Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-01013-CR

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JUAN JOSE RUIZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 750,484

O P I N I O N

In this case, we address the sufficiency of the indictment, the voluntariness of appellant's plea, and the sufficiency of the evidence to support the conviction. Charged by indictment with solicitation of aggravated kidnapping, appellant, Juan Jose Ruiz, waived his right to trial by jury and entered a plea of "no contest," without an agreed recommendation. After finding him guilty, the trial court sentenced appellant to confinement in the Texas Department of Criminal Justice, Institutional Division, for a period of eight years and assessed a fine of $10,000. Appellant asserts five points of error. In the first two, appellant contends:

(1) the indictment failed to properly allege the facts necessary to establish an offense and (2) the court improperly found appellant guilty of the offense of solicitation of aggravated kidnapping in that when presented with a "no contest" plea, the state failed to present sufficient facts to find appellant guilty. In the final three points of error, appellant contends his plea of no contest was not a knowing, voluntary and intelligent plea in that: (i) counsel was ineffective for failing to object to the language of the indictment; (ii) appellant did not understand the rights he was waiving; and (iii) appellant was led to believe that he would receive probation and did not know or believe he could be sentenced to the Texas Department of Corrections. We overrule all points of error and affirm appellant's conviction.

SUFFICIENCY OF INDICTMENT

In his first point of error, appellant contends the indictment failed to properly allege the facts necessary to establish an offense. When a charging instrument fails to allege the facts necessary to establish an element of an offense, the defect is substantive. *See Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990). Article 1.14(b) of the Texas Code of Criminal Procedure provides "if a defendant does not object to a defect, error, or irregularity of form or substance in an indictment . . . *before the date on which the trial on the merits commences*, he waives and forfeits the right to object . . . *and he may not raise the objection on appeal* . . ." TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1999) (emphasis added). *See also Studer*, 799 S.W.2d at 273 (failing to make a pre-trial objection to substantive error in the charging instrument waives the error); *Smith v. State*, 959 S.W.2d 1, 9 (Tex. App.—Waco 1997, pet. ref'd) (waiting to file a motion to quash the indictment until the date of trial waives the error). The record contains no motions challenging the indictment and there is nothing to indicate that appellant voiced any objection to the indictment before trial. Inasmuch as appellant failed to object to the indictment before trial, he waived his right to object to any defect on appeal.

Nevertheless, appellant argues the indictment was so defective as to violate fundamental

fairness. Like appellant, the convicted defendant in *Studer* argued that the information contained a fundamental defect when it failed to allege the facts necessary to establish an offense. *Id*. at 272-73. Construing Article V, section 12 of the Texas Constitution as abolishing the former prerequisites for charging instruments, the Texas Court of Criminal Appeals found that defects of a fundamental nature in the charging instrument were also abolished. *See id*. at 266-72. Therefore, we overrule appellant's first point of error.

FACTUAL SUFFICIENCY OF EVIDENCE

In his second point of error, appellant alleges the trial court improperly found him guilty of the offense of solicitation of aggravated kidnapping because, when presented with a "no contest" plea, the state failed to present sufficient evidence to establish his guilt.

When an accused enters a plea and waives his right to trial by jury, the state must introduce evidence proving guilt to authorize a conviction. *See* TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp.1999). In a review of the factual sufficiency of the evidence, we consider *all* of the evidence "without the prism of 'in the light most favorable to the prosecution'" and "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). If we do not have an agreed or complete statement of the facts, we "cannot consider the 'facts' of the case to determine whether or not sufficient evidence exists to support the conviction." *Greenwood v. State*, 823 S.W.2d 660, 661 (Tex. Crim. App. 1992). Where an appellant waives the right to have a court reporter make a record of the plea hearing, he fails to preserve error for review. *See Campbell v. State*, 942 S.W.2d 738, 740 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 1999 WL 1016388 (Tex. Crim. App. Nov. 10, 1999).[1] Inasmuch as appellant waived his right to have a court reporter make a

[1] When *Campbell* was decided, Rule 50(d) of the Texas Rules of Appellate Procedure was still in effect, which placed the burden on appellant to ensure a sufficient record was presented on appeal. Even though this rule is no longer in effect, the burden cannot be on the state when the absence of a reporter's (continued...)

record of the plea of no contest and the punishment hearing, he failed to preserve error for review. We overrule the second issue.

VOLUNTARINESS OF PLEA

In his third, fourth, and fifth points of error, appellant contends his plea of no contest was not a knowing, voluntary, and intelligent plea because: (i) counsel was ineffective for failing to object to the language of the indictment; (ii) appellant did not understand the rights he was waiving; and (iii) appellant was led to believe he would receive probation. The third and fourth points attack defense counsel's effectiveness, and the fifth point asserts appellant received significant misinformation.

At the outset, we note that a *prima facie* showing of a knowing and voluntary plea is made when the record indicates that a defendant received an admonishment as to punishment. *See Fuentes v. State*, 688 S.W.2d 542, 544 (Tex. Crim. App. 1985). The burden then shifts to the defendant to show that he entered his plea without understanding the consequences. *See id*. Because the record before us indicates that appellant received written admonishments as to punishment, the burden is on him to show he entered the plea without understanding the consequences.

Ineffective Assistance

An accused is entitled to effective assistance of counsel during the plea bargaining process. *See Ex parte Lafon,* 977 S.W.2d 865, 867 (Tex. App.—Dallas 1998, no pet.) (citing *Ex parte Battle,* 817 S.W.2d 81, 83 (Tex. Crim. App. 1991). Claims of ineffective assistance of counsel are evaluated under the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). The first step requires appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional

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[1] (...continued)
record is due to appellant's failure to request a court reporter to make a record of the plea hearing. We find the reasoning in *Campbell* is still sound.

norms. *See Strickland*, 466 U.S. at 688. To satisfy this step, appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695. The second step requires appellant to show prejudice from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d at 770, 772 (Tex. Crim. App. 1999). To establish prejudice, an appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that trial counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel took the actions forming the basis of appellant's ineffective assistance complaint. *See id.*

In the first step of the *Strickland* analysis, we examine the acts or omissions of counsel that are alleged to constitute ineffective assistance. In his third point of error, appellant contends that his trial counsel, Diana Olvera, was ineffective in failing to object to a defective indictment. As previously noted, an indictment is defective if the allegations in the indictment do not encompass every element of the offense charged. *See Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990). In making this determination, we look to the meaning of the words used in the indictment. Although the exact words of the statute do not have to be used in the indictment, the meaning of the words used must be the same. *See* TEX. CODE CRIM. PROC. ANN. art. 21.17 (Vernon 1989). While the language of the indictment charging

appellant follows very closely the offense of criminal solicitation,[2] it also follows closely the offense of aggravated kidnapping, the first degree felony appellant was found to have solicited. The offense of aggravated kidnapping requires a person to intentionally or knowingly abduct another person and "use[] or exhibit[] a deadly weapon during the commission of the offense." TEX. PEN. CODE ANN. § 20.04(b) (Vernon Supp. 1999). The indictment at issue here alleged appellant solicited a kidnapping which was to have used "deadly force, namely a firearm" to prevent the kidnappee's freedom. The statutory definition of "deadly weapon" specifically mentions firearms. *See* TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon 1974). We find the allegations in the indictment establish the elements of solicitation of aggravated kidnapping. Thus, the indictment is not defective. Because the indictment is not defective, trial counsel's failure to object to the indictment was not an omission that falls below an objective standard of reasonableness. For this reason, the first step of *Strickland* is not met. We overrule the third point of error.

In his fourth point of error, appellant contends his trial counsel failed to explain his rights to him in Spanish and failed to tell him the charge and plea involved the use of a weapon.

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[2] The criminal solicitation statute reads:

> A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

TEX. PEN. CODE ANN. § 15.03(a) (Vernon 1974).

The indictment reads in part:

> Juan Jose Ruiz . . . did then and there unlawfully, with the intent that a felony of the first degree, namely, aggravated kidnapping, be committed, the defendant requested, commanded and attempted to induce William King to engage in specific conduct, that under the circumstances surrounding the conduct of William King as the defendant believed them to be, would constitute said felony and would make William King a party to the commission of said felony . . .

The trial court admonishments appellant signed belie these contentions. The written admonishments appellant received expressly state:

> the foregoing Admonishments, Statements, and Waivers as well as the attached written Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession, were read by me or were read to me and explained to me in that language [Spanish] by my attorney and/or an interpreter, namely Diana Olvera . . .

Further, at the hearing on the motion for new trial, Ms. Olvera testified that she communicated appellant's rights to him in Spanish. She also testified that although appellant did not read the admonishments, she read them to him in Spanish and that he initialed each one. Ms. Olvera testified that she discussed the case with appellant many times at her office and during court appearances and gave him all the information he needed to make an informed decision. Because the acts or omissions that appellant contends showed ineffective assistance were contested, we cannot find appellant overcame the strong presumption that his trial counsel was effective. In fact, the evidence presented bolsters, rather than negates, the presumption of counsel's effectiveness. Therefore, the first prong of *Strickland* is not satisfied. We overrule the fourth point of error.

Significant Misinformation

In his fifth point of error, appellant contends trial counsel told him he would receive probation. When, as here, an appellant contends his plea resulted from significant misinformation, we review the record to determine if it supports his contention. *See Russell v. State*, 711 S.W.2d 114, 116 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd). Appellant's trial counsel (Diana Olvera) denied that she led appellant to believe he would receive probation. In light of the admonishments in the record and appellant's trial counsel's testimony, we find no evidence that would indicate appellant believed he would receive probation. Even if appellant earnestly held that belief before he entered his plea, it would not make his plea involuntary. Where an attorney leads a defendant to believe he will receive

probation and the appellant does not, the plea is not involuntary. *See Russell*, 711 S.W.2d at 116. Accordingly, appellant has not met the burden of proving he entered his plea of "no contest" without understanding the consequences. We overrule the fifth point of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed December 23, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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