Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00544-CR

WILLIE WRIGHT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 801,519

O P I N I O N

Willie Wright (Appellant) was indicted for the felony offense of aggravated robbery. He pleaded not guilty and was tried before a jury. The jury convicted Appellant and sentenced him to twelve years' imprisonment. On appeal to this Court, Appellant assigns one point of error, contending that he received ineffective assistance of counsel because his trial counsel failed to object to hearsay testimony introduced by the State. We affirm.

BACKGROUND

Early one morning, while riding their bicycles, Appellant and his co-defendant approached two

persons who had just left a restaurant and were walking toward their automobile. Appellant and his co-defendant dropped their bicycles, produced handguns and pointed them at their two victims. They demanded money, were given $7 and rode away on their bicycles.

The police arrived and investigated the immediate area of the robbery. A resident of the neighborhood told the police officers that the perpetrators of the robbery were probably Appellant and his co-defendant. The police officers obtained a photograph of Appellant and placed it in a photo line-up. One of the victims went to the police station, examined the photo line-up and positively identified Appellant as one of the robbers.

STANDARD OF REVIEW

Claims of ineffective assistance of counsel are evaluated under the two-part *Strickland* test. *See Webb v. State*, 991 S.W.2d 408, 418 (Tex. App.–Houston [14th Dist.] 1999, no pet. h.); *see also Garcia v. State*, 887 S.W.2d 862, 880 (Tex. Crim. App. 1994). To prevail on an ineffective assistance of counsel point, an appellant must show that (1) his counsel's representation was deficient; and (2) the deficient performance was so serious that it prejudiced his defense. *See id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Under the first prong of the test, competence is presumed and the party asserting ineffective assistance must rebut this presumption by proving by a preponderance of the evidence that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound trial strategy. *See Webb*, 991 S.W.2d at 418-19. Specifically, there is a strong presumption that counsel's performance falls within the wide range of professional assistance and that the challenged action constituted sound strategy. *See id.* Under the second prong of the test, an appellant must affirmatively demonstrate prejudice. *See id.* at 418-19. To establish prejudice, an appellant must show there is a reasonable probability that, but for his counsel's errors, the fact finder would have had a reasonable doubt concerning guilt. *See id.* at 419. Failure to establish prejudice defeats an ineffectiveness claim. *See id.*

DISCUSSION

In his only point of error, Appellant contends that because his trial counsel failed to object to hearsay testimony introduced by the State, he was denied effective assistance of counsel.

In his brief, Appellant identifies several statements made during his trial that he argues were hearsay and thus objectionable. Most of the statements Appellant complains of came from police officers who testified about the victims' identification of Appellant. None of these statements, however, were hearsay. Rule 801 provides, in part, the following:

> (e) **Statements Which Are Not Hearsay**. A statement is not hearsay if:
>
> (1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> * * *
>
> (C) one of identification of a person made after perceiving the person ....

TEX. R. EVID. 801(e)(1)(C).

The record in this case shows that both victims testified at the trial and were, therefore, subject to cross-examination. Consequently, none of the statements relating to identification testimony by the police officers were hearsay. *See Rodriguez v. State*, 975 S.W.2d 667, 682-83 (Tex. App.–Texarkana 1998, pet. ref'd) (police officer's testimony at the appellant's trial concerning the out-of-court identification by the victim was not hearsay). Because the testimony was admissible and not hearsay, Appellant's trial counsel was not ineffective by failing to object to the police officers' statements regarding the victims' identification of Appellant. *See id.* at 683.

Appellant also complains that his trial counsel was ineffective for failing to object to a police officer's testimony, who testified that after arriving to investigate the victims' report, the victims told him, "They had been robbed at gunpoint by three suspects who had approached on bicycles." This statement was hearsay but falls under a recognized exception. Rule 803 provides that such testimony is admissible because it relates to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. *See* TEX. R. EVID. 803(2); *Rodriguez*, 975 S.W.2d at 687 (police officer's testimony that the victim told him that his car had just been stolen admissible under

Rule 803(2)). Therefore, Appellant's trial counsel was not ineffective by failing to object to the testimony. *See Rodriguez*, 975 S.W.2d at 687.

Appellant also complains that his trial counsel was ineffective for failing to object on hearsay grounds to testimony by two police officers concerning whether they believed the victims' reports of the incident were consistent with each other and credible. This testimony was based upon the personal observations and opinions of the respective police officers; it was not based upon hearsay. Therefore, Appellant's trial counsel was not ineffective by failing to object to this testimony.

Appellant contends that his trial counsel was ineffective for failing to object to testimony by one of the victims concerning what the other victim said during the robbery. Appellant contends that the testimony by the victim, "She said take my purse, take my purse" and that "I'm sorry, we're poor," was objectionable on hearsay grounds. Neither of these statements were offered in evidence to prove the truth of the matter asserted. *See* TEX. R. EVID. 801(d). Likewise, Appellant's complaint that his trial counsel was ineffective for failing to object to testimony by a police officer concerning a witness' desire to remain anonymous because of "fear of retaliation" was not offered in evidence to prove the truth of the matter asserted. *See id*. Accordingly, Appellant's trial counsel was not ineffective by failing to object.

This Court must examine counsel's performance at trial as a whole and not merely isolated incidents in determining whether counsel was ineffective. An appellant must prove that his counsel's representation was deficient and that the deficient performance was so serious that it prejudiced his defense. Review of counsel's representation must be highly deferential, and we indulge a strong presumption that his conduct falls within a wide range of reasonable representation. In that light, we hold that Appellant was not prejudiced by the errors, if any, made by his trial counsel such that the trial cannot be relied on having produced a just result. *See Webb*, 991 S.W.2d at 418-19; *Rodriguez*, 975 S.W.2d at 688. Point of error overruled.

The judgment is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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