NUMBER 13-16-00250-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

FRANK CHARLES ELDRIDGE JR., Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 24th District Court
of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

By one issue, which we construe as two, appellant Frank Charles Eldridge Jr. appeals his conviction for aggravated assault with a deadly weapon, a second-degree felony, enhanced under the habitual felony offender statute. *See* TEX. PENAL CODE ANN. §§ 12.42(d), 22.02(a)(2) (West, Westlaw through Ch. 49, 2017 R.S.). Eldridge asserts that: (1) various structural errors existed when the trial court admitted testimony from

Angela Klawitter, M.D.; and (2) his trial counsel provided ineffective assistance. We affirm.

I. BACKGROUND

A Victoria County grand jury indicted Eldridge for: (1) one count of burglary of a habitation, with intent to commit a felony, a first-degree felony, *see id.* § 30.02(d) (West, Westlaw through Ch. 49, 2017 R.S.); (2) one count of burglary of a habitation, a second-degree felony, *see id.* § 30.02(c)(2) (West, Westlaw through Ch. 49, 2017 R.S.); (3) one count of aggravated assault causing serious bodily injury, a second-degree felony, *see id.* § 22.02(a)(1); (4) one count of aggravated assault with a deadly weapon, a second-degree felony, *see id.* § 22.02(a)(2); (5) one count of sexual assault, a second-degree felony, *see id.* § 22.011(a)(1) (West, Westlaw through Ch. 49, 2017 R.S.); and (6) one count of resisting arrest, search, or transportation, a Class A misdemeanor. *See id.* § 38.03 (West, Westlaw through Ch. 49, 2017 R.S.). The State further alleged in its indictment that Eldridge had been convicted of two prior felonies in 2000 and 2004. Before trial, the State abandoned the resisting arrest, search, or transportation charge. Eldridge pleaded not guilty to the remaining charges and was tried before a Victoria County jury.

Victoria Police Officer Francis Reyes testified that he responded to a call shortly after 5:00 a.m. on June 21, 2015 to a residence on Crockett Avenue. Once there, he came in contact with a woman who told the officer that her husband had detained someone in the kitchen of the residence. Once inside the residence, Officer Reyes observed a house in “complete disarray” and encountered an individual named John Kelly Demoney (Kelly) holding Eldridge in a headlock on the floor of the kitchen. Officer Reyes

told jurors that he perceived the scene to be “dangerous” and called for backup. Kelly told Officer Reyes that he did not want to release Eldridge because he was afraid that he would assault others. According to Officer Reyes, Eldridge was nude from the waist down. Officer Robert Nichols arrived a short time later to assist Officer Reyes in handcuffing Eldridge and taking him into custody. Officer Reyes testified that based on his experience, Eldridge’s behavior exhibited someone who was under the influence of either drugs, alcohol, or a combination of the two. Officer Reyes later made contact with fifty-seven-year old Deborah Demoney (Deborah), who lived at the Crockett residence and appeared to be bleeding from her eyes.

Deborah testified that she had known Eldridge for approximately fifteen years because he was a close friend of her now-deceased daughter, Janice. Deborah stated that after years of no contact, Eldridge unexpectedly appeared at her home on Crockett sometime in June 2015. Because of their prior relationship, Deborah allowed Eldridge to visit and stay in the home during the day, but she did not allow Eldridge to spend the night. On the evening of June 20, 2015, Deborah recalled that Eldridge left their home at approximately 10:30 p.m. that evening, and she turned in for the evening. Later, in the early morning hours of June 21, 2015, Deborah awoke to the sound of her locked exterior bedroom door, which led to her backyard, being opened and Eldridge appearing. Deborah told jurors that she asked Eldridge what he was doing at her home, and he told her, “Don’t worry about it.” According to Deborah, Eldridge then wandered around the house, and Deborah tried to stop him in order to protect her grandson, who was in the house. At that point, she again asked Eldridge what was wrong with him, causing him to “[double-up] his fists,” charge at Deborah, begin hitting her, and knocked her down to

the ground.

Jacob Demoney (Jacob), age seventeen at the time of trial, testified that he lived with his grandmother Deborah, his uncle Kelly, his nephew, and his brother. He recalled that he awoke the morning of June 21, 2017 from the commotion. Jacob heard Eldridge yell obscenities at Deborah and observed Eldridge begin to beat her up. Jacob testified that upon witnessing this, he woke up Kelly to help with the situation.

Deborah's personal physician Dr. Klawitter testified that she treated Deborah two days after the incident. Dr. Klawitter noted that Deborah suffered from numerous bruises around her eyes and face, and had trouble staying awake in her office as well as concentrating. Dr. Klawitter testified that Deborah suffered from a concussion as a result of this incident and opined that a concussion is the result of a "large amount of force" inflicted upon someone. According to Dr. Klawitter, Deborah suffered from some short-term urinary incontinence due to her head injury, and she also suffered from an eye condition, which required specialized care from an optometrist. Dr. Valerie Baker, an optometrist, testified that she treated Deborah shortly after the incident. Dr. Baker told jurors that her assessment of Deborah revealed that she suffered from an inflammation in her left eye, which affected her vision.

Eldridge did not testify and did not call any witnesses. After deliberations, the jury found Eldridge guilty of aggravated assault with a deadly weapon and acquitted him of the remaining charges. The trial court conducted a bench trial on the issue of punishment and found the State's enhancement allegations true. As a result, the trial court assessed Eldridge's punishment at life imprisonment with the Texas Department of Criminal Justice—Institutional Division. *See id.* § 12.42(d). This appeal followed.

II. Structural Error/Admissibility of Evidence

By the first part of his sole issue on appeal, which we treat as his first issue, Eldridge argues that Dr. Klawitter's testimony created various structural errors in his case requiring a new trial.

A. Applicable Law and Standard of Review

Structural errors (those which involve fundamental constitutional systemic requirements) are those which defy analysis by harmless error standards. *Mendez v. State*, 138 S.W.3d 334, 338 (Tex. Crim. App. 2004). More specifically, a structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 339 (citing *Johnson v. United States*, 520 U.S. 461, 468–69 (1997)); *see also Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The United States Supreme Court has found structural errors in limited types of cases, including: a total deprivation of the right to counsel, lack of an impartial trial judge, unlawful exclusion of grand jurors of defendant's race, violation of the right to self-representation at trial, violation of the right to a public trial, and an erroneous reasonable-doubt instruction to the jury. *See Mendez*, 138 S.W.3d at 340.

A "systemic requirement" (also known as an "absolute requirement or prohibition") is a law that a trial court has a duty to follow even if the parties wish otherwise. Any party that is entitled to appeal may complain on appeal that such a requirement was violated, even if the party failed to complain about the failure or waived the application of the law. *Id.*

The court of criminal appeals has held that a systemic, or absolute, requirement is one of the three distinct kinds of rules in our judicial system. *Id.* The second kind is a

"waivable right," which are rights that must be implemented by the system unless expressly waived. *Id.* And the third kind is a "forfeitable right," which are those rights of litigants which are to be implemented on request. *Id.* The requirements under Texas Rule of Appellate Procedure 33.1(a) regarding preservation of appellate error are not the same for presenting a complaint for appellate review for all of these kinds of rules. *Id.* at 341. "Except for complaints involving systemic (or absolute) requirements, or rights that are waivable only, which are not involved here, all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with Rule 33.1(a)." *Id.* at 342.

B. Discussion

Eldridge argues that various portions of Dr. Klawitter's unobjected-to testimony amounted to structural error and, because it was structural error his counsel was not required to object prior to its admissibility. We disagree.

Error regarding the erroneous admission of evidence, even error involving constitutional issues, is categorized as "trial error" rather than "structural error." *See Rey v. State*, 897 S.W.2d 333, 345 (Tex. Crim. App. 1995) (en banc). Furthermore, Eldridge does not direct us to any authority, and we find none, which elevates his complaints to systemic (or absolute) requirements, or waivable rights. As a result, we examine whether Eldridge properly preserved error regarding the admissibility of Dr. Klawitter's testimony for our review.

Generally, in order to preserve error for appellate review, a party must make a complaint to the trial court, which states the grounds for the ruling that the complaining party seeks and complies with the various procedural rules, and the trial court rules on

such complaint, or refuses to rule on such complaint. *See* TEX. R. APP. P. 33.1(a).

Eldridge's trial counsel failed to object to Dr. Klawitter's now-complained-about testimony at trial, and as a result, such complaint is waived. *See id.* Accordingly, we overrule Eldridge's first issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

By the second part of his first issue, which we construe as his second issue, Eldridge asserts that his trial counsel provided him ineffective assistance.

A. Standard of Review and Applicable Law

Ineffective assistance of counsel is established through the two-prong *Strickland v. Washington* test. 466 U.S. 668 (1984). The *Strickland* test considers: (1) whether counsel's representation fell below an objective standard of reasonableness; and (2) whether there is a reasonable probability that the result of the proceeding would have been different but for the attorney's deficient performance. *Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999) (citing *Strickland*, 466 U.S. at 694); *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi 2006, no pet).

Allegations of ineffectiveness must be "firmly founded in the record." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A "convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. We look to "the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel." *Thompson*, 9 S.W.3d at 813. Furthermore, if either prong cannot be proven, then an ineffective assistance of counsel claim fails. *See Strickland,* 466 U.S. at 697; *Andrew v. State*, 159

S.W.3d 99, 101 (Tex. Crim. App. 2005).

In evaluating the first prong of *Strickland*, counsel's competence is presumed and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action could not have been based on sound strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). "A vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id*.

B. Discussion

Eldridge argues that his trial counsel was ineffective because he failed to object to Dr. Klawitter's testimony, ask for a curative instruction, or move for a mistrial, which harmed him by causing the jury to lose their objectivity due to the "prejudicial and highly inflammatory nature of the testimony" that shifted the burden of proof to him, and tainted his right to remain silent. We disagree.

The record shows that the State introduced Dr. Klawitter's testimony, as Deborah's treating physician, to explain to jurors the extent of Deborah's injuries and what lasting effects resulted from these injuries. As stated, trial counsel is afforded a rebuttable presumption that his conduct was reasonable under prevailing norms and was the result of sound trial strategy. *See Kimmelman*, 477 U.S. at 384. Eldridge lays out the law accurately on this issue, but only puts forth bare conclusions about how his trial counsel was ineffective without more explanation as to how the representation was unreasonable

under prevailing professional norms and was not based on sound trial strategy. *See id.* As a result, we conclude that Eldridge failed to carry his burden under the first prong of *Strickland*. *See Strickland,* 466 U.S. at 697. We overrule Eldridge's second issue.

IV. Conclusion

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
20th day of July, 2017.