also Decker v. State*, 717 S.W.2d 903, 906–08 (Tex. Crim. App. 1983) (op. on reh'g.).

Jones argues that, when a juror withholds material information during voir dire, it hampers the parties' use of for-cause challenges and peremptory strikes, and the complaining party is entitled to a mistrial, citing *Franklin I*, 12 S.W.3d at 477–78. In *Franklin I*, as here, one of the jurors knew the victim, but only realized it when she saw the victim testify. *Id.* at 476. The juror told the trial court that she had a daughter in the same girl scout troop as the victim and that the juror was the troop's assistant leader. She said that she had not recognized the victim's name when asked during voir dire, but that she knew her when she saw her. The defendant requested that the trial court allow him to question the juror regarding her relationship with the victim and ask other specific questions designed to determine any potential bias or partiality of the juror, but the trial court refused, allowed the juror to remain, and denied the defendant's motion for a mistrial. *Id.* The Court of Criminal Appeals reversed the trial court, holding that the information withheld was material and that the trial court erred in denying the defendant the opportunity to question the juror. *Id.* at 478–79.

[6]The juror's good faith, i.e., whether he intentionally withheld the information, "is largely irrelevant when considering the materiality of the information withheld." *Franklin v. State* (*Franklin I*), 12 S.W.3d 473, 478 (Tex. Crim. App. 2000). There is no allegation in this case that the juror intentionally withheld that he knew Katrina.

Thus, *Franklin I* did not hold that the defendant was entitled to a mistrial solely because the juror withheld material information. Rather, the error was the trial court's refusal to allow the defendant the opportunity to question the juror to determine any bias or partiality on the part of the juror. In *Franklin II*,[7] the Court of Criminal Appeals explained that the relationship the juror had with the victim was one that could be considered almost a parental role, which had a tendency to show bias, yet the trial court denied the defendant "the opportunity to discover whether the relationship affected Franklin's right to a trial by an impartial jury." *Franklin II*, 138 S.W.3d at 355–56.

Neither of these factors are present in this case. First, the juror knew Katrina because they worked at the same place of employment at one time. Being an acquaintance with the victim through employment does not, in and of itself, tend to show bias, and therefore it is not material information. *See Decker*, 717 S.W.2d at 907. Further, unlike the defendant in *Franklin I*, Jones was allowed to question the juror. Even with his questioning,[8] no relationship was shown that would tend to show bias or partiality on the part of the juror. The juror denied that he was ever in a dating relationship with Katrina, and there is no evidence that they ever socialized outside of work. Therefore, the information withheld by the juror was not material. *Id.*

Since the information regarding the juror's relationship with Katrina was not material, Jones would not have been entitled to a mistrial, even if he had requested it. Further, "[a] mistrial is an extreme remedy that should be granted only if residual prejudice remains after less drastic

[7]In *Franklin I*, the Court of Criminal Appeals remanded the case to this Court to determine whether the trial court's error was harmful. *Franklin II* affirmed our determination that the error was harmful. *Franklin II*, 138 S.W.3d at 354.

[8]Jones does not assert that his trial counsel's questioning of the juror was deficient.

alternatives have been explored." *Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016) (citing *Ocon v. State*, 284 S.W.3d 880, 884–85 (Tex. Crim. App. 2009)). Even if Jones had shown a tendency for bias or partiality on the part of the juror, a less drastic alternative available to the trial court was to replace the juror with an alternate juror.[9] *See* TEX. GOV'T CODE ANN. § 62.020(d) (West 2013) (providing that "alternate jurors shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties"). Therefore, Jones has not shown that he would have been entitled to a mistrial. Consequently, he has not shown that his trial counsel's performance was deficient in failing to request a mistrial. We overrule Jones' second issue.

IV. The Judgment Must Be Modified

Because Jones was indigent, the trial court appointed counsel to represent him during trial and on appeal. Under Article 26.05(g) of the Texas Code of Criminal Procedure, a trial court has the authority to order the reimbursement of court-appointed attorney fees only if "the judge determines that a defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided . . . , including any expenses and costs." TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West Supp. 2017). "[T]he defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees" of legal services provided. *Armstrong v. State*, 340 S.W.3d 759, 765–66 (Tex. Crim. App. 2011) (quoting *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010)). Since there was no finding that Jones was able to pay them, the assessment of

[9]Two alternate jurors were chosen in this case.

attorney fees was erroneous. *See Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013); *see also Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010); *Martin v. State*, 405 S.W.3d 944, 946–47 (Tex. App.—Texarkana 2013, no pet.).

This Court has the power to sua sponte correct and modify the judgment of the trial court for accuracy when the necessary data and information are part of the record. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd) ("The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court."). Therefore, we modify the trial court's judgment by deleting the assessment of attorney fees.

For the reasons stated, we modify the trial court's judgment by deleting the assessment of attorney fees, and as modified, we affirm the trial court's judgment.

Ralph K. Burgess
Justice

Date Submitted: December 18, 2017
Date Decided: December 19, 2017

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