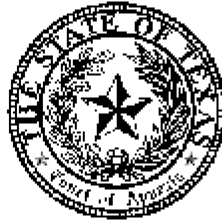
Affirmed and Opinion filed February 1, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-98-01441-CR

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RAYMOND TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 770,514

O P I N I O N

Raymond Torres appeals his jury conviction for aggravated sexual assault. The trial court assessed his punishment at life imprisonment, enhanced by two prior felony convictions. In three points of error, appellant contends: (1) he received ineffective assistance of counsel (points one and three), and (2) the trial court erred in admitting evidence of extraneous offenses committed during appellant's arrest (point two). We affirm.

BACKGROUND

In his first trial, appellant pleaded guilty to this offense and was sentenced to 50 years imprisonment. This case was reversed on appeal. At this second trial, appellant pleaded not guilty and was tried by a jury.

On June 18, 1990, the complainant (Stacy), stopped at a Shell gas station to get gas and to change into work clothes in the bathroom. After she changed her clothes, appellant entered the bathroom, grabbed her, and put a knife to her neck. Appellant took Stacy's car keys, then ordered her to get in the passenger seat. Appellant then drove Stacy's car while holding a knife to her thigh. Appellant demanded money, and she gave him what cash she had, fearing he would kill her if she did not comply with his demands. Appellant told Stacy he needed more money, and Stacy said all she had was her check book and some birthday checks. Appellant kept his knife on Stacy's thigh, drove Stacy to her bank, and had her withdraw money from her account and cash some checks. Appellant then drove to a drug dealer where he bought some drugs. After taking some drugs, appellant took Stacy to a motel. Once in the room, appellant sexually assaulted Stacy. After he sexually assaulted Stacy, appellant smoked drugs and forced Stacy to do the same.

After assaulting Stacy and forcing her to smoke drugs, appellant forced her back into her car, drove her to an ATM machine, and forced her to withdraw more money. Appellant eventually released Stacy at a convenience store, then drove off in her car.

Stacy reported the sexual assault and car theft to the manager of the convenience store, and the manager called the police and an ambulance. Stacy was then taken to the hospital for examination and treatment. The next day, Officer Hopkins learned that Stacy's car was in a parking lot at a shopping center. Hopkins and his partner set up surveillance on the stolen car, and observed appellant get in the car and drive away. Hopkins followed in his unmarked car. Marked police cars entered the chase using their sirens, and appellant jumped a curb and drove into the parking lot of a strip center. Appellant jumped out of the car and ran into a Pancho's Restaurant. He first took a woman hostage, then grabbed a young boy and held a knife to the boy's throat. Hopkins came up behind appellant, put his pistol to appellant's head,

and told appellant to let the boy go. Appellant held the boy hostage for ten to fifteen minutes, and released the boy after a sergeant disabled appellant with a stun gun. After being stunned, appellant continued to be very violent. The police finally had to hogtie and handcuff appellant in order to arrest him. The entire incident was videotape by another officer.

INEFFECTIVE ASSISTANCE OF COUNSEL

In point of error one, appellant contends he received ineffective assistance at the voir-dire stage of the trial when his attorney mistakenly left an objectionable juror on the jury. In point of error three, appellant asserts that his counsel was ineffective because he gave him erroneous advice on punishment causing him to elect that his punishment be assessed by the trial court.

Standard of Review

The U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992), *cert. denied,* 113 S.Ct. 3062 (1993). A reasonable probability is defined as probability sufficient to undermine confidence in the outcome. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670. The defendant must prove

ineffective assistance of counsel by a preponderance of the evidence. *Cannon v. State,* 668 S.W.2d 401, 403 (Tex. Crim. App. 1984).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *Jackson,* 877 S.W.2d at771. We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* In *Jackson,* the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *Id.* at 772. *See also Jackson v. State,* 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

The Objectionable Juror

In response to appellant's counsel's and the prosecutor's question to the panel asking if anyone would hold it against the defendant and think he was guilty if he didn't testify, veniremember number 36, Daniel Melnar**,** indicated he would. Thereafter, the prosecutor questioned Mr. Melnar further after she reminded him that the judge told him at the beginning that a defendant has an absolute right not to testify if he doesn't want to. The prosecutor again asked Melnar:

> I want to know and we all want to know and we certainly want you to be honest is that keeping in mind he is afforded these rights, if he didn't testify, would you be thinking he was guilty otherwise he would be on the stand telling his side of the story?
>
> MELNAR: "I wouldn't – I wouldn't think he's guilty. I may have just a brief doubt."

Upon further questioning by the prosecutor, Mr. Melnar affirmatively answered her questions asking him if he could wait until he heard all of the evidence, decide the defendant's guilt based on the evidence that he heard, and follow the law not presuming the defendant was guilty because he did not testify. Thereafter, the prosecutor again explained to Mr. Melnar that the law would "require you to sit here and base your decision on the testimony that you hear." She asked him if could decide the case "on what

you hear or what you don't hear, but not take into account the fact he does not testify?" Mr. Melnar answered, "Yes." Appellant's counsel then asked Mr. Melnar if he would take it as a circumstance against the defendant that he did not testify in a case, to which Melnar answered: "I guess I have to say no. Just – I have my initial feeling is I have –." At that point, appellant's counsel interrupted Melnar and started to say something to the court. The trial judge asked appellant's counsel not to interrupt, and appellant's counsel then asked Melnar if he had earlier stated he would give more credibility to a police officer as a witness because of his status as a police officer for that reason and no other. Melnar replied that he didn't say that. Based on Melnar's answers, appellant's counsel told the court he would not challenge Melnar for cause.

The State and appellant made their respective strikes of the remaining venirepersons, and the trial court excused the remainder of the panel. At this point, after the panel was excused but before the jury was sworn, appellant's counsel advised the trial court he had made a mistake and that he struck number 32 in error. He explained to the trial court that he meant to strike number 36, Melnar. He asked the trial court to excuse number 36, and the trial court denied his request. In his affidavit filed with the trial court for purposes of appellant's motion for new trial hearing, appellant's counsel stated:

> I mistakenly struck prospective juror number thirty two instead of number thirty six who had stated *initially* that he would take it as a circumstance against the defendant that he did not testify in his own behalf. When the mistake was discovered before the jury was sworn I attempted to object to the composition of the jury and requested that the court seat one of the alternates instead of number thirty six. This was denied (emphasis added).

The record shows that Melner *initially* stated he would hold appellant's failure to testify against him. After further questioning by the defense and the State, the record shows that Melnar unequivocally stated he could follow the law despite his personal prejudices. Therefore, Melnar was not challengeable for cause. *Brown v. State*, 913 S.W.2d 577, 580 (Tex.Crim.App. 1996). In *Brown,* the court of criminal appeals summarized the trial court's duty when faced with a challenge for cause for a venireperson:

> In other words, nothing is left to the discretion of the trial court when the venireperson is unequivocal as to their ability to follow the law. If they testify unequivocally that they can follow the law despite personal prejudices, the trial court abuses its discretion in allowing

> a challenge for cause on that basis. Likewise, if they testify unequivocally that they cannot follow the law due to their personal biases, the trial court abuses its discretion in failing to grant a challenge for cause on that basis. However, when the venireperson vacillates or equivocates on their ability to follow the law, the reviewing court must defer to the trial court's judgment.

Brown, 913 S.W.2d at 580.

Because Melnar was not challengeable for cause, appellant's trial counsel could not be deficient in failing to challenge him for cause. *See McFarland v. State,* 928 S.W.2d 482, 503 (Tex.Crim.App. 1996), *cert. denied,* 117 S.Ct. 966 (1997). Appellant concludes that his trial counsel was deficient because he left a juror on the jury "who was prejudiced against a constitutional right on which appellant was entitled to rely." This is speculation on appellant's part, and the prejudice, if any, is not supported by the record. Appellant has not shown that his trial counsel was deficient for failing to challenge Melnar for cause. Appellant has not met the first prong of *Strickland.*

Appellant concludes his harm is apparent in this record because the jury took a long time to find him guilty. Appellant cites no evidence in the record to demonstrate that the result of the proceeding would have been different. Appellant has failed to meet the second prong of *Strickland.* We overrule appellant's point of error one.

Election to Have the Jury Assess Punishment

In his third point, he further asserts that his trial counsel was deficient because he gave him erroneous advice on punishment causing him to elect that his punishment be assessed by the trial court. Appellant argues that his trial counsel told him he could not get more than 50 years because his punishment at the first trial was set at 50 years after appellant pleaded guilty without an agreed recommendation by the State.

Before voir dire, the trial court advised appellant that the range of punishment, with two prior felony convictions, was 25 years to 99 years or life, if the convictions were found true. Appellant's trial counsel advised the trial court that appellant was originally sentenced to 50 years on his plea, and that it "will be his position that he cannot be sentenced to more than 50 years stacked or unstacked upon conviction if he

is sentenced by the Court." Appellant's counsel did not cite any authority to the trial court for appellant's contention. The prosecutor asked the trial court to state on the record that the punishment in this case is not 50 years, and that "if the defendant is found guilty, he's looking at life." The trial court stated: "The Court has advised him what the range of punishment is." After the jury was sworn, and while the trial court was explaining voir dire procedure to the jury, appellant's counsel approached the bench and told the judge: "He wants to change his election to jury sentencing." The trial court denied appellant's request to have the jury assess his punishment.

At the hearing on appellant's motion for new trial, appellant did not recall that the trial judge told him the range of punishment was 25 to 99 years or life. He stated that he signed the election to have the trial court assess his punishment, and his trial counsel did not tell him he had the option to have the jury assess his punishment. He admitted that he knew he could have the jury assess his punishment, but his trial counsel advised him to have the trial court sentence him. In his affidavit, trial counsel stated: "I informed the court that the defendant wanted to change his election and have the jury assess punishment. The request was denied." Appellant's trial counsel was not called as a witness at this new trial hearing, and neither his affidavit nor the record affirmatively show what advice trial counsel did or did not give appellant relative to his election of who assesses his punishment. The record does not show why trial counsel did not timely file appellant's election to have the jury assess punishment rather than come before the bench after voir dire started and tell the court that appellant wanted to change his election and have the jury assess the punishment.

After the jury found appellant guilty, he was authorized to change his election and ask that the jury assess his punishment provided he obtained the consent of the State. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon 1981 & Supp. 2000). Appellant was acting *pro se* at this time, but his trial counsel was acting as standby. The record is silent as to why neither appellant nor his counsel failed to file a motion to change appellant's election of punishment pursuant to the statute.

Because the record is silent as to why appellant's trial counsel chose the course he did, we find appellant has not met his burden of proving that counsel was deficient. *Jackson,* 877 S.W.2d at772.

Appellant has not met the first prong of *Strickland* requiring proof in the record of trial counsel's defective performance.

Appellant has failed to demonstrate prejudice. We find that appellant has not met the requirements of the second prong of *Strickland*. We overrule appellant's point of error three contending that his trial counsel was ineffective for failing to advise him of his right to have the jury assess his punishment.

Extraneous Offenses at the Guilt/Innocence Stage

In his second point of error, appellant contends the trial court erred by admitting evidence of extraneous offenses committed at the time of appellant's arrest the day after he allegedly sexually assaulted the complainant. Appellant made numerous relevancy objections to the evidence presented by the State concerning his holding a boy as hostage, running into Pancho's when the police were chasing him, and being hogtied after he was arrested. After the trial court overruled the objections, appellant did not further object on the grounds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403.

If the opponent of extraneous offense evidence objects on the grounds that the evidence is not relevant, violates Rule 404(b), or constitutes an extraneous offense, the proponent must satisfy the trial court that the extraneous offense evidence has relevance apart from its character conformity value. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App.1990) (opinion on reh'g). If the trial court determines the evidence has no relevance apart from supporting the conclusion that the defendant acted in conformity with his character, it is absolutely inadmissible. *Id*. On the other hand, extraneous offense evidence is admissible if the proponent persuades the trial court that [the extraneous offense evidence] tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, e.g. absence of mistake or accident . . . [or] that it is relevant upon a logical inference not anticipated by the rule makers. *Montgomery*, 810 S.W.2d at 387-388; *see also Taylor v. State*, 920 S.W.2d 319, 321 (Tex.Crim.App.1996). As long as the trial court's ruling was within the zone of reasonable disagreement, there is no abuse of discretion and the trial court's ruling

will be upheld. *Montgomery*, 810 S.W.2d at 391. *See also Santellan v. State*, 939 S.W.2d 155, 168-169 (Tex.Crim.App. 1997).

Once the trial judge has ruled on whether the evidence is relevant beyond its character conformity value, he has ruled on the full extent of the opponent's Rule 404(b) objection. *Montgomery*, 810 S.W.2d at 388. The opponent must then make a further objection based on rule 403, in order for the trial judge to weigh the probative and prejudicial value of the evidence. *Id.* If appellant fails to object based on rule 403, he waives his complaint on appeal that the evidence was unfairly prejudicial. TEX. R. APP. P. 33.1(a); *Montgomery*, 810 S.W.2d at 388-89; *Peoples v. State*, 874 S.W.2d 804, 809 (Tex.App.--Fort Worth 1994, pet. ref'd).

We will address appellant's relevancy complaint. Appellant has waived any complaint of prejudice under rule 403. *Peoples,* 874 S.W.2d at 809. Appellant's defensive theory was that he was innocent, and that he and Stacy engaged in consensual sex. Appellant's witness, Robert Mann, testified that he had seen appellant and Stacy on the date of the offense in a convenience store. He said he did not see appellant display a weapon, and he felt that Stacy was not being held against her will. Narchee Matthews testified that appellant asked him about purchasing drugs on the date of the offense. He stated he got into the car with appellant and Stacy and he did not notice a knife. He opined that Stacy was not hysterical. In his jury argument, appellant stated that he and Stacy engaged in consensual sex. He told the jury that Stacy wanted ecstacy [an illegal narcotic drug]. Because ecstacy cost $40.00 to $45.00 a tablet, he suggested to Stacy that they go to her bank and get some money. He told the jury he was not denying that he and Stacy had sex, but it was with her "consent all the way."

Because appellant's defensive theory was that he was innocent, and he and Stacy engaged in consensual sex, appellant's intent was an elemental fact of consequence and the extraneous offenses were admissible to show appellant's guilty conscience. *See Foster v. State*, 779 S.W.2d 845, 859-860 (Tex.Crim.App. 1989), *cert. denied,* 110 S.Ct. 1505(1990).

In *Foster,* two extraneous offenses were admitted concerning crimes committed by the appellant during his flight from arresting police officers. *Id.* The evidence showed that appellant shot Jack Bellinoff

several times and took Bellinoff's car without Bellinoff's permission. A few hours later, appellant took several hostages at the bank in Breckenridge. The court of criminal appeals held: "The facts that appellant attempted to kill Bellinoff in order to gain control of Bellinoff's car on the same day that he took hostages and told them he was fleeing from law enforcement authorities are all necessarily related circumstances proving appellant's flight from arrest." *Id.*

Evidence of flight is admissible as a circumstance from which an inference of guilt may be drawn. *Id.* Flight is no less relevant if it is only flight from custody or to avoid arrest. *Id.* From cases decided by the court of criminal appeals, it can be seen that a lapse of time between commission of the offense and the defendant's flight does not always adversely affect admissibility of the flight. *Id.* The fact that extraneous offenses are committed while in flight does not render the evidence inadmissible. *Id.* So long as the extraneous offenses are shown to be necessarily related circumstances of a defendant's flight, they may be admitted to the jury. *Id.* We hold that the extraneous offenses of appellant's flight, holding a boy hostage at Pancho's, and being hogtied after being disabled by a stun gun were relevant because they were necessarily related to circumstances of appellant's flight from arresting officers.

The extraneous acts were also admissible in rebuttal of appellant's defensive theory that he did not commit this crime. *See Creekmore v. State,* 860 S.W.2d 880 (Tex.App.–San Antonio 1993, pet. ref'd). After the State proved the sexual assault and the extraneous offenses, appellant put on his witnesses to support his claim of consensual sex. His argument to the jury was that he was innocent, and the sex was consensual. The premature receipt of extraneous offense evidence may be rendered harmless by a defendant's subsequent actions at trial. *Siqueiros v. State*, 685 S.W.2d 68, 72 (Tex.Crim.App.1985); *Rubio v. State*, 607 S.W.2d 498, 502 (Tex.Crim.App.1980); *Howland v. State*, 966 S.W.2d 98, 104(Tex.App.-Houston[1st Dist.] 1998), *aff'd*, 990 S.W.2d 274 (Tex.Crim.App. 1999). We find the evidence in this case was admissible as relevant to appellant's intent in sexually assaulting Stacy, and to rebut his defensive theory that he did not commit this crime. For these reasons, we hold that the trial court did not abuse its discretion in admitting the testimony of appellant's extraneous offenses committed during his flight from arrest. Appellant's point of error two is overruled.

We affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed February 1, 2001.

Panel consists of Justices Robertson, Sears, and Hutson-Dunn.*

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

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*Senior justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn_sitting by assignment.