Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00217-CR
NO. 14-99-00218-CR

RALPH OHARA DOUGLAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 791,339 and 791,340

O P I N I O N

After a consolidated jury trial, the jury convicted appellant, Ralph Douglas, of two separate incidents of theft and sentenced him to two years confinement in a state jail. Appellant raises eleven points of error in this consolidated appeal. We affirm.

Appellant was indicted for the theft of insurance proceeds from the settlement of an automobile accident involving the complainants, Marian Sherman and Loletha Tillman. The day after the accident occurred, the complainants went to see appellant who, though unlicensed, held himself out to be an

attorney. Appellant had the complainants sign a "Power of Attorney" which appellant told them would allow him to represent them. The document named Luro Taylor and Associates as the attorney of record. When the complainants questioned appellant about the identity of Luro Taylor, he told them that Taylor was his partner. The complainants testified that they never met Taylor.

At this initial meeting, appellant discussed the complainants' personal injury claims with them. Appellant, who was licensed to operate a physical therapy clinic, directed the complainants to go to his clinic for physical therapy. He told them that he would begin settlement negotiations with Geico, the insurance company of the other party involved in the accident. Appellant expressed his opinion that the complainant's cases were worth about $15,000.00. He also told the complainants not to contact Geico because that would interfere with his ability to settle the case.

Over a year later, the complainants became suspicious when their cases had not settled, and appellant refused to tell them anything other than that he was negotiating with the insurance company. Frustrated, the complainants contacted Geico. The Geico representative told them that their cases had settled over a year ago, only three months after the collision, with Sherman receiving $8,750.00 and Tillman receiving $7,250.00. The representative also told them that checks in those amounts had been issued to them and their attorney, Luro Taylor, and had been cashed bearing their signatures. When the complainants expressed their surprise and related that they had never received the money, the Geico representative contacted the Houston Police Department.

Officers at HPD began an investigation. One officer assigned to the investigation asked the complainants to visit appellant at his office to confront him with copies of the checks. He also asked Sherman to wear a concealed microphone to this meeting.

At the meeting, appellant told Sherman and Tillman that he was still in negotiations with the insurance company and they were offering slightly in excess of $2000.00 to settle the claims. When confronted with the copies of the checks, however, appellant told the complainants that Luro Taylor was the one responsible and offered to do whatever was necessary "to make things right."

Appellant was arrested and gave a statement in which he admitted depositing the checks into his

bank account. He claimed in his statement, however, that he had paid the complainants part of the settlement and was trying to stall them in an effort to buy time to raise the balance of the money owed to them.

In points of error two and three, appellant complains about the admission of the testimony of Kimberly Gamble, an assistant general counsel for the State Bar of Texas. Appellant complains that her testimony regarding how complaints against attorneys originate and the State Bar's regulation of unethical attorneys was irrelevant, unfairly prejudicial, and should never have been allowed. We disagree.

The law relating to relevance and the exclusion of evidence is clear. Evidence is relevant if it has any tendency to make the existence of any fact of consequence to a case more or less probable than it would be without the evidence. *See* TEX. R. EVID. 401. All relevant evidence is admissible, unless its admission is constitutionally prohibited or prevented by other rules or statutes. *See* TEX. R. EVID. 402. If the relevance of the evidence is substantially outweighed by the likelihood its admission would prejudice the defendant or confuse the issues, it must be excluded. *See* TEX. R. EVID. 403. The presumption is that relevant evidence is admissible. *See Green v. State*, 971 S.W.2d 639, 645 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). However, a party desiring to exclude evidence must make an objection as soon as the ground for an objection becomes apparent. *See Dinkins v. State*, 894 S.W.2d 330, 355 (Tex. Crim. App. 1995). Objections arising after an objectionable question has been asked and answered are untimely, unless the defendant can show a reason why the objection was untimely. *See id.*

The State contends that appellant waived his objection to Gamble's testimony about how the State Bar receives complaints about attorney conduct. When the prosecutor asked Gamble how she usually received complaints about attorneys, she gave a lengthy response, after which appellant lodged a relevancy objection. The trial court overruled the objection. Without addressing the viability of the State's waiver argument, we find no error in the admission of Gamble's testimony.

Here, both the questions posed by the State and Gamble's answers were relevant. Appellant's defensive theory was Luro Taylor, who was an attorney, authorized appellant to deposit the complainants' settlement checks into his account. Appellant also relied on the defensive theory that fee-sharing

relationships commonly allowed an insurance settlement to be shared by attorneys, physical therapists, and injured clients, with each taking one-third of the settlement amount. Gamble's testimony, therefore, was relevant to rebut these theories advanced by appellant. The question allowed her to establish that she was familiar with clients filing complaints against their attorneys for these types of fee-sharing arrangements. Thus, her testimony was relevant to the State's attempt to refute appellant's defensive theories. Her testimony about the State Bar's regulation of unethical attorneys was also relevant for the same reasons.

Appellant, however, failed to preserve error under Rule 403. Though appellant lodged several relevancy objections, he failed to make a further Rule 403 objection to the challenged testimony as required by *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990). Accordingly, no error was preserved on the prejudicial value of Gamble's testimony. *See* TEX. R. APP. P.33.1.

We overrule appellant's second and third points of error.

In his nine other points of error, appellant complains that he was deprived of effective assistance of counsel because his attorney failed to object to irrelevant evidence. All of the testimony appellant complains about, however, came from Gamble and described the types of fee-sharing arrangements an attorney could enter into with a non-attorney, such as a physical therapist. Due to the similarity of all nine of appellant's points of error in this regard, we will address them together.

Ineffective assistance of counsel is gauged using the two-pronged test announced in *Strickland v. Washington*. *See* 466 U.S. 668 (1984); *see also McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996). To prevail on such claims, the appellant must first demonstrate his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. Second, the appellant must prove that but for counsel's deficiency the result of the trial would have been different. *See McFarland*, 928 S.W.2d at 500. Under this analysis, trial counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged to be ineffective. *See id*. at 500. The appellant must also affirmatively prove that these acts fell below the norm of professional reasonableness. *See id*. Appellate

courts will not speculate about counsel's effectiveness. *See Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist.] 1992, no pet.). Rather, such a claim must be firmly supported by the record. *See McFarland*, 928 S.W.2d at 500.

Here, appellant cannot satisfy either prong of the *Strickland* test. Gamble's testimony was relevant to an issue injected into the case by appellant through his defensive theory. Accordingly, it was not below an objective standard of reasonableness for appellant's trial attorney to fail to object to evidence that was relevant, although his trial counsel objected to much of Gamble's testimony. Further, the record does not reveal that the outcome of appellant's case would have been different had appellant's trial counsel objected to the witness' testimony, since her testimony was proper and relevant to issues raised in the trial. Moreover, even if some of the testimony was irrelevant, appellant cannot show that the result of his trial would have been different had his trial counsel raised a proper objection. Appellant has also failed to show in the record the prejudice that Gamble's testimony allegedly caused him.

Without a strong foundation in the record on these points, we are left to speculate about the impact of trial counsel's inadequacies, if any existed at all. Such speculation is insufficient to establish a claim of ineffective assistance of counsel. *See Huynh*, 833 S.W.2d at 638. Accordingly, we overrule appellant's remaining points of error and affirm the trial court's judgment.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson (not participating) and Wittig.

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