Affirmed and Opinion filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00372-CR

TONY AKUDIGWE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause No. 9935537

O P I N I O N

Appellant appeals his conviction for indecent exposure and presents five issues for review. The first two issues relate to statements made by the Court and prosecutor during closing argument. The third issue involves the trial court's imposition of sex-offender conditions of probation. The fourth and fifth issues are claims that trial counsel was ineffective during the guilt-innocence and punishment phases of trial, respectively. We affirm.

Background

Appellant was seen masturbating in his taxi by two adults. Appellant was parked at the rear of an apartment complex in the early morning. The complex abuts a school. One of the two witnesses was walking her kids through the complex to the school. The other witnesse was Ms. Uwadia. During closing arguments, appellant's trial counsel argued:

> Now, Ms. Uwadia, I don't know why she's so mad. She said, I was absolutely infuriated with everybody, I was mad at the school, and the teachers, and everybody, and I even got on the Internet, and I'm going to get to the bottom of all this. And I don't know why she's so angry when the testimony—I thought from two eyewitnesses, one who was walking children behind the car, another one getting out of a car and looking—looking at almost, not quite the same time.

Later, during the State's closing argument, the following exchange took place:

Prosecutor:	Defense counsel told you, I don't know why—I don't know why they were so angry. He doesn't know why they were so angry? The school, there's children walking to the school, and this man is masturbating in his van and he doesn't know?
Haggard:	Objection, Your Honor. I said Ms. Uwadia was angry.
Court:	Overruled. Overruled, Mr. Haggard. Again, ladies and gentlemen, listen with respect to what each counsel says. What they say is not evidence.
Prosecutor:	And he doesn't know why they were angry that morning. Well, I'll tell you, I'd be angry.
Haggard:	Objection, Your Honor, to her characterizing herself.
Court:	Please don't keep objecting Mr. Haggard.
Defense:	Your Honor, I'm going to object to her saying how she feels. I filed a motion on that and you've ruled on it. I object to it strenuously, how she feels.
Court:	Overruled. Go ahead. Again, ladies and gentlemen, what either counsel says is not evidence, they're making argument on behalf of each of their cases.

Only after the jury began deliberations did defense counsel request an additional instruction that "any thoughts, opinions or any comments by the court should not be considered as evidence." The trial judge refused this request on the ground that it was not timely. Defense counsel stated that he failed to object earlier because he did not want the jury to be further prejudiced.

A jury convicted appellant of indecent exposure, sentenced him to 180 days in jail, and recommended probation. The trial court set the probationary period at two years and added certain conditions to the probation.

Issues

Appellant submits: (1) the trial court's statement that defense counsel refrain from objecting again was an impermissible comment on the evidence; (2) the trial court erroneously overruled his objection to improper jury argument; (3) imposing certain conditions of probation normally given to sex offenders was both unauthorized and unreasonable; (4) trial counsel was ineffective in violation of the Sixth Amendment. We address each issue in turn.

I. Comment on the Weight of the Evidence

Appellant claims the court's statement "Please don't keep objecting Mr. Haggard" is an impermissible evidentiary comment in violation of article 38.05 of the Texas Code of Criminal Procedure. The Court of Criminal Appeals has recently written on the paramount importance juries place on a trial judge's statements. *See generally Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2001). *Blue* makes clear that a defendant need not object to comments from a trial judge in order to preserve error where such comments are held to constitute fundamental error.[1] *Id.* at 132-33.

While we agree with appellant that the comment by the trial judge in this case was improper, we hold the error non-reversible. To constitute reversible error, a comment must

[1] Because we find the comment to be harmless error, appellant's failure to object to it is moot. *See* TEX. R. APP. P. 33.1 (preservation of error rule).

be reasonably calculated to benefit the State or prejudice a defendant's substantial rights. *Hagens v. State*, 979 S.W.2d 788, 794 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (citing *Becknell v. State*, 720 S.W.2d 526, 531 (Tex. Crim. App. 1986)). *See also* TEX. R. APP. P. 44.2(b) (harmless error standard). The comment occurred in the context of a prolonged discussion between the prosecutor, defense counsel, and trial judge regarding one of the witnesses's motives for investigating the alleged crime. During this discussion, as noted above, the record indicates the trial judge repeatedly advised the jury that each side's opinions as to the witness's motive was not evidence. Viewed in this context, we hold the judge's comment, while improper, did not rise to the level of reversible error.

Appellant's first issue is overruled.

II. Improper Jury Argument

Appellant contends the prosecutor's comment regarding why she thought the State's witnesses were angry was improper argument. We disagree. Rather, Texas court's hold a prosecutor's argument is not improper if it responds to defense counsel's argument. The comment at issue responded to defense's closing comment regarding why one of the State's witnesses had been so angered by appellant's behavior. *See Nethery v. State*, 692 S.W.2d 686, 693 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110 (1986) (state may respond with evidence of motive in response to defense comments–species of invited error). The comment is therefore not objectionable. *Id*. [2]

Appellant's second issue is overruled.

III. Imposition of Sex-Offender Community Supervision Conditions

The trial court required appellant to comply with several probationary conditions applicable to sex-offenders under Section 13B of the Code of Criminal Procedure.[3] Initially,

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[2] Additionally, we believe the comments, both by the prosecutor and defense counsel, constituted reasonable deductions from the evidence. *See generally Westbrook v. State*, 29 s.W.3d 103, 115 (Tex. Crim. App. 2000) (reasonable deduction from the evidence one of four proper types of jury argument).

[3] The conditions required appellant to undergo a sex offender treatment evaluation, participate in a psychological assessment, refuse employment involving contact with children, and stay away from facilities where children are located.

the court required appellant to register as a sex-offender. That requirement has since been removed. At no time during sentencing or in his motion for a new trial did appellant object to the conditions of probation.

We agree with the State that appellant waived any error committed by the trial court imposing probationary conditions applicable to sex offenders. *See Speth v. State*, 6 S.W.3d 530, 535 (Tex. Crim. App. 1999) (defendant may not complain of condition of probation for first time on appeal), *cert. denied*, 529 U.S. 1088 (2000). Appellant argues that *Speth* is distinguishable because the jury did not recommend probation in *Speth*.[4] However, whether a jury recommends probation is immaterial in determining the conditions of probation. It is the judge who determines the nature and type of conditions that are "in the best interest of justice, the public, and the defendant." TEX. CODE CRIM. P. art. 42.12 §3(a). *See also id.* at §11(a) ("judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant"). Appellant cites no case distinguishing *Speth* in the manner suggested. We find none and decline to recognize the distinction urged. Because appellant failed to object to the conditions imposed, he waived his right to appeal the alleged error.

We overrule appellant's third issue.

IV. Ineffective Assistance of Counsel - Issue Four

Appellant claims trial counsel was ineffective at the guilt-innocence phase of trial in failing to talk to two customers, one of whom appellant transported about the time of the alleged offense. The name, phone number, and pick-up address of each customer was available in the records provided by the cab company. Appellant argues testimony from these witnesses would have provided a "proper time-line" establishing how long appellant was in the vicinity of the crime. Additionally, appellant claims trial counsel failed to provide

[4] Specifically, appellant argues that the mandatory grant of probation upon the jury's recommendation, pursuant to Section 4 of Article 42.12 of the Code of Criminal Procedure, renders *Speth* inapplicable.

physical evidence that the State's two trial witnesses could not have seen appellant masturbating, based on their location (and elevation) in relation to the cab.[5]

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) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (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.

Trial counsel testified at the hearing on appellant's motion for new trial that he declined to speak with the two customers because he did not believe either had relevant information. He testified that the printed records from the cab company were sufficient to establish a time-line. One of the customers was a no-show, and would therefore be unable to identify appellant. The other customer was picked-up, according to the printed cab records, at a different location than the crime scene. The exact time the customer was picked-up and dropped-off was recorded by the cab company. Trial counsel testified that

[5] Appellant asserts ineffectiveness based on two bare allegations. First, appellant claims one witness could not have seen as far into the cab as she suggested. Second, appellant claims ineffectiveness for failure to determine exactly how far the other witness allegedly stood from the cab.

his strategy was to use the incontrovertible time records provided by the cab company, together with evidence of the distance between the crime scene and the location of the second customer, to show that it was unreasonable to believe appellant committed the crime. Trial counsel testified that he did not want to call any witnesses that might call into question the validity of the cab company records. We find these decisions to be objectively reasonable trial strategy. As such, appellant cannot overcome the first prong of *Strickland*.

Appellant's fourth issue is overruled.

V. Ineffective Assistance of Counsel - Issue Five

The *Strickland* test for ineffectiveness applies at the punishment phase of trial as well as guilt-innocence. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). Appellant argues trial counsel was ineffective at sentencing in failing to object to the registration requirement, the child safety-zone requirement, and the obligation to undergo psychological counseling. However, because we hold the conditions imposed are not objectionable, trial counsel's conduct was not deficient.

A condition of community supervision is invalid if it contains all three of the following characteristics: (1) it has no relationship to the crime; (2) it relates to conduct that is not in itself criminal; and (3) it forbids or requires conduct that is not reasonably related to the future criminality of the defendant or does not serve the statutory ends of community supervision. *Marcum v. State*, 983 S.W.2d 762, 768 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). The text of the relevant statute allows the judge to impose "any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant." *See* TEX. CODE CRIM. P. art. 42.12 §11(a). Section 11(a) of Article 42.12 specifically states that the list of probationary conditions given is non-exhaustive.

Appellant committed a sex-related offense near a school during a time period when a reasonable person would expect children to be arriving. Under these facts, the child-safety zone condition is clearly reasonable, as is the requirement that appellant undergo

psychological counseling.[6] Both conditions protect the community and are related to the crime.

It is axiomatic that trial counsel commits no error in failing to make meritless objections. Trial counsel's conduct therefore did not fall below an objectively reasonable standard. Appellant cannot overcome the first prong of *Strickland*. Appellant's fifth point of error is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ Joe L. Draughn
Senior Justice

Judgment rendered and Opinion filed January 10, 2002.
Panel consists of Justices Yates, Edelman, and Draughn.[7]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[6] We do not decide whether requiring compliance with the sex-offender registration program would have been reasonable had it not been stricken from the court's judgment.

[7] Senior Justice Joe L. Draughn sitting by assignment.