

Affirmed and Opinion filed November 24, 1999.



In The

Fourteenth Court of Appeals

NO. 14-97-00691-CR

FLORENCIO AVILA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 731,268**

OPINION

Appellant was charged by indictment with the offense of aggravated sexual assault. A jury found appellant guilty of the offense and assessed punishment at forty years confinement in the Texas Department of Criminal Justice-Institutional Division. Appellant raises five points of error challenging his conviction: (1) improper closing argument by the State; (2) ineffective assistance of counsel during guilt/innocence; (3) ineffective assistance of counsel during punishment; (4) improper cross-examination by the State of defense witness Shelly Thompson; and (5) improper cross-examination by the State of defense witness Armenia Martinez. We affirm.

A rendition of the underlying facts is not necessary to the disposition of this appeal. Therefore, we will dispense with the facts and proceed to review appellant's points of error.

I. IMPROPER CLOSING ARGUMENT BY PROSECUTION

Appellant objects, in his first point of error, to the following portion of the State's closing argument:

Now, I want to review some of the things the defense attorney said. First of all, I want you to notice during the course of the trial it's a rule as old as time itself -- and pardon the pun -- but I called it for years the cockroach method. I know we've already had one Roach in the trial, but there's another one. A cockroach method. That's where the defense goes along and just like a cockroach tries to flap its wings, tries to stir up as much dust as possible trying to confuse members of the jury. That trick, that is an old standard trick among lawyers, as old as the hills.

Appellant asserts that this argument attempts to strike at the accused over the shoulders of his attorney.

To preserve error for appellate review, appellant must have made a specific, timely objection at the earliest possible opportunity. *See* TEX. R. APP. P. 33.1(a); *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991). Appellant's counsel did not object to the remarks at trial, and therefore waived any challenge to them on appeal. Accordingly, appellant's first point of error is overruled.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In points of error two and three, appellant challenges the effectiveness of his trial counsel in both the guilt/innocence and punishment phases of his trial.

A. Guilt/Innocence Phase

The proper format for deciding claims of ineffective assistance of counsel during the guilt/innocence phase of trial is the two-prong standard adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). This standard was applied to Texas constitutional and statutory law in *Hernandez v. State*, 726 S.W.2d 53, 56-7 (Tex. Crim. App.

1986). In *Strickland*, the Court held that an appellant must first show that defense counsel's performance was deficient, such that the errors made were so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment of the United States Constitution. *See Strickland*, 466 U.S. at 687. The proper standard of effectiveness will be an objectively reasonable standard, taking into account all the surrounding circumstances. *See id.* at 688. In addition, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See id.* at 690.

Under the second prong of the *Strickland* standard, an appellant must show that the deficient performance prejudiced the defense, in that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. 466 U.S. at 687. Thus, an appellant must demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See id.* at 694.

An appellant must satisfy both prongs of the *Strickland* standard, demonstrating both deficiency and prejudice; otherwise, the conviction cannot be said to have "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

In his brief, appellant appears to allege four different bases for his ineffectiveness claim during the guilt/innocence phase. His first three bases center on a line of questioning of defense witness Shelly Thompson, appellant's girlfriend. Thompson was called as a character witness by the defense, and on direct examination she offered the following testimony:

Q: Would you say that Florencio Avila, in your opinion, has a good reputation for --

A: Yes, he does.

Q: -- for truthfulness?

A: Yes, he does.

Q: Would you say that he is a person of good moral character?

A: Moral character? Like as far as values and everything goes?

Q: Yes.

A: Yes.

On cross-examination, Thompson testified as follows:

Q: Now, you said that he has a good reputation?

A: Yes, he does.

Q: That he has a good moral character; is that correct?

A: Yes.

Q: You've known him for the last four years?

A: Yes, I have.

Q: So you must know that he is a member of a criminal street gang
called the Black Latins. You know that, don't you?

A: I didn't know he was a member. I know he talks to some of them.

Appellant argues that defense counsel should never have asked Thompson about appellant's moral character in the first place, thereby opening up his character for examination. Appellant argues that if defense counsel would have properly investigated appellant's loose connection to the Black Latins, counsel might not have asked Thompson to vouch for appellant's character. He also argues that counsel was ineffective by failing to object to all subsequent impeachment testimony in which the State questioned witnesses about appellant's connections to the Black Latins street gang. Appellant asserts that because the State never offered any proof to establish that appellant was a member of that gang, defense counsel erred by not objecting to the State's queries. Additionally, appellant argues his counsel was ineffective for failing to request any kind of limiting instruction on such testimony.

Appellant's fourth argument concerning ineffectiveness of counsel centers on defense counsel's failure to object to the State's categorization of appellant and his friends during closing argument. Appellant points to the following portions of the State's argument as objectionable: "Who are you going to believe? Her or him and his bunch of rats, with the exception of his mom, his sweetheart, and his boss" and, "Who are you going to believe, him or her? Him and his scum bag friends or her?"

Appellant has not overcome the presumption under the first prong of *Strickland* that counsel's decision to question witnesses about his character was part of an objectively reasonable trial strategy. Appellant merely points to possible errors made by defense counsel, but does not establish, or even allege, that under all the circumstances a reasonably effective attorney would have behaved differently. Further, we can find nothing in the record itself which would rebut the presumption of reasonably sound trial strategy. The first witness to testify, Alberto Saldana, in whose home the assault took place, stated that his nickname was no longer "Roach" because he had gotten out of the "gang business." Further, the State established that several of the men present the night of the assault were current or former gang members. With this evidence, it would be difficult for the jury not to conclude that appellant was an associate of these gang members. Therefore, a reasonable attorney could have therefore decided to present character witnesses to vouch for appellant, as part of a trial strategy to demonstrate that even though appellant associated with these gang members, he was still a person of good moral character. This strategy correlates with appellant's defense that even if he was present in Saldana's home during the assault, he did not participate in the assault.

Appellant has also failed to satisfy the first prong of *Strickland* in his complaint about defense counsel's failure to object to the gang affiliation references by the State during cross-examination and closing argument. Evidence that a defendant is affiliated with a gang is not ordinarily admissible during guilt/innocence unless it constitutes same-transaction contextual evidence. *See Pondexter v. State*, 942 S.W.2d 577, 585 (Tex. Crim. App. 1996). When a defendant puts his character at issue, however, the State may introduce gang affiliation as impeachment evidence by asking "do you know" or "have you heard" questions. *See* TEX. R.

CRIM. EVID. 404(a)(1); *Reynolds v. State*, 848 S.W.2d 785, 788 (Tex. App.-Houston [14th Dist.] 1993, pet. ref'd). Once defense witness Thompson was questioned by defense counsel about the appellant's character, the State was entitled to question witnesses about appellant's gang affiliation. *See Reynolds*, 848 S.W.2d at 788. Appellant's counsel did not render ineffective assistance by failing to object to the State's questions because they were permissible under the rules of evidence. Even if defense counsel would have had a sound basis for objecting to the gang affiliation references, however, appellant does not rebut the presumption that his counsel's decisions were part of a reasonably sound trial strategy. As noted above, defense counsel's strategy appears to have been to acknowledge appellant's association with gang members, but to present him as a good person despite his gang affiliation. Appellant has not overcome the presumption that his counsel's decisions were part of an objectively reasonable trial strategy.

Appellant also fails to satisfy the second prong of the *Strickland* standard. He does not establish that the alleged errors by counsel so harmed his defense, that but for these errors the result of the proceeding would have been different. Appellant argues that the jury was given the impression that he was involved in gangs and crime, but he fails to establish that the jury would not have convicted him were it not for the implication. As the Supreme Court noted in *Strickland*, "It is not enough for appellant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission would meet that test." 466 U.S. at 692. It is not enough in the instant case that appellant alleges some possible harm. In order to satisfy the second prong of *Strickland*, appellant would need to show that the jury would not have convicted him if defense counsel had prevented the introduction of the gang affiliation testimony. In this case, there was overwhelming evidence before the jury of appellant's guilt. The complainant was able to positively identify appellant as one of her assailants, by silhouette, voice, and name. In addition, several of appellant's own friends placed him at the scene during the assault. With this evidence supporting appellant's guilt, a jury could easily have found appellant guilty without the gang affiliation references in evidence. Appellant has therefore failed to demonstrate a reasonable probability that the alleged errors

affected the result of the proceeding sufficient to undermine our confidence in the outcome of the jury's deliberation.

Appellant has failed to satisfy either prong of the *Strickland* standard. Accordingly, appellant's second point of error is overruled.

B. Punishment Phase

Appellant also objects to the State's questions and jury argument during the punishment phase of trial which alluded to his gang affiliation. Appellant argues that the State did not have the factual foundation to question witnesses about this subject, and that defense counsel's failure to object or seek limiting instructions to this testimony and argument was therefore erroneous.

The proper format for deciding claims of ineffective assistance of counsel in the punishment phase of a non-capital trial is also the *Strickland* two-prong test. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999).¹

Testimony regarding a defendant's affiliation with a gang may be admissible during the punishment phase of trial because it bears on the character of the accused. *See* TEX. CODE CRIM. P. ANN. art. 37.07§3(a) (Vernon Pamph. 1999); *Beasley v. State*, 902 S.W.2d 452, 456-57 (Tex. Crim. App. 1995); *Ybarra v. State*, 775 S.W.2d 409, 411 (Tex. App.-Waco 1989, no

¹ In *Hernandez*, the Court of Criminal Appeals reconsidered whether the standard set forth in *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980), and *Ex parte Cruz*, 739 S.W.2d 53 (Tex. Crim. App. 1987), should continue to determine ineffectiveness of counsel claims in noncapital sentencing proceedings. The court stated that the *Duffy* standard essentially is the first prong of the *Strickland* standard. Therefore, under *Duffy*, defendants are not required to prove prejudice. *See Hernandez*, 988 S.W.2d at 770-771. The court went on to hold that the two-prong standard from *Strickland* should be used instead in both the guilt/innocence and punishment phases of trial. *See id.* at 771-72. The court reasoned that:

Duffy was decided before and without the benefit of *Strickland*. Therefore, to the extent *Duffy*, as we have limited it in *Cruz*, is inconsistent with *Strickland* on matters of federal constitutional law, we have no choice but to overrule it as we are obligated to follow United States Supreme Court precedent on matters of federal constitutional law.

Id. at 771.

pet.). This type of testimony is admissible so long as the jury is provided with evidence of the defendant's affiliation with the gang. *See Beasley*, 902 S.W.2d at 457.

In the instant case, the State offered ample evidence establishing appellant's affiliation with the Black Latins gang. Testimony established that appellant was a documented associate of the Black Latins, that several of appellant's friends were members of that gang, that three current or former members of the Black Latins were present the night of the assault, and that items around his friend's home and the courthouse where the trial was being held were tagged with Black Latins graffiti.² Thus, appellant's counsel did not render ineffective assistance by failing to object to the State's questions because they were permissible under article 37.07§3(a).

Further, the State's closing argument is the proper place for a summation of the State's case and evidence. *See Coleman v. State*, 881 S.W.2d 344, 358 (Tex. Crim. App. 1994). In the instant case, it was not erroneous for defense counsel to fail to object to the State's references to appellant's gang affiliation because they were properly included in closing argument.

Even if defense counsel could have prevented the questions and jury argument that referenced appellant's gang affiliation, appellant does not rebut the presumption under the first prong of *Strickland* that his counsel's decisions were part of a reasonably sound trial strategy. Appellant fails to demonstrate that under all the circumstances, a reasonable attorney would have acted differently. Appellant's associations with gang members were already in evidence. It appears that defense counsel continued to employ the same strategy in the punishment phase as at trial, distinguishing appellant as a good person, who was different from the gang members with whom he associated.

² Even though appellant and other witnesses denied that he was a member of the gang, the testimony is still admissible. *See Anderson v. State*, 901 S.W.2d 946, 948 (Tex. Crim. App. 1995).

In addition, appellant fails to demonstrate that but for the alleged errors by defense counsel, the result of the sentencing would have been different. In fact, appellant does not appear to allege any actual harm at all. In order to satisfy the second prong of *Strickland*, appellant would need to specifically demonstrate that the result of the sentencing proceeding would have been different if his counsel would have objected to the gang affiliation references. Even if the testimony was not admitted, the jury was already clearly aware of appellant's associations with gang members. Further, they had just pronounced him guilty of committing a crime that occurred in collusion with several of the gang members. Appellant's third point of error is overruled.

III. IMPROPER CROSS-EXAMINATION BY PROSECUTION

Appellant complains, in points of error four and five, about the State's questioning of defense witnesses Shelly Thompson, appellant's girlfriend, and Armenia Martinez, appellant's mother. Appellant argues that the State improperly questioned Thompson and Martinez on facts not in evidence, namely, appellant's gang affiliation.

Defense counsel, however, did not object to the State's questions at trial, and therefore, appellant did not preserve the issue of their appropriateness for appellate review. *See* TEX. R. APP. P. 33.1(a); *Turner*, 805 S.W.2d at 423. Accordingly, appellant's fourth and fifth points of error are overruled.

Having overruled all of appellant's points of error, we affirm the trial court's judgment.

/s/

Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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