Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01382-CR

EDWARD MARION JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 34,227

O P I N I O N

Appellant was charged in a two-count indictment with aggravated sexual assault of a child and indecency with a child. *See* TEX. PEN. CODE ANN. §§ 21.11 & 22.021 (Vernon Supp. 2000). The jury found appellant guilty on both counts and assessed punishment at fifteen years in prison and imposed a $10,000 fine on the aggravated sexual assault charge and ten years in prison, probated for ten years, and a $5,000 fine on the indecency charge. Finding appellant has not demonstrated that counsel's performance was constitutionally deficient, we affirm.

I. Discussion

At trial, the complainant testified that on two separate occasions in 1996, when she was nine years old, appellant sexually molested her. Appellant did not file a motion for a new trial. In a single point of error, appellant complains he was denied effective assistance of counsel at the punishment phase of his trial in violation of the Sixth and Fourteenth Amendments and in violation of article I, section 10, of the state Constitution.

A. Standard of Review

To demonstrate lack of effective assistance of counsel guaranteed by the Sixth and Fourteenth amendments, appellant must demonstrate counsel's representation fell below an objective standard of reasonableness under the prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687, 692 (1984). Counsel's effectiveness is presumed, and appellant must rebut this presumption by identifying the acts or omissions that are alleged as ineffective and must affirmatively prove that the acts or omissions fell below the professional norm of reasonableness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). An ineffectiveness claim is judged not by isolating a portion of counsel's representation, but on the totality of the representation. *Strickland*, 466 U.S. at 688. Appellant also must establish that counsel's performance was so prejudicial, it deprived appellant of a fair trial. *Id*. Appellant must show that a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. We use the *Strickland* standard in evaluating a claim of ineffective assistance in connection with the sentencing phase of a noncapital trial. *Hernadez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999). The right to counsel guaranteed by the state Constitution is generally seen as imposing no higher standard than that imposed by *Strickland*. *Id.* at 772.

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.2d 808, 813 (Tex. Crim. App. 1999). Failure to make the required showing of either

deficient performance or sufficient prejudice defeats appellant's ineffectiveness claim. *Id.* Absent both showings, we cannot conclude the outcome resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.*

B. Testimony

First, appellant complains of counsel's performance in connection with testimony introduced during the punishment phase. The State introduced the testimony of a female relative of appellant, not the complainant, who told the jury that appellant had begun sexually molesting her when she was in the third grade in the early 1980s. About ten days before jury selection began, the State gave notice to the defense that it intended to call the relative as a witness to testify about "[i]nappropriate acts of a sexual nature" toward the female relative. The State provided no address or phone number to contact the witness. When the defense objected to the testimony on grounds of lack of adequate notice, the State told the court that the witness's mother contacted the prosecutors the Tuesday before the Monday trial. On Wednesday before trial, the witness, now an adult, contacted the prosecutors. The prosecutor's office attempted to contact defense counsel on Thursday with a contact telephone number, but was not able to reach counsel until Friday. After receiving the telephone number, the defense did not attempt to contact the witness before trial.

Appellant complains that counsel was ineffective for failing to request notice pursuant to article 37.07, section 3(g), of the Code of Criminal Procedure, of the State's intent to introduce evidence of extraneous offenses.[1] Counsel relied instead upon an agreed court order requiring the State to provide the name and location of the State's witnesses and an agreed order prohibiting the State from mentioning any extraneous

[1] Appellant also complains counsel was ineffective for not requesting notice pursuant to article 38.37, section 3, of the Code of Criminal Procedure. That section, however, applies only to "evidence of other crimes, wrongs or acts committed by the defendant *against the child who is the victim of the alleged offense*." TEX. CODE CRIM. PROC. ANN. art. 38.37, §§ 2 & 3 (Vernon Supp. 2000) (italics added). By its plain language, article 38.37 does not apply to evidence of extraneous offenses committed against an individual other than the victim of the charged offense. Thus, article 38.37 does not apply to the testimony here at issue.

offenses in the guilt-innocence phase subject to approaching the bench.

Article 37.07, section 3, provides as follows:

> (g) On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Criminal Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3 (Vernon Supp. 2000). The court order upon which the defense relied in lieu of article 37.07 stated, "Motion for State of Texas to Reveal the Identity and Location of State Witnesses is GRANTED as to state witnesses for the case in chief."

On appeal we are not called upon to determine the reasonableness of the notice given by the State regarding the testimony. We are called upon, rather, to determine whether defense counsel was constitutionally deficient for not requesting article 37.07 notice. Appellant seems most concerned that the State gave untimely contact information regarding the witness. The Beaumont court has determined that extraneous-offense notice given Friday before a Monday trial is reasonable, *see Ramirez v. State*, 967 S.W.2d 919, 923 (Tex. App.—Beaumont 1998, no pet.), while the Waco court has found similar notice unreasonable, but any error harmless, *see Hernandez v. State*, 914 S.W.2d 226, 234 (Tex. App.—Waco 1996, no pet.). *See also Neuman v. State*, 951 S.W.2d 538, 540 (Tex. App.—Austin 1997, no pet.) (stating that notice insufficient where notice attempted Friday afternoon before Monday trial, with actual notice given first day of trial). Here, however, the State gave appellant notice of the witness's identity and the substance of her testimony approximately ten days before the trial and delivered the telephone number — which

counsel did not use — three days before trial. For purposes of his ineffectiveness claim, appellant has failed to demonstrate a request pursuant to article 37.07 would have produced more timely notice on the part of the State. Appellant has failed to demonstrate that counsel erred by relying on the pretrial order rather than requesting notice pursuant to article 37.07.

Appellant further complains that after counsel received notice of the witness, counsel was ineffective for not seeking out and interviewing the witness. Approximately ten days before trial, the prosecutor provided appellant with the substance of the witness's testimony. He also complains that his counsel erred by not cross-examining this witness. In *Butler v. State*, the Court of Criminal Appeals said:

> *[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation*. In other words, counsel has a duty [either] to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary*. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

716 S.W.2d 48, 54 (Tex. Crim. App. 1986) (quoting *Strickland*, 466 U.S. at 690) (Italics added.) Given the degree of deference afforded to trial counsel's judgments where the record is silent as to his trial strategy,[2] appellant has not met his burden in demonstrating his trial counsel's decisions were ineffective.

Additionally, appellant complains that counsel erred by failing to object to the witness's testimony on grounds of relevance and unfair prejudice. Evidence of an

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[2] For instance, appellant may have told his lawyer, "Yeah, I did that, too." Based on his client's concession, trial counsel may have decided not to antagonize the witness any further or anger the jury by cross-examining her — a reasonable construction in light of his closing argument as excerpted in the State's brief. If so, this would seem to be a "reasonable decision that makes [a] particular investigation[] unnecessary." *Strickland*, 466 U.S. at 690. In the absence of evidence contrary to this hypothetical, appellant has failed to rebut the presumption of sound trial strategy.

extraneous unajudicated crime or bad act may be offered by the State at punishment if the trial court deems the evidence relevant. *See* art. 37.07, § 3 (a). Counsel is not ineffective for failing to object to admissible evidence. *Jones v. State*, 950 S.W.2d 386, 389 (Tex. App.—Fort Worth 1997, pet. ref'd, untimely filed). Moreover, counsel's failure to object to evidence may be strategic where the evidence is even arguably admissible. *Id.* It is the appellant's burden to show that counsel's failure to object was not sound trial strategy. *Id.*

The evidence admitted during punishment alleged inappropriate sexual activity by appellant dating back to the late 1970s and early 1980s. The testimony alleging a long-term pattern of behavior arguably was relevant to the jury's assessment of punishment. The trial court would have been acting within its discretion to find the evidence admissible. Because the evidence was arguably admissible, trial counsel's failure to object could have been a matter of trial strategy. *Jones*, 950 S.W.2d at 389. Appellant has failed to demonstrate that counsel was ineffective for failing to object to its admission on relevance or unfair prejudice grounds.

C. Jury Arguments

Appellant further complains that trial counsel was ineffective for making certain jury arguments. At issue are the following statements made by counsel during closing at the punishment phase:

> And I thought about what to say to y'all about punishment, and obviously there are two places to consider – two ends, the probation and the life. And if [the prosecutor] and I agree on anything, it's going to be this: This is not a probation case.
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> ....
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> Now, I'm not going to insult anybody by coming up here and saying cut this guy loose so that he can get on an elevator with you. I have two children, I wouldn't want that either.

Appellant has a burden to demonstrate that counsel's actions were not sound trial

strategy. *See Howland v. State*, 966 S.W.2d 98, 104-05 (Tex. App.—Houston [1st Dist.] 1998), *aff'd*, 990 S.W.2d 274 (Tex. Crim. App. 1999); *Jones*, 950 S.W.2d at 389. Here, the record is silent as to counsel's strategy. At the time counsel made the arguments at issue, appellant had been found guilty of aggravated sexual assault of a child and indecency with a child. He was facing a maximum punishment of life in prison. Witnesses had testified about inappropriate sexual activity going back at far as the early 1970s. Appellant's counsel suggested the jury assess punishment at between two and five years in prison on the indecency charge and ten years in prison, probated for ten years, on the aggravated sexual assault charge. By acknowledging that some prison time was appropriate, counsel apparently was attempting to establish credibility with the jury. In the absence of a record demonstrating that counsel's actions stemmed from the lack of a sound trial strategy, we cannot say that as a matter of law counsel's actions demonstrated ineffectiveness. We note that appellant received fifteen years in prison on one charge and ten years' probation on the other. When one considers appellant was facing life in prison, his actual punishment did not fall on the harsh side of the jury's options. Appellant has not demonstrated counsel's ineffectiveness.

II. Conclusion

Appellant has not met his burden of showing trial counsel's ineffectiveness. We overrule his single point of error and affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed July 12, 2001.
Panel consists of Justices Yates, Fowler, and Wittig.
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