NO. 12-11-00347-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MICHAEL HOWARD BAKER, II, APPELLANT	***§***	***APPEAL FROM THE 217TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

After a guilty plea, Michael Howard Baker, II was convicted of theft and sentenced to two years of confinement. In one issue, Appellant argues that his trial counsel provided ineffective assistance. We affirm.

BACKGROUND

Appellant was indicted by an Angelina County grand jury for theft of more than $1,500 but less than $20,000. He pleaded guilty and the trial court conducted a hearing on punishment. On cross examination, Appellant acknowledged his two prior convictions for burglary of a building, one prior conviction for burglary of a habitation, one prior conviction for failure to stop and give information, and one prior conviction for unlawful carrying of a weapon. On redirect, Appellant testified about his successful completion of community supervision for the offense of theft by check. Appellant testified that he knew he was wrong for committing the crime he was charged with and asked to be placed on five years of community supervision. Appellant maintained throughout his testimony that he had a good work history and would be able to work while on community supervision in order to pay restitution in addition to providing for his wife and son.

After Appellant's testimony, the State called Rebecca Grove, who was a cousin of

Appellant's estranged wife, Hope. Grove testified that Appellant has a bad reputation for truthfulness in the community and that she witnessed Appellant threaten Hope. She also testified that Appellant had threatened her as well. Grove described a specific incident in September 2011 when Appellant and Hope were arguing and Appellant told Hope that "he would do 25 to life to kill her." The prosecutor played a recording of the argument over Appellant's objection.

Hope testified that Appellant had threatened her in the past and that she obtained a protective order against him after he struck her ear while taking their son to the hospital. After the assault, Hope lived with her mother. When asked about Appellant's employment history, Hope explained that Appellant had been unemployed for about six months prior to his arrest in the current case, that she was the primary breadwinner for the family, and that they were on food stamps when Appellant was unemployed.

Ultimately, Appellant was sentenced to confinement for two years.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his sole issue, Appellant argues that he received ineffective assistance of counsel at trial because his attorney did not request that the State give notice of its intent to offer evidence of extraneous offenses or bad acts pursuant to Texas Code of Criminal Procedure, Article 37.07.

Standard of Review

It is well settled that an accused has a right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984). The benchmark for judging any claim of ineffective assistance is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. ***Id.***, 466 U.S. at 686, 104 S. Ct. at 2064. We follow the standard set forth in ***Strickland*** to determine whether counsel was ineffective. ***Hernandez v. State***, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986).

To prevail on an ineffective assistance of counsel claim, an appellant must prove by a preponderance of evidence (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064; ***Thompson v. State***, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The first prong of the test requires a showing that counsel made errors so serious that counsel was not functioning as the counsel required by the Sixth Amendment, and that counsel's representation fell below an objective

standard of reasonableness. ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). The second prong requires a showing that counsel's errors were so serious as to deprive the appellant of a fair trial. ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. Simply put, the appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Tong***, 25 S.W.3d at 712; ***Thompson***, 9 S.W.3d at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Tong***, 25 S.W.3d at 712. If either prong of the ***Strickland*** test is not satisfied, we cannot conclude that the trial results were unreliable. *See* ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064.

When reviewing a claim of ineffective assistance of counsel for failure to request notice under Article 37.07, we must first determine whether the appellant was entitled to the notice. ***Jaubert v. State***, 74 S.W.3d 1, 2 (Tex. Crim. App. 2002); *see also* ***Loredo v. State***, 157 S.W.3d 26, 29 (Tex. App.—Waco 2005, pet. ref'd).

Applicable Law

The Texas Code of Criminal Procedure provides that at the punishment phase of a criminal trial, the State may introduce evidence of "an extraneous crime or bad act that is shown beyond a reasonable doubt." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West 2011). The attorney representing the State must give notice of the State's intent to introduce such evidence if the defendant makes a timely request for the notice. ***Id.*** at § 3(g). This notice must be given to the same extent and in the same manner as is required under Rule 404(b)[1] during the guilt/innocence phase of the trial. ***Worthy v. State***, 312 S.W.3d 34, 38 (Tex. Crim. App. 2010). The notice must include the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g). Article 37.07 and Rule 404(b) both guard against surprise and promote early resolution on the issue of admissibility of uncharged misconduct, conduct that the defendant would not otherwise know might be offered at trial, either during the guilt or punishment phase. ***Worthy***, 312 S.W.3d at 38-39.

Discussion

During the punishment hearing, Grove testified about an argument between Appellant and

[1] The relevant portion of Texas Rule of Evidence 404(b) provides that such evidence may be admissible for purposes other than showing character conformity, "provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction."

Hope. Grove testified, in part, that during the argument, Appellant told his wife that "he would do 25 to life" to kill her. The State then attempted to introduce a cell phone recording of the argument into evidence, and the following exchange occurred:

> Trial Counsel: Judge, at this point, I had no idea this existed until just now. I've had no opportunity to hear this, know anything about it, know what's coming on this at all. I mean, I would object to its admissibility at this point.
>
> Trial Court: On what basis?
>
> Defense Counsel: I did not have – I mean, one, I don't know that they've proven up the proper predicate for it; but, two, this is something I have had absolutely no chance to be prepared for at all. I've not heard it. I don't know what's about to come out. I mean, this is all first impression for me. I've never been afforded an opportunity to review it or anything. . . .
>
> Trial Court: Okay. I'm going to overrule the predicate objection.
>
> Prosecutor: And as to notice I assume you've overruled that as well?
>
> Trial Court: Unless there was something filed requiring that they disclose all the information they had.
>
> Prosecutor: There was not, Your Honor.
>
> Defense Counsel: There was not, Judge, because we did an open plea.

The trial court overruled defense counsel's objection and the cell phone recording was played.

Appellant argues that trial counsel's performance was deficient because he failed to request notice, pursuant to Article 37.07, of the State's intent to introduce evidence of extraneous bad acts. According to Appellant, this deficiency prevented him and his attorney from learning of the cell phone recording of the argument and constitutes ineffective assistance of counsel.

Appellant's argument presupposes that a request for notice pursuant to Article 37.07 would have required disclosure of the contents of the cell phone recording. We find no authority, nor does Appellant cite such authority, supporting a conclusion that he would have been entitled to disclosure of extraneous recordings under Article 37.07. Section 3(g) of Article 37.07 only requires the State to give notice of the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g). Therefore, Appellant has failed to show that his counsel would have been entitled to disclosure of the cell phone recording's contents if he had requested the notice available under Article 37.07.

Because Appellant would not have learned of the cell phone recording if his counsel had requested notice under Article 37.07, he has not established that his trial counsel's failure to request the notice was deficient performance. Consequently, Appellant has not satisfied the first prong of ***Strickland***. Accordingly, we overrule Appellant's sole issue.

DISPOSITION

The judgment of the trial court is ***affirmed***.

SAM GRIFFITH
Justice

Opinion delivered June 20, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JUNE 20, 2012

NO. 12-11-00347-CR

MICHAEL HOWARD BAKER, II,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeals from the 217th Judicial District Court of
Angelina County, Texas. (Tr.Ct.No. CR-30336)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**; and that this decision be certified to the trial court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.