Affirmed and Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00570-CR

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MATIAS MATT ESPINOZA, III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 773,080

O P I N I O N

Charged with the offense of murder, appellant, Matias Matt Espinoza, III, was tried before a jury and found guilty. The jury assessed punishment at confinement for life in the Texas Department of Criminal Justice, Institutional Division. Appellant filed this appeal, claiming in nine points of error that he received ineffective assistance of counsel and in one point of error that the trial court erred by not instructing the jury on "sudden passion" during the punishment phase of the trial. We affirm.

FACTUAL BACKGROUND

Appellant saw Andrea Montoya and some of her friends outside of Palmers' Icehouse around 2:00 a.m. as they were leaving to go over to a friend's apartment. Appellant and his friends followed Montoya and her friends to Mark Perez's apartment, where they met another group of people who were already there drinking. After introductions were made, everyone continued drinking and dancing. While dancing, a girl accidentally bumped into Mark Perez. Perez became angry and started cursing. After a brief argument, he told the girl and her friends to leave. As the girls were leaving, one of them made a comment to one of Montoya's friends, and they started arguing. The two girls began to fight, and everyone left the apartment and went downstairs into the parking lot.

In the parking lot, appellant and Jose Sanchez tried to break up the fight by pulling the girls apart. Sanchez grabbed one of the girls by the hair and pulled her away. Appellant became angry because that girl was a friend of his, and he pushed Sanchez backwards into the bushes. Appellant advanced towards Sanchez, cursing at him. At some point, appellant drew his knife. Both Marissa Ramon and Montoya tried to grab appellant's wrist; however, appellant freed himself from their grasps and stabbed Sanchez twice with the knife. Perez then pulled appellant off Sanchez. After seeing the knife in appellant's hands, Perez pushed him; then, appellant started swinging the knife at Perez. Appellant then ran away. Perez ran after appellant, and they began to fight. Before running away again, appellant cut Perez on his arm with the knife.

INEFFECTIVE ASSISTANCE OF COUNSEL

In points of error one through seven, nine, and ten, appellant contends he was denied effective assistance of counsel. Specifically, he alleges ineffective assistance because counsel did not inquire during *voir dire*: (1) whether prospective jurors could consider community supervision as a proper punishment, (2) whether prospective jurors could not consider the five-year minimum prison sentence for the offense of murder, (3) as to the law of lesser included offenses to the crime of murder and the corresponding penalties, (4) whether prospective jurors had racial prejudice against Hispanic persons charged with a crime, (5) whether prospective jurors were unable to follow the law concerning appellant's right to be presumed innocent, (6) whether prospective jurors had a bias in favor of law enforcement, (7) concerning the law of "sudden passion" as it relates to the crime of murder and the special issue at the punishment

hearing; also, appellant alleged that during the punishment phase of the trial, counsel was ineffective for failing to request a "sudden passion" charge and special issue in the court's charge for the jury to consider.[1]

We evaluate claims of ineffective assistance of counsel under the two-prong analysis articulated in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). In order to prevail on this claim, the appellant must show: (1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) actual prejudice from counsel's deficient performance. *See id*. The appellant must prove his claim by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id*. However, the appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). When the record is silent as to defense counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Jackson v. State*, 877 S.W.2d at 771). Here, the record is silent as to defense counsel's strategy. We will not speculate in hindsight as to the reasons for defense counsel's decisions, and therefore, appellant cannot make the requisite showing under the first prong of *Strickland*.

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[1] Appellant's tenth point of error merely claims ineffective assistance from the cumulative effect of the errors, a matter we consider regardless of whether an appellant brings a separate point of error asserting this complaint.

Furthermore, by the time defense counsel began *voir dire*, members of the panel of prospective jurors were yawning and losing interest. The Texas Court of Criminal Appeals has held "[t]he length of voir dire examination could have very well been dictated by trial strategy." *Jackson v. State*, 491 S.W.2d 155, 156 (Tex. Crim. App. 1973). Likewise, given the waning interest of the panel, the areas which defense counsel chose to cover could have been dictated by trial strategy. The prosecutor and the trial judge already had covered many of the areas of which appellant now complains, including whether the prospective jurors (a) could consider the full range of punishment, (b) could follow the law regarding the presumption of innocence, and (c) held a bias in favor of law enforcement. Some courts have considered the inquiries made by the prosecutor or the judge in finding that defense counsel was not deficient for failing to make additional inquiries into the same areas. *See, e.g., White v. State*, 999 S.W.2d 895, 898 (Tex. App.–Amarillo 1999, pet. ref'd) (finding counsel was not deficient for failing to cover a topic already addressed by the prosecution); *Beck v. State*, 976 S.W.2d 265, 267 (Tex. App.–Amarillo 1998, pet. ref'd) (finding counsel was not deficient for failing to cover topics already addressed by the prosecution or the court); *Williams v. State*, 970 S.W.2d 182, 184 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd) (finding counsel was not deficient when the court participated in *voir dire*).

Even if defense counsel's performance could be characterized as deficient based on a failure to cover the areas about which appellant complains, appellant must still satisfy the second prong of *Strickland* by showing actual prejudice, i.e., but for trial counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *See Thompson*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. To show prejudice, appellant must explain why the jurors were objectionable or why further questioning might have been in order. *See McFarland v. State*, 928 S.W.2d 482, 503-04 (Tex. Crim. App. 1996), *overruled on other grounds, Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999). Our sister court of appeals in San Antonio has found that there is no actual prejudice if the state asked the jurors whether they could be fair and impartial. *See Bone v. State*, 12 S.W.3d 521, 524 (Tex. App.–San Antonio 1999, pet. granted); *Cunningham v. State*, 982 S.W.2d 513, 523 (Tex. App.—San Antonio 1998, pet. ref'd). Here, appellant did not explain why the jurors were objectionable or why further questioning might have been in order. Also,

defense counsel asked the prospective jurors whether they could be fair and impartial, and none of the prospective jurors selected for service on this case responded or gave any indication that they could not be fair and impartial. Thus, appellant has not shown a reasonable probability that but for trial counsel's alleged deficient performance, the result of the proceeding would have been different. Because appellant has not satisfied either the first or second prongs of *Strickland*, we overrule appellant's first through seventh, ninth, and tenth points of error.

JURY CHARGE

In his eighth point of error, appellant contends the trial court erred when it failed to *sua sponte* include a "sudden passion" charge for the jury to consider. At the punishment stage of the trial, the defendant may raise the issue of whether he caused the death under the immediate influence of sudden passion arising from adequate cause. *See* TEX. PEN. CODE ANN. § 19.02(d) (Vernon 1994). When evidence from any source raises a defensive issue and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993). The evidence which raises the issue may be strong, weak, contradicted, unimpeached, or unbelievable. *See id*. However, the trial court has no duty to *sua sponte* instruct a jury on unrequested defensive issues even though the issues are raised by the evidence. *See Posey v. State*, 966 S.W.2d 57, 62-63 (Tex. Crim. App. 1998); *Rios v. State*, 990 S.W.2d 382, 384 (Tex. App.–Amarillo 1999, no pet.). A defendant must request the inclusion of the defensive issue or object to its omission from the charge before an appellate court can find error. *See Posey*, 966 S.W.2d at 62-63 (noting that under a similar mitigation provision in section 20.04(d) of the Texas Penal Code, the trial court had no duty to *sua sponte* instruct the jury on the mitigation issue absent the defendant's objection to the lack of that instruction).

Here, the record reflects that appellant failed to request a "sudden passion" instruction. Furthermore, appellant did not object to the absence of such an instruction. Therefore, the trial court did not err in failing to include a "sudden passion" instruction in its jury charge. Accordingly, we overrule appellant's eighth point of error.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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