Affirmed and Opinion filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01057-CR

NATHAN BLOUNT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 807,537

O P I N I O N

Over Nathan Blount's plea of not guilty, a jury convicted him of aggravated robbery. He pleaded not true to two enhancement paragraphs. The trial court found the enhancements true and assessed punishment at 55 years' confinement in the Texas Department of Criminal Justice, Institutional Division. He raises three issues on appeal: (1) the court erred by allowing testimony into evidence that other juries have convicted other defendants with equally scant identification evidence; (2) appellant was denied effective assistance of counsel; and (3) the prosecutor acted in bad faith by informing the jury in

opening argument and at trial that his wife participated in the offense. We affirm the judgment of the trial court.

FACTUAL BACKGROUND

Mr. John Aydam is 75 years old and the owner of a pawn shop at the 11000 block of South Post Oak Road in Houston. On February 11, 1999, Aydam, his wife, his daughter, his grandson, and several employees were working at the shop when a black female pressed a buzzer at the door requesting entry. She was allowed to enter, but held the door open for several masked and armed men who followed her into the shop. At gunpoint, the employees were ordered to lie down on the floor, and at least one of them was hit on the head with a gun.

Appellant first approached Aydam's daughter, Suzanne Lang, and held a gun to her stomach. She testified that she was standing "eyeball-to-eyeball" with appellant, and she could see through his mask, which was made of a "sort of semi-see through" material. Because appellant was standing so close to Lang, she testified that she could see his eyes very clearly, and because he was cursing and yelling at the employees and threatening to kill them, she was able to remember his voice.

While the other two men were smashing the display cases and removing their contents, appellant then "pulled a pistol" on Aydam and told him, at least twice, "Get down on the floor, mother f-----." Aydam testified that appellant was wearing a "thin veil" covering only part of his face. When Aydam looked up at appellant from the floor, appellant kicked him in the face. As a result, Aydam was unconscious for a few seconds. Appellant dragged him across the floor to a safe on the other side of the room. While holding the pistol against Aydam's back, appellant told him several times to get up. Aydam opened the safe and gave him about $6,000 in cash and about $400 from his pocket. At that time, Aydam got a glimpse of appellant's face through the veil and, on that basis testified that he could tell what appellant looked like. Appellant then pushed Aydam down and told him to

lie on the floor again. Appellant kept his pistol trained on Aydam until he and his accomplices left the shop. A few seconds after they left, a shot was fired through the front window. The bullet pierced an interior wall of the shop and went through Aydam's wife's hair.

Lang could not identify appellant in an initial photo spread, but later identified him visually in a line-up with a 90 to 95 percent level of certainty. Aydam was able to immediately identify appellant in a voice line-up; that is, Aydam turned his back to the line-up while each individual said, "Get down on the floor, mother f-----."

RELEVANCE

Appellant complains in his first issue on appeal that the trial court erred in allowing the prosecutor to ask Officer Bryant, one of the first officers to arrive at the scene, whether defendants have been successfully prosecuted in cases when complainants have left out a few details about the events of the crime. At trial, defense counsel objected, saying "That has nothing to do with this case—what he did in the past." The trial court overruled the objection, and Bryant answered affirmatively. We view this general objection as one pursuant to Texas Rule of Evidence 401, which provides:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

TEX. R. EVID. 401.

The determination of relevance should be left largely to the trial court and will not be reversed absent an abuse of discretion. *Goff v. State*, 931 S.W.2d 537, 553 (Tex. Crim. App. 1996) *cert. denied*, 520 U.S. 1171, 117 S.Ct. 1438, 137 L.Ed.2d 545 (1997). However, evidence that is not relevant is inadmissible. TEX. R. EVID. 402. For evidence to be admissible, it must be relevant or pertinent to the issues of the case. *Foster v. State*, 909 S.W.2d 86, 88 (Tex. App.–Houston [14th Dist.] 1995, pet. ref'd) (citing *Mayes v. State*, 816 S.W.2d 79, 84 (Tex. Crim. App. 1991)). In order to be included in the expansive definition

of relevant evidence, the evidence must have influence over a consequential fact, i.e., any fact that is of consequence to the determination of the action. *Mayes*, 816 S.W.2d at 84. Whether other juries have convicted defendants in the past when witnesses have left out a detail or two about what happened during a robbery is not relevant to a consequential fact in this case. Therefore, it was error to allow this testimony into evidence. We now must determine whether that error warrants reversal. TEX. R. APP. P. 44.2(b) (prescribing that non-constitutional error that does not effect a substantial right must be disregarded).

"A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In other words, Rule 44.2 requires us to examine the error in relation to the entire proceeding to determine whether it had a "substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). To perform a harmless error analysis, the following factors should be considered: (1) the source of the error; (2) the nature of the error; (3) whether the error was emphasized and its probable collateral implications; (4) the weight a juror would probably place upon the error; and (5) whether declaring the error harmless encouraged the State to repeat it with impunity. *Wilson v. State*, 938 S.W.2d 57, 61 (Tex. Crim. App. 1996).

We conclude that, after reviewing the record as a whole, the testimony had little if any influence on the jury's verdict. Most significantly, in light of the two positive identifications made in this case, a juror would likely place little weight upon the fact that other juries have convicted defendants in the past when witnesses were unable to fully recall every detail about a crime shortly after its commission. Therefore, even though we find that the trial court erred in admitting this evidence, we do not believe that appellant was harmed by it. TEX. R. APP. P. 44.2(b).

Appellant also complains on appeal that the probative value of this testimony was outweighed by undue prejudice and should not have been admitted. TEX. R. EVID. 403.

Appellant's general objection preserved a complaint under 401 only; therefore, he has not preserved an objection under Rule 403. *Goff*, 931 S.W.2d at 551 (holding that when a complaint on appeal does not comport with an objection at trial, error is not preserved on the complaint). Accordingly, appellant's first issue on appeal is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant complains in his second issue on appeal that appellant was denied effective assistance of counsel at trial for the following reasons: (1) trial counsel failed to adequately investigate the lawfulness of appellant's arrest; (2) trial counsel did not move to have the results of the lineup suppressed; and (3) trial counsel failed to object to testimony from the officer who conducted the lineup.

For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by Texas in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 55.

Appellant carries the burden to prove, by a preponderance of the evidence, the ineffectiveness of his trial counsel. *Thompson v. State*, 9 S.W. 3d 808, 813 (Tex. Crim. App. 1999). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Thompson*, 9 S.W.3d at 813. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in the record. *Thompson*, 9.S.W.3d at 813-14. The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex.

App.—Houston [1st Dist.] 1994, pet. ref'd). We look to the totality of the representation to determine whether counsel was ineffective in a criminal proceeding. *Ex parte Carillo*, 687 S.W. 2d 320, 324 (Tex. Crim. App. 1985).

Appellant's trial attorney filed a pre-trial motion for discovery and inspection requesting "[a]ll warrants of arrest, search warrants and affidavits in support thereof … in the investigation of the alleged offense herein." However, counsel never got a ruling on this motion and, as such, appellant contends that counsel was ineffective.

To support a finding of ineffective assistance of counsel based on an attorney's failure to investigate certain evidence, it must be affirmatively shown that the evidence would have benefitted the defendant. *Garrett v. State*, 998 S.W.2d 307, 314 (Tex. App.—Texarkana 1999, pet. ref'd). That is, there must be a reasonable probability that, but for counsel's failure to advance the defense, the result of the proceeding would have been different. *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996).

In the first of his three claims of ineffectiveness, appellant complains that counsel should have investigated whether he was arrested on a valid warrant, rather than a pocket warrant issued for his wife Traci Blount. Indeed, trial counsel did not effectively challenge the warrant or introduce it into evidence. Nor did he develop a record by moving for a new trial. Consequently, there is no evidence in the record showing that appellant's arrest was unlawful and, thus nothing to show that the evidence would have benefitted appellant.[1] This complaint is overruled.

Appellant's second allegation of ineffective assistance of counsel is based on his attorney's failure to pursue a motion to suppress the results of the lineup. Specifically, appellant claims that because trial counsel failed to determine whether appellant was

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[1] Trial counsel's failure to pursue this issue can be challenged by collateral attack, as there is nothing in the appellant record to show us that the evidence would have benefitted appellant. *Garrett v. State*, 998 S.W.2d at 314.

lawfully arrested, the identifications were tainted and should have been suppressed. But to successfully argue that the failure to request a motion to suppress amounted to ineffective assistance of counsel, appellant must show that the motion would have been granted. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). Appellant has not made that showing here; therefore, we overrule this complaint.

As part of his second argument, appellant further argues that if appellant was charged prior to the lineup, his constitutional right to counsel would have attached because it was a critical stage of the prosecution. However, prior to the lineup, Officer Huey asked appellant if he wanted to be represented by counsel, and he told appellant that he had a right to such representation. Appellant refused the offer. Therefore, appellant waived this argument. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) (noting that the right to counsel may be waived as long as the waiver is made both knowingly and intelligently); *Oliver v. State*, 872 S.W.2d 713, 716 (Tex. Crim. App. 1994).

Finally, appellant contends that counsel was ineffective because he failed to object to testimony elicited from the officer who conducted the lineup. Essentially, Officer Huey was asked whether the lineup was unfairly suggestive.[2] He explained that the alternates chosen for the lineup had characteristics similar to appellant's, and replied affirmatively when asked if the identifications, therefore, were "honest." Appellant argues that this testimony bolstered the identifications of Aydam and Lang, and trial counsel's failure to object constituted ineffective assistance of counsel. We disagree.

The record reflects that, taken in context, Officer Huey's use of the word "honest" referred to the lineup procedures rather than the identifications made by the witnesses. In fact, Officer Huey was testifying about the procedures generally employed in creating a fair lineup. To that end, he explained that officers usually choose alternates who have similar

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[2] *See Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988) (stating that an unnecessarily suggestive identification procedure violates due process of law).

characteristics, i.e., same height, build, skin color, and age, as to not "prejudice" the lineup or make the suspect "stand out." Immediately after this explanation, when Officer Huey was asked whether this particular lineup was "honest," his affirmative response did nothing to bolster the identifications made by the witnesses, but only conveyed his belief that the procedures used were fair to the appellant. Therefore, we overrule this complaint, as trial counsel would have no basis for an objection here.

Appellant makes a second bolstering argument. Specifically, he claims that trial counsel's failure to object to Officer Huey's testimony that Aydam's and Lang's identification were "strong tentatives" constitutes ineffective assistance of counsel. We decline to address whether this testimony impermissibly bolstered Aydam's and Lang's testimony, because, even if it did, counsel's failure to object to it did not prejudice appellant under *Strickland*. That is, we believe that the admission would not have produced a different result in this case. Both Aydam and Lang made in-court identifications of appellant and testified extensively about his voice and the facial features visible through his mask. The jury was there to assess the witnesses' demeanor and whether the witnesses were sure about appellant's identification. We overrule this complaint.

In appellant's last issue on appeal, he argues that the prosecutor acted in bad faith by discussing the participation of appellant's wife in the robbery during opening statement and at trial. First, appellant did not object to counsel's reference to appellant's wife at opening statement; therefore, error, if any, was effectively waived. TEX. R. APP. P. 33.1(a). Secondly, as to the reference made at trial, the trial court sustained appellant's objection and instructed the jurors to disregard the testimony. We must presume that the court's instruction to disregard to the jury was followed. *Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988). Furthermore, we do not believe that the instruction was insufficient to withdraw an adverse impression that may have been produced in the minds of the jury. *Id*.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 10, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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