

NO. 12-16-00014-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*CARL ANTHONY WILSON,
APPELLANT*

§ *APPEAL FROM THE 114TH*

V.

§ *JUDICIAL DISTRICT COURT*

*THE STATE OF TEXAS,
APPELLEE*

§ *SMITH COUNTY, TEXAS*

MEMORANDUM OPINION

Carl Anthony Wilson appeals from his conviction for driving while intoxicated. In one issue, he contends that he received ineffective assistance of counsel at trial. We affirm.

BACKGROUND

Deputy Jason Railsback with the Smith County Sheriff's Office stopped Appellant for speeding. He testified that Appellant's vehicle smelled of alcohol, his speech was slurred, he had difficulty forming concise sentences, he appeared nervous, and he had glassy, bloodshot eyes. Railsback conducted field sobriety tests, which indicated that Appellant was intoxicated. A blood test revealed that Appellant's blood alcohol ratio was two times the legal limit, at 0.153. Appellant pleaded "not guilty" to felony driving while intoxicated. The jury found Appellant guilty and assessed punishment of imprisonment for sixty years.

INEFFECTIVE ASSISTANCE

In his sole issue, Appellant contends that trial counsel rendered ineffective assistance by failing to object to the State's closing argument during the punishment phase of trial.

Standard of Review and Applicable Law

An appellant complaining of ineffective assistance must satisfy a two-pronged test. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also*

Tong v. State, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). Under the first prong, the appellant must show that counsel’s performance was “deficient.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Tong*, 25 S.W.3d at 712. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. The appellant must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.*, 466 U.S. at 688, 104 S. Ct. at 2064; *Tong*, 25 S.W.3d at 712. Absent evidence of counsel’s reasons for the challenged conduct, we assume a strategic motivation if one can be imagined, and we will not conclude that challenged conduct is deficient unless it was so outrageous that no competent attorney would have engaged in it. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

Under the second prong, an appellant must show that the “deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Tong*, 25 S.W.3d at 712. Prejudice requires a showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Tong*, 25 S.W.3d at 712. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Tong*, 25 S.W.3d at 712. The appellant must establish both prongs by a preponderance of the evidence or the ineffectiveness claim fails. *Tong*, 25 S.W.3d at 712.

Review of trial counsel’s representation is highly deferential. *Id.* We indulge a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. The appellant bears the burden of overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*; *Tong*, 25 S.W.3d at 712. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). The record on direct appeal is rarely sufficiently developed to fairly evaluate a claim of ineffectiveness. *Id.* at 833.

Facts

During closing arguments, the State made the following comments:

In this case, if you assess a life sentence like we’re asking, then after 15 years, he would be eligible for parole. And if he made parole, he would be on parole for the rest of his life. If you give

him 60 years, he'll be eligible for parole at 15. And if he made parole, then he would be on parole until his 60-year sentence is done, whenever he's released. Similarly, whatever sentence you give, if he's eligible for parole and makes parole, then he'll be on parole until the sentence is completed.

...

If [defense counsel's] argument is correct that when [Appellant's] on parole he's not committing more crimes, then I think we would want him on parole for the rest of his life, because it's working.

....

If you give him a life sentence, he's eligible at 15 years. But if he ever gets parole and gets out, we know for sure somebody's going to be supervising him every single day for the rest of his life, and that's the best you can do to make him stop.

Appellant's trial counsel did not object to the State's argument.

In the punishment charge, the trial court instructed the jury as follows:

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or 15 years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

It cannot be accurately predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

The charge also instructed the jury that "[s]tatements made by the lawyers are not evidence."

Analysis

A jury is entitled to consider the existence of parole law when assessing punishment. TEX. CODE CRIM. PROC. ANN. art. 37.07 § 4 (West Supp. 2016). A prosecutor may accurately restate the law given in the jury charge, including parole law, or ask the jury to consider that law

when assessing punishment. *Hawkins v. State*, 135 S.W.3d 72, 84 (Tex. Crim. App. 2004). “[T]he jury is simply prohibited from considering how parole law and good time would be applied to a particular defendant.” *Id.*; TEX. CODE CRIM. PROC. ANN. art. 37.07 § 4. Whether improper jury argument is harmful at the punishment phase of trial depends on the following factors: “(1) the severity of the misconduct (prejudicial effect), (2) curative measures, and (3) the certainty of the punishment assessed absent the misconduct (likelihood of the same punishment being assessed).” *Hawkins*, 135 S.W.3d at 77.

Assuming, without deciding, that the State’s argument was improper and trial counsel was deficient by failing to object, Appellant has not shown that such performance prejudiced his defense. See *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; see also *Tong*, 25 S.W.3d at 712. The majority of the State’s argument focused on Appellant’s eligibility for parole under various scenarios, as opposed to speculating about when Appellant might actually be paroled. See *Taylor v. State*, 233 S.W.3d 356, 359 (Tex. Crim. App. 2007); see also *Spencer v. State*, 460 S.W.3d 180, 187 (Tex. App.—Eastland 2015, pet. ref’d). The trial court instructed the jury in accordance with article 37.07 and further instructed that the attorneys’ arguments are not evidence. We presume the jury followed the trial court’s instructions, and the record does not indicate otherwise. See *Resendiz v. State*, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003).

Additionally, when assessing Appellant’s punishment, the jury could consider both evidence admitted at the guilt phase of trial and evidence of Appellant’s prior criminal history, which included convictions for possession of marijuana, burglary of a habitation, and burglary of a vehicle. See *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999); see also *Rayme v. State*, 178 S.W.3d 21, 27 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d); TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3. Thus, even without the State’s argument, the jury could have found that a sixty-year sentence is justified. Notably, the jury did not assess the life sentence requested by the State.

Under the circumstances of this case, we conclude that any improper argument by the State with regard to parole law was harmless. See *Hawkins*, 135 S.W.3d at 77. Appellant has failed to demonstrate a reasonable probability that, but for trial counsel’s failure to object to the State’s argument, the result of Appellant’s punishment proceeding would have been different. See *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; see also *Tong*, 25 S.W.3d at 712. We overrule Appellant’s sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we *affirm* the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered September 21, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

SEPTEMBER 21, 2016

NO. 12-16-00014-CR

CARL ANTHONY WILSON,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 114-0948-15)

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 court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.