Affirmed and Opinion filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01147-CR

JOSE LUIS ARRELLANO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 809,698

O P I N I O N

Appellant, Jose Luis Arrellano, challenges his sentence for aggravated assault. We affirm.

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[1] In the prayer and nature of the case sections of appellant's brief, he asserts that the purpose of his appeal is to reverse the sentence he received and remand "for a new trial on the question of punishment . . . ." However, the section of appellant's brief providing a statement of the case indicates he is appealing *both* his conviction *and* sentence. Because the substance of all appellant's complaints and his prayers for relief address only the sentencing, we do not interpret his appeal as challenging his conviction.

I. F B

On April 4, 1999, Dustin P., a fifteen-year-old middle school student, got into a fight with another student, Frank R. Apparently, a dispute arose because Dustin had been dating the ex-girlfriend of Frank's best friend. Although no serious injuries were reported, it was clear that Dustin had "won" the fight, and may have been aided by his older brother. Several hours after the fight, Dustin received phone calls from Frank's friends, who told him that something "really bad" was going to happen to him. Then, around 11:30 that night, a girl named "Christina" came to Dustin's home to tell him that something "bad" was going to happen to him. Dustin went to bed between 12:00 and 12:30 a.m. Later that night, he woke up on the floor with intense pain in his abdomen. He looked down, saw a hole in his stomach, and realized he had been shot. Dustin's father called for help, and Dustin was taken by Life Flight to Memorial Hermann Hospital, where he underwent surgery for his injuries.

In the investigation that followed, police discovered that at least five bullets had struck Dustin's house, and they concluded that Dustin had been the victim of a drive-by shooting, apparently in retaliation for his fight with Frank.

On the night of the shooting, appellant met with Richard R. Appellant and Richard first went to Dustin's older brother's house to talk to him. Later that evening, appellant drove Richard to a house where Richard obtained a gun. Appellant then drove Richard to Dustin's street. Richard exited the car a few houses away from Dustin's home and fired several shots at Dustin's house before returning to the car. Still at the wheel, appellant drove away.

Appellant was charged by indictment with the felony offense of aggravated assault. Appellant entered a plea of guilty and elected to have a jury assess punishment. The jury assessed punishment at seven years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant now challenges the sentence he received, raising four points of error.

II. I P F R

In his first point of error, appellant contends that the trial court erred by commenting on the weight of the evidence through the use of hypothetical illustrations during voir dire. In his second point of error, appellant contends that the trial court erred in admitting evidence that appellant was a member of a gang without requiring the proper legal foundation or predicate. In his third point of error, appellant contends the trial court erred in allowing evidence of appellant's gang membership without requiring that the State provide evidence of the character and reputation of the gang. In his fourth point of error, appellant claims he was denied effective assistance of counsel.

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[2] Texas Penal Code section 7.02(a) outlines the law of parties, which provides that one may be criminally responsible for the conduct of another if:

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
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> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or
> (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

T . P . C A . § 7.02 (Vernon Supp. 2001)

III. U H D V D

In his first point of error, appellant complains that the trial court improperly commented on the weight of evidence when it offered the venire members two hypothetical examples to help them determine whether they could consider the full range of punishment. The State responds that appellant's failure to object to the trial court's actions presents no issue for this court to review. The State further asserts that even if appellant had lodged a timely objection, the trial court did not err in using the hypothetical examples to illustrate principles of law before the venire. We agree with the State.

A trial court has wide discretion to control voir dire and, thus, its actions are reviewed under an abuse of discretion standard. , 951 S.W.2d 787, 790 (Tex. Crim. App. 1997). A question is proper if it seeks to discover a juror's view on an issue applicable to the case. , 808 S.W.2d 482, 484 (Tex. Crim. App. 1991). Article 38.05 of the Texas Code of Criminal Procedure provides that a judge shall not comment on the weight of the evidence nor make "any remark calculated to convey to the jury his opinion of the case." TEX. CRIM. PROC. CODE ANN. art. 38.05 (Vernon Pamph. 2001). However, a timely objection is necessary to preserve error concerning a trial judge's remarks, including those remarks that rise to the level of a comment on the weight of the evidence. 991 S.W.2d 267, 273 (Tex. Crim. App. 1999), 528 U.S. 1026 (1999) (stating that a defendant who objected, during voir dire, to the trial court's initial definition of reasonable doubt nevertheless failed to preserve error because the defendant did not renew his objection when the trial court rephrased its definition); 903 S.W.2d 715, 741 (Tex. Crim. App. 1995) (holding that a defendant's objection to the use of an improper hypothetical during voir dire preserved error only with respect to the venire member to whom it was directed); , 707 S.W.2d 611, 619 (Tex. Crim. App. 1986) (preserving error for review requires an objection at the time the statement in question is made).

Here, the trial court posed the hypotheticals to the venire members. Appellant's trial counsel polled the veniremembers and made no objection to the use of the hypotheticals. To preserve error, the objecting party must object at the earliest opportunity, and continue to object each time the objectionable evidence is offered. , 867 S.W.2d 30, 35 (Tex. Crim. App. 1993). Thus, by failing to object, appellant waived any complaint as to the trial court's remarks. , 819 S.W.2d 854, 858 (Tex. Crim. App. 1991).

Appellant's first point of error is overruled.

IV. E G M

In both his second and third points of error, appellant complains the trial court erred in admitting evidence of his alleged gang affiliation. More specifically, in his second point of error, appellant complains the court erred in admitting the evidence "without requiring the proper foundation or predicate." Further, appellant contends that evidence of the gang's purpose and activities is necessary "to allow the jury to determine the gang's effect as to the character traits of Appellant." In his third point of error, appellant complains that the trial court erred by allowing evidence of his alleged gang membership without requiring the State to provide evidence of the gang's character and reputation.

The evidence of appellant's gang affiliation came from Deputy Ramon Hernandez, who testified that, during a non-custodial interview, appellant admitted he was a member of the Northglen Hoods gang. During a hearing outside the jury's presence, appellant objected to the admission of the evidence of his gang membership. The record contains the following exchange concerning the grounds for the objection:

> MR. TRENT: Yes, Your Honor. I believe the testimony of Detective Hernandez is going to be that during the course of taking

[3] Appellant states that his trial counsel "failed to make an objection" to evidence regarding his alleged gang membership. The excerpt below clearly contradicts this contention.

a confession of Jose Arrellano, Mr. Arrellano admitted membership in the Northglen Gang.

THE COURT: All right. So it's going to be— you're going to get it in there the context of what he told the officer during the course of a confession?

MR. RACER: Yes, Judge, it's not in the confession. I would urge that it not be admitted because of the . It's more . If it's probative, it would have been in the confession in the first place.

THE COURT: Your objection goes to the –

MR. RACER: The gang membership. Any evidence as to that is more .

After hearing additional testimony and giving appellant an opportunity to elicit additional evidence related to his objection to gang membership evidence, the trial court overruled the objection and allowed the State to ask questions "in regards [sic] to statements the Defendant made while he was at the station speaking to [the] officer." Appellant's objection stating that the alleged gang membership evidence was more "prejudicial than probative" does not comport with the complaint he now voices on appeal. Appellant does not contend that the evidence was more prejudicial than probative but that the trial court erred by allowing evidence of his gang membership without also providing evidence of the character and reputation of the gang. Because an evidentiary objection stating one legal theory may not be used to support a different legal theory on appeal, appellant's complaints related to the "proper predicate" for evidence of gang membership were not preserved for appellate review.

, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990).

Finally, appellant claims that if gang membership is admitted into evidence, then evidence of the gang's purpose and activity must also be presented. Again, a defendant does not preserve error where he makes an objection stating one legal theory and bases his complaint on appeal on a different legal theory not mentioned at trial. Thus, because

[4] Emphasis added.

[5] Emphasis added.

appellant did not raise his complaint in the court below, he did not preserve his third point of error for appellate review.

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

V. I A C

In his fourth and final point of error, appellant contends his trial counsel made several errors that amounted to ineffective assistance of counsel. Specifically, appellant complains that when a juror, who was a law enforcement officer, revealed he was a friend of State's witness, Deputy Hernandez, appellant's counsel should either have (1) made a motion for the court to voir dire the juror further to determine any probable biases or (2) asked that the juror be removed and then proceeded to sentencing with eleven jurors. Appellant also contends that trial counsel should have (1) objected to the judge's comments on the weight of the evidence during voir dire; (2) objected to the admission of evidence regarding appellant's alleged gang membership and required the State to lay the proper foundation and predicate for such evidence; (3) asked the trial court to instruct the jury, or obtained a ruling, that there was no evidence or insufficient evidence regarding the character and reputation of appellant; and (4) during voir dire, asked the court to strike each prospective juror for cause, because several jury veniremembers admitted they could not consider the full range of punishment.

The key issue in every ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." , 466 U.S. 668, 686 (1984). To show ineffective assistance of counsel, appellant must prove two elements by a preponderance of the evidence. , 928 S.W.2d 482, 500 (Tex. Crim. App.

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[6] Nevertheless, we note that Officer Hernandez's testimony was relevant and admissible to show appellant's character. *See Stewart v. Stone*, 995 S.W.2d 251, 258 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also* T . C . P . C A . art. 38.22, § 5 (Vernon Pamph. 2001) (allowing "statement[s] made by the accused . . . that [do] not stem from custodial interrogation, or a voluntary statement, whether or not the result of custodial interrogation, that has any bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law").

1996) (relying on , 466 U.S. at 687). First, trial counsel's performance must have been deficient under prevailing professional norms; and second, the deficient performance must have prejudiced the defendant. In other words, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. , 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In reviewing an ineffective assistance of counsel claim, this court reviews both elements of the test as a mixed question of law and fact. at 698. Further, we "indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance . . . ." at 689. It is incumbent upon appellant to overcome this presumption. , 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). Finally, all allegations of ineffective assistance of counsel must be supported by the record.

660 S.W.2d 65, 75 (Tex. Crim. App. 1983).

Although appellant's brief outlines five alleged errors that could possibly amount to deficient performance under the test, appellant offers no analysis to show how these purported errors could have prejudiced appellant so much that the result of the proceeding would have been different. Appellant's brief simply argues that certain actions were deficient and states what actions trial counsel should have taken. "Failure to make a showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." 928 S.W.2d 482, 500 (Tex Crim. App. 1996) (quoting , 466 U.S. 668, 700 (1984)). Moreover, an "error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." , 466 U.S. at 691. Here, appellant's brief fails to address the prejudice component essential to prevail under the analysis. Consequently, we need not determine whether trial counsel's performance was deficient. at 697 (stating that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address

both components of the inquiry if the defendant makes an insufficient showing on one."). Appellant's fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 19, 2001.
Panel consists of Justices Edelman, Frost and Chief Justice Murphy.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[7] Senior Chief Justice Paul C. Murphy sitting by assignment.