Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01250-CR

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GARY KING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 155th District Court
Austin County, Texas
Trial Court Cause No. 95R-044

O P I N I O N

Gary King, appellant, stood trial on two counts of indecency with a child. Over his plea of not guilty, a jury found him guilty as to count I and not guilty as to count II. The trial court assessed his punishment at twenty years' confinement in the Texas Department of Criminal Justice, Institutional Division. King appeals his conviction on five issues for review. We affirm.

FACTUAL BACKGROUND

On July 1, 1995, cousins A.C.W. and K.W. spent the night at their grandmother, Sarah W.'s house. When A.C.W. awoke in the middle of the night, he found appellant sucking his penis. A.C.W. hit appellant. Appellant then ran out of the house with his pants down. Apparently, appellant went next door to A.C.W.'s great grandmother's house, where appellant was staying. A.C.W. ran to tell his grandmother, who responded by nailing two boards to the door of her house in an attempt to prevent appellant from returning.

The next morning, the police were called. The officers that arrived on the scene spoke with A.C.W. and with appellant. However, the officers did not arrest appellant that morning. Instead, they arrested him later, after obtaining an arrest warrant.

DISCUSSION AND HOLDINGS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

In his first three issues for review, appellant contends that he was denied effective assistance of counsel at trial. He argues that counsel was ineffective for three reasons: (1) trial counsel failed to challenge two veniremembers, Ms. Taylor and Ms. Sliva, for cause; (2) trial counsel failed to object to the prosecution's use of the word "crime" throughout the trial; and (3) trial counsel failed to object when the State allegedly incorrectly argued the law as to why the officers did not immediately arrest the defendant in this case.

For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Texas Court of Criminal Appeals in *Hernandez v. State*. 726 S.W.2d 53, 57 (1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 55.

To prevail on this claim, appellant carries the burden to prove his trial counsel was

ineffective by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 688-89; *Thompson*, 9 S.W.3d 813-814. The record is best developed by a collateral attack, such as an application for writ of habeas corpus or a motion for new trial. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). As we explain below, appellant has not met his burden.

A. Voir Dire

In his first issue for review, appellant complains that his trial counsel, Mr. Garvie, should have challenged veniremembers Taylor and Sliva for cause. Under the Texas Code of Criminal Procedure, challenges for cause are made when a particular juror alleges a fact which renders him "incapable or unfit to serve on the jury." TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (Vernon 1989). The challenges for cause that can be made by the defense are listed in the Code of Criminal Procedure in article 35.16, section (a). Included among these is that he has a bias or prejudice in favor of or against the defendant. *Id*. at (9).

Appellant claims that during the State's voir dire, both Taylor and Sliva stated that they believed that when testifying as to a sexual incident, children would tell the truth. Appellant has misrepresented the record as to Taylor. The State, in fact, did not even ask Taylor whether she believed children would tell the truth when testifying as to a sexual incident. The only exchange on the record between Taylor and either the State or the defense was the following:

THE STATE:	How do you feel about a male putting his mouth on a child's penis? Now what comes to your mind when I told you that?
TAYLOR:	It would upset me.
THE STATE:	It would upset you?
TAYLOR:	Yes.
THE STATE:	But if you heard that in this case, could you listen to both sides

and be fair when listening to the testimony?

TAYLOR: I think so. Yes.

Not challenging Taylor for cause does not demonstrate that appellant's trial counsel's representation fell below an objective standard of reasonableness. Actually, nothing in Taylor's remarks would give rise to a challenge for cause for the defense under the Texas Code of Criminal Procedure. *Id*. She said that she thought she could be fair, despite the fact that this case might upset her.

It does appear from the record, however, that Sliva testified that she believes children, when testifying as to a sexual incident, would tell the truth. It is true that appellant's trial counsel did not challenge Sliva for cause for this statement, nor did he examine Sliva during his time in voir dire. During voir dire, appellant's trial counsel did, however, address the issue of a child's credibility. He said:

> In cases where children are involved, there are some people who feel like the mere fact that one is a child, they should have special credibility, automatically, whatever the case. Is there anybody that feels that way? The mere fact that individuals get on a stand as a child that they should have special credibility? I see by your not raising your hands, you don't feel that way.

There is a strong presumption that appellant's trial counsel's decision not to examine this veniremember and not to challenge her for cause fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 688-89; *Thompson*, 9 S.W.3d at 813-814. Without citing to any authority for this proposition, appellant argues that the presence of the "biased" juror on the jury satisfies the first prong of the *Strickland* test. However, we do not presume that Sliva was biased. While she did state that she believed children would tell the truth about sexual incidents, she also did not raise her hand when asked if a child should be given special credibility. Appellant's counsel may have reasonably concluded that Sliva held no bias against appellant, and may have had a strategic reason not to directly question her about

this. Appellant must overcome the presumption that the trial counsel's conduct fell within the wide range of reasonable professional assistance by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 808, 813. We believe that appellant failed to overcome this presumption. Accordingly, we overrule appellant's first issue for review.

B. Failure to Object to the Prosecution's Use of the Word "Crime"

In his second issue for review, appellant complains that his trial counsel's failure to object to the prosecution's use of the word "crime" throughout the guilt-innocence phase of the trial constituted ineffective assistance of counsel. As we set out below, we do not hold that this constituted ineffective assistance of counsel.

The jury, as the exclusive judge of the witnesses' credibility and the weight to be given to their testimony, may accept or reject any or all of the evidence that it comes into contact with at the trial. TEX. CODE CRIM. PROC. ANN. art. 36.13 (Vernon 1981). However, it is bound to receive the law from the court and be governed by it. *Id*. The court charged the jury with the following instruction: "The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant." We also cannot help but note that, though the appellant was indicted on two counts of indecency with a child, and the prosecution referred to both of these counts as "crimes" throughout the trial, the jury found appellant not guilty on one of the counts. Clearly, the jury did not take the State's use of the word "crime" as proof beyond a reasonable doubt that the crime occurred. We do not find that appellant proved by a preponderance of the evidence that the challenged conduct could not be considered sound trial strategy. Moreover, we do not find that but for counsel's conduct, the result of the proceeding would have been different. *See Hernandez v. State*, 756 S.W.2d 53, 55 (Tex. Crim. App. 1986). Accordingly, we overrule appellant's second issue for review.

C. Closing Argument

In his third issue for review, appellant contends that his trial counsel's failure to object

to closing arguments made by the State amounted to ineffective assistance of counsel. Proper closing argument must fall within one of the following four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's arguments; or (4) a plea for law enforcement. *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985). During his closing argument, appellant's trial counsel stated, "[d]oesn't it strike you as odd that Mr. King supposedly had committed this offense, was allowed to go on, after, after [sic] officers talked to everybody here that you have talked to today? Plus one that is deceased. I submit to you that those things should make you hesitate." The State, in its closing argument, responded that, "[t]he police legally could not arrest him at that time until they had a judge issue a warrant for his arrest."

The law that the State refers to is 14.04 of the Texas Code of Criminal Procedure, which states, "[w]here it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused." TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1979). In this case, when the police arrived at the scene, they had the chance to talk to King. They determined that he was on his way to a wedding. Nothing in the record indicates that King was about to escape, nor that the police had no time to procure a warrant against King before arresting him. From our review of the record, it does not appear that the State's argument on this point amounted to an improper jury argument to which appellant's trial counsel should have objected. In fact, this argument appears to be a response to defense counsel's argument. As a result, we do not find that appellant proved by a preponderance of evidence that his trial counsel's representation fell below an objective standard of reasonableness. *See Hernandez*, 753 S.W.2d at 55. We, therefore, overrule appellant's third issue for review.

II. PROSECUTORIAL AND JUDICIAL MISCONDUCT

In his fourth and fifth issues for review, appellant urges this court to reverse the trial

court for prosecutorial and judicial misconduct that occurred below. The fourth issue for review alleges that the trial court and the prosecutor erred by failing to correct and disclose perjured testimony to the jury. In the fifth issue for review, appellant maintains that the trial court and the prosecutor erred when the trial court allegedly permitted the prosecutor to argue facts outside the record. As we explain below, we do not agree.

A. Perjured Testimony

If the perjured testimony is material, then the prosecutor has a duty to correct the erroneous impression left with the jury by the perjured testimony. *Ex Parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989). Due process prohibits prosecutors from presenting testimony that any member of the "prosecution team" knows to be false. *Id*. at 292; *Ex Parte Castellano*, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993); *see Ex Parte Fierro*, 934 S.W.2d 370, 372 n.2 (Tex. Crim. App. 1996). The Supreme Court has announced that the standard of materiality for perjured testimony is the harmless error standard. *United States v. Bagley*, 473 U.S. 667, 679 n.9, 105 S.Ct. 3375, 3382 n.9, 87 L.Ed.2d 481 (1985). Thus, this court must reverse the judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a).

At trial, the alleged victim of the first count of indecency with a child, A.C.W., during cross-examination by the defense, denied that he had talked to the prosecutor on the previous day. The defense attorney, in an apparent attempt to allow A.C.W. to correct his testimony, asked A.C.W. several times whether he had talked to the prosecutor. Each time A.C.W. replied that he had not. During re-direct, the State seemed to try to correct this false testimony by making sure that A.C.W. knew who the defense counsel was talking about when he asked if he had spoken with the "prosecutor" the day before. Again, A.C.W. denied that he had spoken to the prosecutor on the previous day.

Ultimately, this testimony went uncorrected. However, from the record it appears that

A.C.W. was confused; it also appears, as we have noted, that the prosecutor was trying to correct A.C.W.'s inaccurate statement. Since we were able to discern this from the record, we are confident the jury also was able to understand this. At the very least, the jury probably understood that there was some question about A.C.W.'s testimony. There is no doubt that A.C.W.'s character for truthfulness did have bearing on the outcome of this case. However, we find beyond a reasonable doubt that this false testimony did not contribute to the conviction or punishment. Looking at the record as a whole, if A.C.W. had admitted to speaking with the prosecutor before trial, we cannot say that the outcome would have been different. Further we cannot hold that, looking at the record as a whole, had the jury known that A.C.W. testified falsely about this fact, that such knowledge would have contributed to appellant's conviction or punishment. We overrule appellant's fourth issue for review.

B. Closing Argument

In his final issue for review, appellant complains that the trial court and prosecutors erred in allowing the prosecutor to argue facts outside the record. We find this argument to be without merit.

Proper closing argument must fall within one of the following four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's arguments; or (4) a plea for law enforcement. *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985). Improper closing arguments include references to facts not in evidence or incorrect statements of law. *Burke v. State*, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983). An argument must be considered in light of the record as a whole, and, to constitute reversible error, the argument must be extreme or manifestly improper, violate a mandatory statute, or inject new facts, harmful to the accused, into the trial proceedings. *Brandley*, 691 S.W.2d at 712-13.

The jury argument in contention is as follows:

THE STATE: Grandmother was next door where this defendant was confronting

him saying what were you doing in my house that night? And when she told the defendant she was going to call the police, you heard - -"

DEFENSE: Objection, Your Honor. With all due respect to counsel, the lady that she is talking about did not testify in this case and she is relating testimony from that person who did not testify. That was not before the jury.

THE COURT: Members of the jury, . . . the only facts you are to consider are those that come from the witness stand and you are the judges of facts. Counsel, you may proceed.

DEFENSE: Judge, excuse the interruption, Judge but can I have a ruling on my objection?

THE COURT: Counsel, sometimes when I make a ruling, it's interpreted as a comment on the weight, on the evidence and I choose not to make a ruling for that purpose.

The following testimony, however, occurred at trial on the State's direct examination of A.C.W.:

THE STATE: Where did you go at eight o'clock in the morning?

A.C.W.: He, me and my grandma went over there to my great grandma's house.

THE STATE: And this is next door?

A.C.W.: Yes.

THE STATE: And why did you go next door?

A.C.W.: Because Gary had been broken [sic.] into our house and my grandma wanted to know why he was in there.

. . .

THE STATE: After the conversation, did you and your grandma stay at your great grandmother's house or did you go home again?

A.C.W.: No. He asked, he asked him another question. He asked you know, if I let him in, why would he be beating on her - - why would I be beating on his door . . .

THE STATE: Who said that?

A.C.W.: My grandma.

THE STATE: Did your grandma tell him anything else?

A.C.W.: No. Then she told him she was going to call the law.

The defense did not object to this testimony during trial. Having waived any objection to this testimony, the defense could not object when this testimony was used by the State in its closing argument. Additionally, the State's remarks in closing argument were permissible as reasonable deductions from the evidence. Accordingly, we overrule appellant's fifth issue for review.

For the above stated reasons we affirm the opinion of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

Do Not Publish — TEX. R. APP. P. 47.3(b).