Affirmed and Opinion filed January 20, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01377-CR

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RICK A. MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 85th District Court
Brazos County, Texas
Trial Court Cause No. 25,728-85

O P I N I O N

Appellant, Rick A. Martinez, was charged with and pled guilty to the felony offenses of aggravated kidnaping, aggravated sexual assault, and unauthorized use of a motor vehicle. His punishment was assessed by a jury at twenty years confinement and $10,000 fine for the aggravated kidnaping, twenty years confinement and $10,000 fine for the aggravated sexual assault, and two years confinement and a $2,000 fine for the unauthorized use of a motor vehicle. He raises five issues on this appeal: (1) his pleas were involuntary and violated his due process and due course rights because the trial court failed to admonish him of the deportation consequences of his guilty pleas; (2) his substantial rights were violated

because the trial court failed to admonish him of the deportation consequences of his guilty pleas; (3) he was egregiously harmed when the trial court included an erroneous parole instruction in the jury charge; (4) he was denied effective assistance of counsel; and (5) the evidence was factually insufficient to show he threatened the complainant with deadly force or used or exhibited a knife as a deadly weapon. The judgment of the trial court is affirmed.

VOLUNTARINESS OF GUILTY PLEAS

In his first two issues, appellant points out that the trial court was required under TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 1999)[1] to admonish appellant that if he were not a United States citizen, his guilty pleas could result in deportation. He asserts that because the court did not advise him of these consequences, his pleas were not voluntary because he could not have fully appreciated the or understood the consequences of those pleas. The State does not contend the admonishment was given.

Appellant is correct in stating the admonition is mandatory and the trial court erred in failing to provide it. *Morales v. State*, 872 S.W.2d 753, 754-55 (Tex. Crim. App. 1994).

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[1] Article 26.13 states, in pertinent part:

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

(4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.

(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

Where a court has failed to admonish a defendant under Article 26.13, we conduct our harm analysis under TEX. R. APP. P. 44.2(b) to determine whether the error affected a substantial right. *Carranza v. State*, 980 S.W.2d 653, (Tex. Crim. App. 1998). In evaluating appellant's showing of harm, we may not require him to show more than that he was unaware of the consequences of his plea and the trial court's admonishments misled or harmed him. *See Carranza*, 980 S.W.2d at 658; *see also* TEX.CODE CRIM.PROC.ANN. art. 26.13(c) (Vernon 1989).

In *Carranza*, the court held the failure to admonish that defendant of deportation consequences affected a substantial right of that defendant because he affirmatively showed he was a citizen of Mexico and that he was in the United States illegally because his green card had expired. Because of his status, that defendant affirmatively showed he was subject to deportation. *Id*. at 658. Conversely, in *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997), the court held that where the record reflected the defendant was a U.S. citizen, the court's failure to admonish him concerning the deportation consequences of his plea was harmless error. *Id*. at 264.

In this case, to establish he was subject to deportation and thus harmed, appellant relies solely on his statement at the punishment phase that he was born in Durango, Mexico. However, also in the record is appellant's own booking slip dated October 8, 1998, which reflects his "Place of Birth" as "Fresno, CA." Also there in the record is appellant's criminal history showing his birthplace as "California." The record further reflects appellant came to the U.S. when he was two months old and has spent the remainder of his life here.

Appellant's uncorroborated bare statement he was born in Durango, Mexico does not affirmatively establish he was subject to deportation. This is especially so in light of other evidence in the record showing him to have been born in the U.S. and thus a U.S. citizen. Standing alone, even the fact of a foreign birth does not per se show lack of U.S. citizenship. Appellant also fails to provide any evidence he was unaware of the consequences of his plea. Appellant's first issue is therefore overruled.

PAROLE INSTRUCTION

Next, appellant contends he was egregiously harmed when the trial court included an erroneous parole instruction in his charge. Specifically, the charge read:

> Under the law applicable, 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-half of the sentence imposed or thirty (30) years, whichever is less, without consideration of any good conduct time he may earn.

(Emphasis added.)

Appellant correctly states the charge given by the trial court was erroneous because the instruction required under TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 does not include the "plus any good time earned" language.[2]

Trial counsel failed to object to this instruction. Therefore, our standard of review is pursuant to *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984) (op. on reh'g). Under the *Almanza* standard, the charge error must be fundamental and constitutes reversible error only if it is so egregious and created such harm that the defendant did not have a fair trial. Moreover, the actual degree of harm must be determined in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *Id.* at 171. *See* TEX. R. APP. P. 44.2(b) (requiring affect of substantial right.)

Appellant does not offer argument or evidence pertaining to harm in light of the *Almanza* factors. Rather, he speculates that as a result of this error, he was egregiously harmed because the jury incorrectly understood he would become eligible for parole when his actual time served plus his good time equaled one-half of his sentence, when in fact he would not become eligible for parole until his actual time served equaled one-half of his sentence. As proof the jury heeded the erroneous charge, appellant notes that he asked the jury for a suspended sentence of "no more than ten years" and the state asked for forty years

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[2] Art. 37, § 4 states:

> Under the law applicable to this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn.

on the aggravated kidnaping and sexual assault charges. The actual sentence imposed by the jury was twenty years. Because of this, he contends, the jury "obviously" doubled his request and "split the difference" with the State.

While it is possible the jury considered the erroneous instruction, appellant's contentions how the jury reached its verdict are wildly speculative and logically suspect. The method used by the jury in assessing punishment is far from "obvious," as appellant argues.

In considering both the *Almanza* factors and appellate rule 44.2(b), we observe the erroneous language is negated or mitigated by the later portion of the charge informing the jury the determination is made "without consideration of any good conduct time [appellant] may earn." Further, courts are to presume that juries follow the judge's instructions about not considering parole. *Myers v. State,* 866 S.W.2d 673, 674 (Tex. App.–Houston [1st Dist.] 1993, writ ref'd). Absent indications to the contrary, the presumption prevails. *Clayton v. State,* 767 S.W.2d 504 (Tex. App.–Amarillo 1989, writ ref'd).

The probative evidence against appellant was powerful and largely undisputed. He pled guilty to crimes involving sexual assault, kidnaping and theft which involved his use of deadly force against a helpless and terrified young woman. Despite this, the jury only assessed a fraction of the sentence it was authorized to.

The State did not mention the parole instruction during closing arguments. During Appellant's close, his counsel informed the jury that appellant "before even becoming eligible for parole, will have to do one half of his sentence," thus leaving the jury with the *correct* standard.

In light of the above factors, appellant has not shown either he was egregiously harmed under *Almanza* or that the error affected a substantial right under 44.2(b) by the surplus language in the charge. The issue is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant next argues he was denied effective assistance of counsel because trial counsel (1) failed to object to the court accepting appellant's guilty pleas without admonishing him of the immigration consequences; and (2) failed to object to the erroneous parole instruction in the charge.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992), *cert. denied*, 113 S.Ct. 3062 (1993).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670.

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App.1994)(en banc). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id*. In *Jackson*, the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *Id*. at 772. *See also Jackson v. State*, 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

Appellant did not file a motion for a new trial, and therefore failed to develop evidence of trial counsel's strategy. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial).

Here, the record is silent as to the reasons appellant's trial counsel chose the course he did.

Apart from this, the record does indicate trial counsel acted as a competent lawyer and that based on the totality of his representation, his assistance was effective. Despite the abhorrent crimes appellant was charged with, counsel was able to make an agreement with the State that the worst punishment it would request would be forty years. Further, he was able to convince the jury to assess just half the sentence the State asked for. Counsel called several character witnesses and had a psychologist testify about appellant's state of mind during the offenses. He effectively cross-examined the complainant and State's witnesses and made numerous appropriate objections to their testimony.

The first prong of *Strickland* has not been met. *Jackson*, 973 S.W.2d at 957. Due to the lack of evidence in the record concerning trial counsel's reasons for these alleged acts of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. *Id.*[3]

Even if this record rebutted the *Strickland* presumption of sound trial strategy, appellant has not demonstrated that trial counsel's performance prejudiced the defense. There was more than sufficient evidence to justify the jury's punishment. Thus, appellant has not shown a reasonable probability that but for counsel's alleged unprofessional performance, the result of the proceeding would have been different. *Strickland*, 104 S.Ct. at 2064. Therefore, appellant has not met the second prong of the *Strickland* test. This issue is overruled.

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[3] We note that counsel may not have objected to the trial court's failure to admonish defendant about deportation simply because he had reason to believe appellant would not be in jeopardy of deportation.

FACTUAL SUFFICIENCY

Lastly, appellant contends the evidence was factually insufficient to show he threatened the complainant with deadly force or used or exhibited a knife as a deadly weapon.

The facts at trial showed that appellant was complainant's boss and a friendly acquaintance. He lured her up to his apartment by telling her she had a phone call. There, he came up behind her covered her mouth and nose, then brandished a knife in her face. Appellant told complainant he needed her car and she told him, "that he could take my car and that I just didn't want him to hurt me." He tied her up with duct tape, then forced her to get on the floor and got on top of her. He cut her panties with the knife, ripped them off, and tried to rape her. He was able to penetrate complainant with his finger but not his genitals. When she continued to resist, he put the knife on her arm and said, "Don't make me hurt you." When complainant was asked at trial if she thought he would hurt her, she replied, "Well, I thought he would hurt me; but I didn't think he would kill me. I don't think he – I wasn't really afraid at that point." Complainant gave up on trying to rape her, taped her legs, forced her in the closet, and stole her car. At trial, a law enforcement officer testified, without objection, that the knife used in the commission of these acts was capable of causing death or serious bodily injury, thus a deadly weapon. Appellant testified that he did not remember using a knife during the commission of the offenses, however, he nonetheless pled guilty to using the knife in the commission of the offenses.

In reviewing factual sufficiency, we must view all the evidence without the prism of "in the light most favorable to the prosecution," and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex.Crim.App.1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App.1996). The court of criminal appeals has discussed three major principles to guide courts of appeals when conducting a factual sufficiency review. *See Cain*, 958 S.W.2d at 407. First, we must observe the principle of deference to jury findings. The jury is the judge of the facts, and an appellate court should only exercise its fact jurisdiction to prevent a manifestly unjust result. *Id.;* TEX.CODE CRIM. PROC. ANN. art. 36.13 (Vernon 1981) and art. 38.04 (Vernon 1979)*; Clewis*, 922 S.W.2d at 135. Second, "when a court of appeals

reverses a lower court decision on factual sufficiency grounds, it should ... clearly state why the jury's finding is factually insufficient ... as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias." *Cain*, at 407. Finally, in reviewing for factual sufficiency, we review all the evidence. *Id.; Clewis*, at 129.

In our case, appellant undisputedly used a knife on complainant to abduct her, tie her up, sexually assault her, and steal her car. She was clearly afraid of being seriously injured, as would any normal person in her position. This is evident by the fact that she submitted to appellant's every demand except in her refusal to allow him to penetrate her. Appellant's noting that complainant was not afraid of appellant at one point in the attack does not go far in surmounting the otherwise powerful contrary evidence establishing that he threatened appellant with deadly force and used or exhibited a deadly weapon against her in commission of the crimes to which he pled guilty. The evidence is sufficient to sustain the verdict. Appellant's factual sufficiency issue is overruled.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed January 20, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).