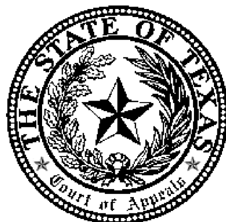
Affirmed and Opinion filed February 14, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00780-CR

SHANE KEVIN MYERS, SR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 551,854

O P I N I O N

Appellant, Shane Kevin Myers, Sr., was convicted of the offense of indecency with a child. On November 15, 1991, after assessing punishment at confinement for a term of ten years, the trial court placed appellant on ten years' probation. The State subsequently sought to revoke appellant's probation based upon two violations of his probationary conditions. After hearing evidence, on April 10, 2001, the trial court revoked appellant's probation and sentenced him to four years' incarceration. In five points of error, appellant challenges both his conviction and revocation of probation and complains: (1) the State introduced insufficient evidence to prove that he was the same person placed on probation on November 15, 1991; (2) the State introduced insufficient evidence to prove that he

committed second degree battery under Louisiana law; (3) the trial court abused its discretion in permitting the State to improperly impeach its own witness; (4) he received ineffective assistance of counsel; and (5) there was a fatal variance between the indictment and the proof of indecency with a child adduced at trial. We affirm.

Appellant was charged by indictment with the offense of aggravated sexual assault of a child. The offense was initially alleged to have occurred on or about February 1, 1989. The State subsequently moved to amend the indictment, requesting that the date of the offense be changed to March 31, 1989, and that it be allowed to add indecency paragraphs as set forth in an attachment to its motion.[1] The trial court granted the State's motion. Appellant then moved for probation and waived trial by jury. The trial court found appellant guilty of indecency with a child, and ordered a presentence investigation. Thereafter, as aforementioned, on November 15, 1991, the trial court assessed punishment at ten years' confinement, and appellant was placed on ten years' probation, subject to various terms and conditions.

On February 7, 2001, the State filed a motion to revoke probation, alleging that appellant violated the terms and conditions of his probation by admitting alcohol use to his probation officer. An amended motion was later filed, reurging appellant's admission of alcohol use and alleging as an additional ground for revocation of probation his commission of the offense of second degree battery, in violation of the laws of the State of Louisiana and the terms and conditions of his probation.

At a hearing on the amended motion, appellant entered a plea of true to the allegation of using alcohol, and a plea of not true to the allegation of battery. The State called Charles Bennett, a sex offender compact officer with the Harris County Community Supervision and Corrections Department, to testify. Mr. Bennett testified that, while he himself had never met appellant, he had been in regular contact with Connie Durio, the probation officer in Louisiana to whom supervision of appellant had been transferred. Mr. Bennett testified

[1] The referenced attachment does not appear in the appellate record.

without objection that Ms. Durio had reported to him appellant "admitted to her that he had used alcohol," and that an arrest warrant had issued against appellant for battery because he "had beaten up his wife pretty bad." Mr. Bennett further testified that Ms. Durio indicated appellant's alcohol use "had gone on for some time," but this was the first time "she had some problems with him having used alcohol." Thereafter, appellant's mother, his wife, and her aunt[2] testified as to the altercation between appellant and his wife that gave rise to the battery charges. Each denied appellant committed battery even when, in the case of appellant's wife and her aunt, they were confronted with prior statements they had given to the contrary.

The trial court found that appellant had used alcohol and committed the offense of battery, revoked his probation, and sentenced him to confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of four years. This appeal ensued.

In his first and second points of error, appellant contends the revocation order should be vacated and reversed for insufficient evidence to support the trial court's findings. Specifically, appellant asserts the State introduced insufficient evidence to prove that he was the same person placed on probation on November 15, 1991, and further failed to show that he committed second degree battery under Louisiana law.

Appellant, however, pled true to the use of alcohol allegations. Such a plea was sufficient to establish all facts necessary to establish a violation of the conditions of his probation. *O'Neal v. State*, 623 S.W.2d 660, 661 (Tex. Crim. App. 1981); *Moses v. State*, 590 S.W.2d 469, 470 (Tex. Crim. App. [Panel Op.] 1979); *Cole v. State*, 578 S.W.2d 127, 128 (Tex. Crim. App. [Panel Op.] 1979); *Moore v. State*, 11 S.W.3d 495, 498 n.1 (Tex. App.—Houston [14th Dist.] 2000, no pet.). "And once a plea of true has been entered, [appellant] may not challenge the sufficiency of the evidence to support the subsequent

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[2] The record is unclear as to whether and in what degree the witness was actually related to appellant's wife.

revocation." *Id.*; *see also Rincon v. State*, 615 S.W.2d 746, 747 (Tex. Crim. App. [Panel Op.] 1981); *Cole*, 578 S.W.2d at 128; *Hays v. State*, 933 S.W.2d 659, 661 (Tex. App.—San Antonio 1996, no pet.). Accordingly, appellant's first and second points of error are overruled.

In his third point of error, appellant avers the trial court abused its discretion in permitting the State to improperly impeach its own witness. Specifically, appellant complains the prosecutor's impeachment of appellant's wife through the witness's own statement was merely a subterfuge intended to get the otherwise inadmissible hearsay contained in the statement before the trial court.

We do not reach appellant's complaint, however, because he failed to object to the prosecutor's questions. TEX. R. APP. P. 33.1 (a)(1) (requiring appellants, as a prerequisite to presenting a claim for appellate review, to bring forward a record showing that the complaint was made to the trial court by a timely objection). It is fundamental that an error in the examination of witnesses or to the admission of evidence is not preserved for appellate review absent a timely objection at trial. *Cisneros v. State,* 692 S.W.2d 78, 82 (Tex. Crim. App. 1985). Failure to do so constitutes a waiver of the objection or matter. *Id.* Thus, appellant waived any error by failing to properly object. Appellant's third point of error is overruled.

In his fourth point of error, appellant contends he was deprived of the effective assistance of counsel when his attorney convinced appellant to enter a plea of true to the use of alcohol allegation, and failed to object to Mr. Bennett's testimony as hearsay.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). The right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id.* Appellant must first demonstrate his counsel's

performance was deficient and not reasonably effective. *Id.* at 688–92. Thereafter, appellant must demonstrate the deficient performance prejudiced his defense. *Id.* at 693. Essentially, appellant must show that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and we are to indulge the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is appellant's burden to rebut this presumption, by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland*, 928 S.W.2d at 500.

If appellant proves his counsel's representation fell below an objective standard of reasonableness, he must still affirmatively prove prejudice as a result of those acts or omissions. *Strickland*, 466 U.S. at 693; *McFarland*, 928 S.W.2d at 500. Counsel's errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors had no effect on the judgment. *Strickland*, 466 U.S. at 691. Appellant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *McFarland*, 928 S.W.2d at 500. If appellant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id.*

Appellant did not file a motion for new trial and the record contains no evidence of the reasoning behind his trial counsel's alleged actions in convincing appellant to enter a plea of true to the use of alcohol allegation and failing to object to Mr. Bennett's testimony as hearsay. We cannot conclude, therefore, that counsel's performance was deficient.

Jackson, 877 S.W.2d at 771–72; *see also Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (holding that when the record provides no explanation as to the motivation behind trial counsel's actions, an appellate court should be hesitant to declare ineffective assistance of counsel). An appellate court is not required to speculate on the reasons behind trial counsel's actions when confronted with a silent record. *Jackson*, 877 S.W.2d at 771. Appellant fails to provide this Court with any evidence to affirmatively demonstrate the ineffectiveness of his trial counsel. Thus, appellant has not satisfied his burden on appeal to rebut the presumption that counsel's actions were reasonably professional and motivated by sound trial strategy.

Moreover, even if the record rebutted the presumption of sound trial strategy, appellant has not demonstrated that trial counsel's performance prejudiced the defense. He has not, therefore, met the second prong of the test. Because appellant produced no evidence concerning trial counsel's reasons for choosing the course he did, nor did he demonstrate prejudice to his defense, his fourth point of error is overruled. *McFarland,* 928 S.W.2d at 500.

In his fifth point of error, appellant contends there was a fatal variance between the indictment and the proof supporting his conviction for indecency with a child adduced at trial, and that such variance requires reversal with instructions to render an acquittal. Specifically, appellant argues that, as the indictment was not physically altered, the State's purported change in the date of the offense and addition of paragraphs concerning the offense of indecency with a child were never effective. Appellant asserts, therefore, he was charged only with aggravated sexual assault of a child, yet was convicted of an offense never actually alleged in the indictment—indecency with a child.

An appeal from an order revoking probation is limited to the propriety of the revocation. *Corley v. State*, 782 S.W.2d 859, 860 n.2 (Tex. Crim. App. 1989); *Heiskell v. State*, 522 S.W.2d 477, 478 (Tex. Crim. App. 1975); *Hoskins v. State*, 425 S.W.2d 825, 828–29 (Tex. Crim. App. 1968) (op. on reh'g). Thus, as in all other collateral attacks upon

a judgment, review may be had only where the defendant restricts himself to pleading and proving fundamental error that makes the judgment void. *Corley*, 782 S.W.2d at 860 n.2; *see also Traylor v. State*, 561 S.W.2d 492, 494 (Tex. Crim. App. [Panel Op.] 1978) (noting that review of the original conviction is permitted only "in a case of fundamental error such as a fatally defective indictment").

In the instant case, appellant asserts a fatal variance between the indictment and the proof of the offense of which he was convicted. He complains that the indictment alleges aggravated sexual assault of a child, but that the evidence proffered supported (if at all) only his conviction for indecency with a child. Such a collateral attack on the sufficiency of the evidence cannot be made for the first time in an appeal from an order revoking probation. *Vaughn v. State*, 608 S.W.2d 237 (Tex. Crim. App. [Panel Op.] 1980); *Traylor*, 561 S.W.2d at 494; *Puckett v. State*, 801 S.W.2d 188, 191 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

Further, even if such a collateral attack could be mounted, we observe that no fatal variance existed. The fatal variance doctrine stands for the proposition that a variance between the indictment and the evidence at trial may be fatal to a conviction because due process guarantees the defendant notice of the charges against him. *Moore v. State*, 11 S.W.3d 495, 499 (Tex. App.—Houston [14th Dist.] 2000, no pet.). However, only a material variance is fatal. *Id.* (citing *Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App. 1995)). A variance is material only if it operated to the defendant's surprise or prejudiced his rights. *Id.*

The offense of indecency with a child may be a lesser included offense of aggravated sexual assault. *Cunningham v. State*, 726 S.W.2d 151, 153 (Tex. Crim. App. 1987); Quinn v. State, 991 S.W.2d 52, 54 (Tex. App.—Fort Worth 1998, pet. ref'd) (noting that the determination is to be made on a case-by-case basis). The instant case was tried to the court, and in such circumstances "'the prosecution is not required to submit a lesser included offense charge to the trial judge. The trial court is authorized to find the appellant guilty of

any lesser offense for which the State provides the required proof.'" *Leach v. State*, 35 S.W.3d 232, 237 (Tex. App.—Austin 2000, no pet.) (quoting *Shute v. State*, 877 S.W.2d 314, 315 (Tex. Crim. App. 1994)). Moreover, "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitations period. *Addicks v. State*, 15 S.W.3d 608, 611 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (citing *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997)). Here, assuming the State's amendment was ineffective, the indictment returned January 18, 1990, stated the offense occurred "on or about February 1, 1989," while the proof showed the relevant date to be March 31, 1989. The alleged date of the offense, therefore, was both before the date the indictment was presented and well within the statutory limitations period. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01 §§ (2)(D), (5)(B) (Vernon Supp. 2001) (declaring the statute of limitations for indecency with a child to be ten years from the date of the commission of the offense, and that for aggravated sexual assault to be ten years from the eighteenth birthday of the victim of the offense). Accordingly, in this case there was no variance, material or otherwise. We overrule appellant's fifth point of error.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed February 14, 2002.

Panel consists of Justices Hudson, Fowler, and Edelman.

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