Affirmed and Opinion filed February 3, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01068-CR

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JOHNNY CLYDE COBB, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 749,640

O P I N I O N

Appellant, Johnny Clyde Cobb, appeals his conviction for capital murder. TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994). The juvenile court transferred the case to the district court where appellant was tried as an adult. A jury found appellant guilty, and the trial judge sentenced him to confinement for life. In three points of error, appellant contends the trial court erred in allowing the admission of an extraneous offense and his confession into evidence, and that his counsel rendered ineffective assistance. We affirm the judgment of the trial court.

Appellant told friends he was going to "hit a lick," meaning that he wanted to "rob" someone. Later that day, appellant met Joe Lewis and the two drove to a McDonalds restaurant. Either appellant or Lewis went into the restaurant, wearing appellant's yellow and white Starter jacket and a blue ski mask. One of them pulled out a .380 pistol, which belonged to appellant, and demanded money. Ezekiel Sanchez, an employee at McDonalds, held his hands up in the air. Before he could move toward the cash register, appellant or Lewis shot Sanchez in the arm. Sanchez died minutes later.

After the robbery, the two drove to a nearby Whataburger and committed a second robbery. Houston Police Officer Sneed responded to a general broadcast concerning these crimes. He saw a car that matched the description given in the broadcast. Appellant was driving the car. Sneed stopped the car, and saw a white Starter jacket, blue ski mask, and some rolled coins in the back seat. The two escaped, but were captured shortly thereafter.

In his first point of error, appellant argues that the trial court erred in admitting evidence of the extraneous offense of robbery. We find that the extraneous offense was admissible as same transaction contextual evidence. Moreover, any error was cured when similar evidence came in later without objection.

To determine whether an extraneous offense is admissible as "same transaction contextual evidence," we must first find the evidence is relevant under TEX. R. EVID. 401, and then determine whether the evidence "should be admitted as an 'exception' under TEX. R. EVID. 404(b)." *See Mayes v. State*, 816 S.W.2d 79, 84-87 (Tex. Crim. App. 1991).

Evidence is relevant if it has a "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. When a defendant does not dispute that the conduct in question occurred, but he does claim the act was free from criminal intent, extraneous offenses are relevant to prove guilty intent. *See Plante v. State*, 692 S.W.2d 487, 491-92 (Tex. Crim. App. 1985).

In our case, the appellant was charged as both the principal, and alternatively, as a party to the capital murder of Ezekiel Sanchez. Appellant did not testify, but the State did admit a statement he gave to the police. In this statement, appellant claimed that Lewis wanted to rob somebody. Lewis asked him to drive to the McDonalds and appellant complied. Lewis went into the McDonalds for about three minutes and came out with some money in his hand. Appellant said that Lewis then wanted to hit the Subway, but that he wanted to go home. Appellant then admits to driving to Whataburger, where he claims that Lewis committed a second robbery.

Appellant does not admit to committing the capital murder or intentionally or knowingly assisting Lewis during the crime. However, the fact that he continued to follow Lewis' commands after he was aware that Lewis robbed the McDonalds shows that his actions were intentional. The more often an act has occurred, the less likely it occurred unintentionally. *Id; Rankin v. State,* 995 S.W.2d 210, 213 (Tex. App.–Houston [14th Dist.] 1999). Therefore, we find the evidence of the extraneous offense was relevant to the elemental fact of appellant's intent and fits within an exception in TEX. R. EVID. 404(b) as evidence of appellant's intent. TEX. R. EVID. 404(b); *See Taylor v. State,* 920 S.W.2d319, 321 (Tex. Crim. App. 1996), *cert. denied,* 519 U.S. 951, 117 S.Ct. 364, 136 L.Ed.2d 255 (1996).

Moreover, any error was cured when appellant did not object to similar testimony about the extraneous offense by Officer J.R. Sneed and Anthony Stewart, the janitor at Whataburger. Defense counsel must object every time allegedly inadmissible evidence is offered, otherwise the error is cured. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991); TEX. R. APP. P. 33.1. Appellant's first point of error is overruled.

In his second point of error, appellant claims that his trial counsel was ineffective when he failed to object to victim impact testimony at the guilt/innocence phase of the trial. The record fails to support appellant's claim.

For counsel to be ineffective at the guilt/innocence phase of 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). *Strickland* requires a defendant to show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) the probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App.1999).

In looking at these requirements, a court is to keep in mind that the right to counsel does not guarantee an error-free counsel or counsel whose competency is judged by hindsight. *See Hernandez v. State*, 726 S.W.2d 53, 58 (Tex. Crim. App.1986). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id*.

The record contains no evidence to explain why appellant's trial counsel did not object to the victim impact testimony. We are unable to conclude that appellant's trial counsel's performance was deficient. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). Therefore, appellant has failed to rebut the presumption that his counsel's failure to object was a reasonable decision. *See Thompson v. State*, 1999 WL 812394, *5 (Tex. Crim. App.). We overrule appellant's second point of error.

In his third point of error, appellant contends that the trial court committed reversible error by admitting appellant's confession into evidence, arguing that it was obtained in violation of TEX. FAM. CODE ANN. § 52.02 (Vernon 1995). However, appellant failed to preserve this issue for our review.

Appellant filed a motion to suppress his statements made to police officers. At the conclusion of the hearing, appellant's trial counsel asked the court to: (1) suppress his statements made to officers that were not recorded, (2) redact the portion of the statement that concerned the extraneous offense, and (3) suppress his written confession because the State

did not comply with TEX. FAM. CODE ANN. § 51.09 (Vernon 1995), in that appellant was not read his *Miranda* rights. The trial judge excluded the unrecorded oral statements, but overruled appellant's other request.

On appeal, appellant argues that the State did not comply with TEX. FAM. CODE ANN. § 52.02 (Vernon 1995) because (1) he was not immediately taken before a designated juvenile judge (2) he was questioned prior to meeting with a judge, and (3) he was not taken to a designated place as described in the Family Code. To preserve error for appeal, a defendant's objection on appeal must comport with his objection in the trial court. TEX. R. APP. P. 33.1; *Knox v. State*, 934 S.W.2d 678, 687 (Tex. Crim. App.1996). Appellant's trial objection did not alert the trial judge to the alleged errors of which he now complains. We overrule appellant's third point of error.

We affirm the judgment of the trial court.

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Joe L. Draughn
Justice

Judgment rendered and Opinion filed February 3, 2000.
Panel consists of Justices Draughn, Cannon, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe L. Draughn, Bill Cannon, and Norman Lee sitting by assignment.