Affirmed and Opinion filed November 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01185-CR

JEFFREY SOWELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 824,684

O P I N I O N

Jeffrey Sowell appeals his conviction for aggravated robbery. Appellant presents two issues. First, he claims the trial evidence is legally insufficient to sustain his conviction. Second, Appellant claims his trial counsel was ineffective in violation of his Sixth Amendment rights. We overrule both issues and affirm.

Background

Appellant and a Hispanic accomplice forced their way into the home of Ms. Lorinda Garza on September 2, 1999. The intruders identified themselves as police officers and

proceeded to search the home for valuables. Appellant carried a black pistol on his belt during the home invasion. From Ms. Garza's jewelry box, the intruders removed jewelry belonging to Ms. Garza and an eagle-shaped ring belonging to Mr. Domingo Martinez. Mr. Martinez had been staying with Ms. Garza at the time of the robbery. He did not testify at trial.

Appellant was subsequently apprehended. The indictment referenced the theft of Mr. Martinez's ring. The ring was later discovered at a pawn shop. The owner of the pawn shop, Mr. James Harris, had known Appellant for many years. Mr. Harris testified that Appellant had pawned the eagle-shaped ring on September 3, 1999, one day after the robbery. The pawn shop receipt for the ring was recovered from the home of Appellant's alleged accomplice. The receipt bore the name of Appellant's brother. Though Appellant closely resembles his brother, Mr. Harris was certain that it was Appellant, not his brother, who pawned the ring.

During the punishment phase of trial, the State offered testimony from two individuals who identified Appellant as the perpetrator of a separate home invasion in which Appellant had also impersonated a police officer. During his closing statement, Appellant's trial counsel concluded by asking that the jury "consider a prison term of not less than twenty years for these two crimes that have been committed."

Legal Insufficiency

Appellant's insufficiency claim hinges upon his contention that, by failing to offer testimony from Mr. Martinez himself, the State failed to prove Mr. Martinez did not consent to the taking of his ring. Appellant does not allege any insufficiency regarding proof of the assault on Ms. Garza.

In performing a legal sufficiency analysis, we review the evidence in the light most favorable to the verdict, and ask whether any rational trier of fact could have rendered the jury's findings beyond a reasonable doubt. *Maldonado v. State*, 998 S.W.2d 239, 251 fn.

3 (Tex. Crim. App. 1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Viewing the evidence in the light most favorable to the verdict, we disagree with Appellant's contention that the State offered no evidence that Mr. Martinez's ring was taken without his effective consent. Ms. Garza testified that the ring belonged to Mr. Martinez and that she placed it in her jewelry box. She testified that Mr. Martinez was her boyfriend and that he was staying with her at the time of the theft. Ms. Garza's testimony is circumstantial evidence that Mr. Martinez did not, *in absentia*, give his ring to Appellant during the home invasion. To find otherwise would challenge common sense. We therefore hold that the evidence establishing the underlying theft was legally sufficient. *See* TEX. PEN. CODE ANN. §§ 29.01-29.03.

In support of his argument, Appellant also relies upon *Hill v. State*. 640 S.W.2d 879 (Tex. Crim. App. 1982), *overruled by Woods v. State*, 653 S.W.2d 1 (Tex. Crim. App. 1983). We disagree with Appellant's application of *Woods* to the facts presented here. In *Hill* and *Woods*, the jury charges failed to track the indictment language requiring an assault "in the course of committing theft." Instead, the charges attempted to individually set forth the elements of the underlying theft. In both cases, the charges failed to require that the jury find that property was taken "without the owner's effective consent." In *Woods*, the Court of Criminal Appeals overruled *Hill*, holding that the lack of consent could be inferred. However, in both *Hill* and *Woods* the victim of the assault was also the victim of the theft. Appellant submits that where, as here, the victims of the assault and robbery are different, lack of consent cannot be inferred.

We disagree. Here the evidence established that Mr. Martinez's ring was in Ms. Garza's jewelry box, i.e. in her possession, custody and control. She testified that she was physically pushed and handcuffed her in her home. There can be no doubt that the ring was removed from her possession without *her* effective consent. We would narrowly extend the holding in *Woods* under the facts presented here, holding that where a rightful possessor of the property of another demonstrates no consent to the removal of the property, the lack of

consent of the true owner may be inferred.

Appellant's first issue is overruled.

Ineffective Assistance

Appellant claims his trial counsel was ineffective in: (1) failing to utilize a picture of Appellant's brother when cross-examining those witnesses who identified Appellant as the perpetrator of the second home invasion; and (2) closing with a remark admitting that Appellant committed the second home invasion and requested that the jury sentence Appellant to "not less than twenty years."

Texas courts apply the *Strickland* test to determine whether counsel's representation was so inadequate as to violate a defendant's Sixth Amendment right to counsel. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). *See generally Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must first show by a preponderance of the evidence that counsel's performance was deficient, *i.e.*, that his assistance fell below an objective standard of reasonableness. *Thompson*, 9 S.W.3d at 812. Next the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S. Ct. 966 (1997). When reviewing a claim of ineffective assistance, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

Apparently, Appellant closely resembles his brother. A picture of Appellant's brother

was available to trial counsel but was not used to cross examine witnesses during the punishment phase. Those witnesses identified Appellant as the perpetrator of another, similar crime. Thus, Appellant argues:

> Every criminal lawyer dreams of the day that he has a picture of a person that so resembles his client that he knows all he will have to do is show that picture to a witness and the witness will identify that person as the perpetrator. That opportunity existed in this case.

The fact that counsel *could have* used the picture of the brother in an effort to lead witnesses at the punishment phase into identifying Appellant's brother as the perpetrator of the second home invasion is not, by itself, evidence of deficient performance. We agree with the State that such a tactic could have been considered and reasonably rejected by Appellant's counsel. Appellant's counsel may have believed such a tactic unlikely to succeed; he may also have thought it to be viewed by the jury as trickery.

Similarly, our review of the record of trial counsel's closing arguments yields no evidence of deficient performance. Counsel for Appellant did admit that Appellant had committed the second home invasion. However, as the State correctly observes, it is obvious from the context of trial counsel's argument that the goal in conceding guilt was to obtain a favorable sentencing decision.

As for the statement by counsel that the sentence be "not less than twenty years," it seems more probable than not that counsel suffered an unfortunate error of speech. The focus of counsel's closing argument was rehabilitation for Appellant. Faced with possible life imprisonment, counsel asked the jury for a sentence that would provide Appellant with an opportunity to be rehabilitated. Read in context, there can be no doubt that counsel meant to request a sentence of "not more than twenty years." We think it likely the jury recognized the error. We find the evidence before us not enough to overcome the strong presumption that counsel acted reasonably. Appellant therefore cannot overcome the first prong of *Strickland*. We overrule Appellant's second point of error.

Accordingly, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed November 21, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.[1]

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

[1] Senior Justice Don Wittig sitting by assignment.