TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00571-CR

George Gary, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. D-1-DC-16-904036, HONORABLE KAREN R. SAGE, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant George Gary was convicted by a jury of possession with intent to deliver a controlled substance. *See* Tex. Health & Safety Code § 481.114(a), (c). He pled true to an enhancement allegation and was sentenced to five years in prison. The trial court entered judgment accordingly. In two issues, he argues that the trial court erroneously admitted hearsay testimony and that he received ineffective assistance of counsel. For the following reasons, we will affirm.

DISCUSSION

I. Hearsay testimony

In his first issue, Gary argues that the trial court erred in admitting State's Exhibits 13 and 14 because the exhibits, he contends, contained hearsay statements and violated his confrontation rights under both the state and federal constitutions.

During direct examination of an investigating officer assigned to the case, the State offered a copy of an excerpt of a recorded telephone call that Gary made from jail the day of his arrest. Defense counsel took the witness on voir dire, established that the call was between Gary and an unidentified individual, and made several objections:

Defense:	So is State's [Exhibit] 13, is that just [Gary] talking by himself or is he talking to someone?
Witness:	He's having a conversation with another gentleman.
Defense:	So that gentleman is on his call as well?
Witness:	Yes, sir.
Defense:	And that gentleman is discussing this case?
Witness:	They're making comments about what had happened, so I would say yes.
Defense:	Okay. I would object to hearsay. I would object to confrontation. And I object 403. I would ask the Court to conduct a hearing.
Court:	Objection is overruled. State's 13 is received.

The audiotape was then played for the jury.

We conclude that Gary's objection was not sufficiently specific to preserve his issue for review. This case is similar to *Whitaker v. State*, 286 S.W.3d 355, 369 (Tex. Crim. App. 2009), in which the court of criminal appeals held that a broad hearsay objection was insufficient to preserve the issue for review. In that case, like the present case, the State offered an audiotape of a conversation between the appellant and another individual. Defense counsel objected as follows:

> I'm going to object on two grounds: One, this is a conversation between Adam Hipp [sic] so I'm going to object. We object on hearsay, as well as Crawford, because it is testimonial. Even though he's laid a predicate for that tape to be offered, Adam Hipp is the one that has the conversation with him. . . . .

Id. at 368.

The court held that the hearsay issue was not preserved because the objection did not specify which portions of the audiotapes were objectionable. *Id.* at 369. The court observed that "[t]he trial court was not obligated to search through these audiotapes and remove all of the inadmissible references so that the recorded statements only contained the admissible evidence." *Id.* (quotations omitted); *see also Hernandez v. State*, 599 S.W.2d 614, 617 (Tex. Crim. App. 1980) (op. on reh'g) ("[W]hen evidence is admitted, a part of which is admissible and a part of which is not, it is incumbent on the party objecting to the admissibility of the evidence to specifically point out what part is inadmissible to preserve the alleged error . . . .").

In this case, although the scope of Gary's objection is unclear, the record suggests that he objected to admission of the entire exhibit because it contained possible hearsay statements by an unidentified person. *See* Tex. R. Evid. 801(d) (rule against hearsay). However, he did not contend at trial, and does not argue on appeal, that the exhibit does not contain at least some admissible testimony. *See id.* R. 801(e)(2)(A) (party-opponent admission is not hearsay). Therefore, he was required to specify which of the statements contained in the recording were objectionable, which he did not do. *See Whitaker*, 286 S.W.3d at 369; *Hernandez*, 599 S.W.2d at 617. He requested that the court "conduct a hearing," but did not specify for what purpose. And he does not challenge, on appeal, the trial court's refusal to hold a hearing or contend that, if given the

opportunity, he would have reviewed the tape and identified the objectionable statements. In fact, Gary has failed to specify the objectionable statements on appeal, arguing only that "[t]he statements by the unidentified person in the recordings was [sic] hearsay." The trial court was not required to review every statement by the unidentified declarant and determine which statements may have constituted inadmissible hearsay, nor is this Court on appeal. *See Whitaker*, 286 S.W.3d at 369; *Hernandez*, 599 S.W.2d at 617; *see also Richter v. State*, 482 S.W.3d 288, 298 (Tex. App.—Texarkana 2015, no pet.) (holding global hearsay objection to admission of recorded conversation between appellant and other individuals did not preserve error because recording contained some admissible evidence and appellant failed to specify objectionable portions of recording); *Mims v. State*, No. 03-13-00266-CR, 2015 WL 7166026, at *7 (Tex. App.—Austin Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication) (holding global hearsay objection to admission of victim's "workbooks" that contained some admissible evidence did not preserve error where appellant failed to specify objectionable portions). Because appellant failed to object to specific statements contained in the audiotape as hearsay, he failed to preserve his argument for review.

Gary also challenges the admission of State's Exhibit 14 on the same basis, which contains another excerpt of that same jailhouse call. However, he made no objection to the admission of that evidence at trial and thus waived that argument. *See* Tex. R. App. P. 33.1. Because he failed to preserve his first issue for review, it is overruled.

II. Ineffective assistance of counsel

In his second issue, Gary argues that he received ineffective assistance of counsel because defense counsel did not object to the admission of certain testimony elicited by the State at trial.

A. Ineffective-assistance standard

To prevail on a claim of ineffective assistance of counsel, an appellant must show by a preponderance of evidence that (1) his counsel's representation fell below the standard of prevailing professional norms and (2) there is a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Nava v. State*, 415 S.W.3d 289, 307-08 (Tex. Crim. App. 2013). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Mata v. State*, 226 S.W.3d 425, 428 (Tex. Crim. App. 2007).

An undeveloped appellate record will usually prevent the appellant from meeting the first *Strickland* prong, as the reasonableness of counsel's performance can be proven deficient only through facts that do not normally appear in the appellate record. *Id.* at 430. If counsel has not been afforded the opportunity to explain the reasons for his conduct, his behavior will not be found to have been deficient unless the challenged conduct was so outrageous that no competent attorney would have engaged in it. *Nava*, 415 S.W.3d at 308.

B. Gary has not demonstrated that he received ineffective assistance of counsel because the testimony of which he complains was admissible opinion testimony

Gary contends that defense counsel rendered deficient performance by failing to object to the admission of testimony provided by Jaime Carrillo, an officer with the Austin Police Department, regarding the odor of money and the significance of folded currency. Specifically, Officer Carrillo testified that he discovered a bucket containing a large amount of money in the trunk of the vehicle registered to Gary. Officer Carrillo explained that he believed that the money was authentic because it possessed a "distinct odor of money." He then testified that some of the bills in the bucket were folded and explained that "[i]t's common for someone who is in the narcotics business to fold money . . . to make it more concealable if it's on their person or in their hand primarily." Gary argues that the testimony was inadmissible because the State presented no evidence that Officer Carrillo was qualified to testify as to those matters "as an expert."

Gary cites no authority in support of his contention Officer Carrillo's testimony as to his opinions regarding the smell and appearance of the money he found in Gary's vehicle was inadmissible. *See* Tex. R. App. P. 38.1(i) (appellant's argument "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *see also Wolfe v. State*, 509 S.W.3d 325, 343 (Tex. Crim. App. 2017) (appellate court has no obligation to construct appellant's issues, facts, or arguments with appropriate citations to authorities and to the record). Even assuming that Gary sufficiently briefed his issue, we conclude that he has not demonstrated that counsel rendered deficient performance in failing to object to admission of that testimony.

1. Lay opinion testimony under Texas Rule of Evidence 701

Both lay and expert witnesses can offer opinion testimony. *Osbourn v. State*, 92 S.W.3d 531, 535 (Tex. Crim. App. 2001). A witness can testify in the form of an opinion under Rule 701 if the opinions or inferences (1) are rationally based on his perceptions and (2) are helpful to the clear understanding of the testimony or the determination of a fact in issue. *Id.* Perceptions refer to a witness's interpretation of information acquired through his or her own senses or experiences at the time of the event (i.e., things the witness saw, heard, smelled, touched, felt, or tasted). *Id.* The witness's testimony can include opinions, beliefs, or inferences as long as they are drawn from his or her own experiences or observations. *Id.* As a general rule, observations that do not require significant expertise to interpret and that are not based on a scientific theory can be admitted as lay opinions if the requirements of Texas Rule of Evidence 701 are met. *Id.* at 537.

A witness may offer such an opinion even when he has experience or training. *Id.* Even events not normally encountered by most people in everyday life do not necessarily require expert testimony. *Id.* The personal experience and knowledge of a lay witness may establish that he or she is capable, without qualification as an expert, of expressing an opinion on a subject outside the realm of common knowledge. *Id.*

2. Officer testimony was admissible lay opinion testimony

The State did not offer Officer Carrillo as an expert witness. However, his testimony as to the smell of money was rationally based on his perceptions and was helpful to understanding his testimony. *See id.* The court of criminal appeals has held that, "[w]hile smelling the odor of marihuana smoke may not be an event normally encountered in daily life, it requires limited, if any,

expertise to identify." *Id.* Given the ubiquity of money relative to that of marijuana, Officer Carrillo was free to testify that he identified the bills as money based on the odor he perceived. *See id.* Defense counsel thus did not render deficient performance in not objecting to that testimony. *See Burruss v. State*, 20 S.W.3d 179, 188 (Tex. App.—Texarkana 2000, pet. ref'd) ("The failure to object to admissible evidence is not ineffective assistance.").

Gary also fails to show that Officer Carrillo's testimony regarding the significance of the bills being folded was inadmissible. This Court confronted a similar issue in *Austin v. State*, 794 S.W.2d 408, 409-11 (Tex. App.—Austin 1990, pet. ref'd). In that case, a police officer testified that, based on his experience, the words "Swedish Deep Muscle Rub" posted in a massage parlor are often "key words" for prostitution. *Id.* at 409. The trial court admitted the testimony over appellant's objection that the State had not qualified the officer as an expert. *Id.* This Court concluded that the officer's testimony was admissible as opinion testimony under Rule 701. *Id.* at 410. We held that a witness may testify as to matters with which he has personal knowledge even though he may also be qualified to testify as an expert. *Id.* (holding testimony was admissible under Rule 701 and Rule 702, the rule governing admission of expert testimony).

Here, similarly, although Officer Carrillo had considerable experience as a narcotics officer, his testimony that drug dealers often fold money in order to conceal it was admissible as opinion testimony under Rule 701. The testimony was based on his personal observations as a police officer and did not concern a matter that required special expertise. *See id.*; *see also Reece v. State*, 878 S.W.2d, 320, 325 (Tex. App.—Houston [1st Dist.] 1994, no pet.) (police officer's testimony that actions he observed were consistent with someone selling drugs was admissible under Rule 701);

Williams v. State, 826 S.W.2d 783, 785 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (police officer could testify, as either a lay witness or an expert, that he interpreted the defendant's actions to be a drug transaction); *Williams v. State*, 760 S.W.2d 292, 296 (Tex. App.—Texarkana 1988, pet. ref'd) (officer's testimony about "the common use of vise grips to assist in stealing cars" was admissible under Rule 701 as lay opinion evidence based on officer's personal observations and experience as a police officer). Officer Carrillo's testimony as to the inference he drew based on the fact that the bills were folded was thus admissible under Rule 701. Because the admission of Officer Carrillo's testimony was not improper, defense counsel did not render deficient performance in not objecting to it. *See Strickland*, 466 U.S. at 690; *Burruss*, 20 S.W.3d at 188.

The appellate record does not affirmatively demonstrate that defense counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 690; *Mata*, 226 S.W.3d at 428. Gary's second issue thus is overruled.

CONCLUSION

We affirm the judgment of conviction.

_____

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: August 31, 2017

Do Not Publish