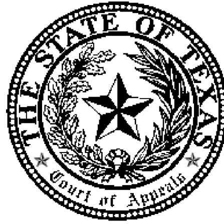
Affirmed and Opinion filed February 28, 2002.



In The

Fourteenth Court of Appeals

NO. 14-00-01408-CR

DALE ALLEN GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 37,307

O P I N I O N

Appellant pleaded nolo contendere to the offense of murder. A jury assessed punishment at ninety-nine years in the Texas Department of Criminal Justice, Institutional Division. Appellant complains in four issues on appeal that he was denied effective assistance of counsel at the punishment phase of trial. We affirm the judgment of the trial court.

FACTUAL BACKGROUND

In the early morning hours of July 22, 1999, appellant strangled and killed his girlfriend Leslie Weatherly ("Complainant") as she was attempting to break off their relationship. At some point thereafter, appellant contacted two people: his father, Kenneth Green, who immediately called the police after appellant told him what he had done, and his platoon commander, Thomas Mateo, with whom he served in the Vietnam war.

Shortly after Kenneth Green called the police, officers arrived at appellant's residence. Without resistance, appellant led the officers to complainant's body. But once appellant was detained, he became extremely violent and agitated. It took four paramedics and two police officers to restrain him. As he was being escorted from the house, he kicked, punched, and bit, screaming that he would not be taken by the North Vietnamese. He referred to the officers and paramedics as "Gooks," and screamed, "Get the leeches off of me!" Ultimately, they gave appellant a sedative, but even with this medication, he threatened to choke the officers and paramedics as soon as he was able.

During the punishment phase of trial, the State offered evidence of numerous extraneous acts appellant committed against his prior girlfriends and former wives. None of these incidents were ever reported to police.

Sally Jo Austin, one of appellant's former live-in girlfriends, testified that he choked her on two separate occasions: once appellant voluntarily let her go and, on the other occasion, Austin's son was able to physically restrain him and free his mother.

The State called Kathleen Burch, another former live-in girlfriend, who testified that appellant choked her as he pinned her to the floor and to the wall, telling her "I could kill you."

Mary Brown, appellant's first ex-wife, also testified that appellant had strangled her, but she freed herself by kicking him and hitting him in the head with an ashtray.

Another ex-wife, Virginia Barnes, testified that appellant became obsessive and abusive shortly after they married. He refused to let her carry on her normal activities without his supervision and frequently kept her from working. On one occasion, appellant threw a Bible at her, hitting her in the nose which "messed up [her] nose real bad." On another occasion, while Barnes was cleaning out her car, he physically assaulted her by slamming her head against the window, hitting her in the head with his fist, and pulling her hair. On yet another occasion, appellant was angry that Barnes had chosen to ride with her sister to a party. Appellant and the sister's husband followed them in another car. Appellant was speeding and came up behind the other car, scaring Barnes and her sister. When appellant arrived at the party, he got into an argument with a party-goer, calling her foul names and, at one point, he brandished a gun. Once more, he pushed another party-goer to the ground. That same evening after the party, appellant got into an altercation with Barnes' sister's neighbor and shot his gun so close to the neighbor's ear that his eardrum burst and began "gushing blood." Barnes also testified that on one occasion, appellant chased her thirteen-year-old daughter out of the house with a shotgun.

The State called appellant's father, Kenneth Green,[1] to the stand to testify about appellant's phone call to him on the night of the murder and appellant's admission during that conversation that he strangled and killed complainant. Green testified that it sounded like appellant was in shock. Green also testified about appellant's experiences in the Vietnam war. Defense counsel elicited the following testimony about appellant's war injuries and their apparent effects on his son: appellant had served as a Marine and experienced live combat at a very young age; he was wounded by shrapnel when another Marine stepped on a nearby landmine; after recovering in Japan from that injury, appellant was returned to combat, where he witnessed many comrades being killed by land mines; and since his return from Vietnam, appellant "wasn't the same kid" as he was before.

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[1] Appellant's father testified that he was a veteran of the armed forces, serving 23 years in the Air Force during World War II, Korea and Vietnam.

Green further testified that, after completing his time in the service, he returned to the United States and was hospitalized. During this time period, he seemed to be in a daze. The doctors concluded he suffered from post-traumatic stress disorder. He apparently had frequent flashbacks to his service in Vietnam. Green added that ever since appellant had completed his tour of duty, he had suffered from prescription drug abuse. The night of the murder, Green told police that, in his opinion, his son was having a flashback when he killed complainant. Green also testified that appellant had received continuous treatment for flashbacks and post-traumatic stress disorder for about thirty years.

The State called Thomas Mateo, appellant's commander in Vietnam, to testify about the phone call he had with appellant the night of the murder. Mateo described appellant as a very troubled individual generally, and on the night of the murder, he sounded scared, upset and disoriented. Appellant told Mateo that he had blacked out that night, and the next thing he remembered, his girlfriend was dead.

On cross-examination, defense counsel elicited testimony about the nature of the combat seen by appellant in Vietnam. Mateo testified that their area of operation was heavily booby-trapped with 55- to 155-pound box mines which would literally vaporize any person stepping on them. Appellant witnessed several such explosions, and most of the men in his platoon were killed by land mines or ambushes. Because appellant was "just a kid" at the time, he had developed strong bonds with the other soldiers in his brigade. It was overwhelming for him to repeatedly witness the casualties.

Mateo testified that some soldiers respond differently to the exposure of such brutal combat: some readjust, but some are scarred for life. According to the conversations he had had with appellant since serving together, and from the content and tenor of his conversation with appellant the night of the murder, Mateo believed that appellant was one who had been scarred for life from his service in Vietnam. Based on Mateo's training and experience in the Marines, he concluded that people who suffer from post-traumatic stress disorder do not think rationally.

INEFFECTIVE ASSISTANCE OF COUNSEL

To show ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-65, 2068 (1984); *Rodriguez v. State*, 899 S.W.2d 658, 664 (Tex. Crim. App. 1995).

When reviewing a claim of ineffective assistance of counsel, we must be highly deferential to trial counsel and avoid the deleterious effects of hindsight, presuming that counsel made all significant decisions in the exercise of reasonable professional judgment. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Appellant bears the burden to show counsel's ineffectiveness by a preponderance of the evidence, and allegations of ineffectiveness must be firmly founded in the record, affirmatively showing the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813; *Dewberry v. State*, 4 S.W.3d 735, 757 (Tex. Crim. App. 1999). Without record evidence, we cannot conclude counsel was ineffective. *See Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000) (holding that "without some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic design"), *cert. denied*, 532 U.S. 1053, 121 S. Ct. 2196, 149 L. Ed.2d 1027 (2001). Except in rare cases, a claim of ineffective assistance must be brought by application for writ of habeas corpus rather than direct appeal, in order to develop the facts and allow trial counsel to explain. *See Robinson v. State*, 16 S.W.3d 808, 813 (Tex. Crim. App. 2000). Finally, the fact that another attorney might have pursued a different course of action will not support a finding of ineffectiveness. *Hawkins v. State*, 660 S.W.2d 65, 75 (Tex. Crim. App. 1983); *Edwards v. State*, 37 S.W.3d 511, 513 (Tex. App.—Texarkana 2001, pet. ref'd).

DISCUSSION

For the following reasons, all of which took place during the punishment phase of trial, appellant claims he received ineffective assistance of counsel: (1) counsel failed "to develop medical and psychiatric evidence through expert witnesses and testimony to mitigate punishment"; (2) counsel "refus[ed] or fail[ed] to challenge any of the State's punishment evidence"; (3) during final argument, counsel did not "assert any position on behalf of appellant and [argued] the evidence to the appellant's detriment"; and (4) the cumulative effect of the errors in the foregoing three issues on appeal "undermined the proper functioning of the adversarial process and cannot be relied on as having produced a just result." We address appellant's second issue for review first.

1. COUNSEL "REFUS[ED] OR FAIL[ED] TO CHALLENGE ANY OF THE STATE'S PUNISHMENT EVIDENCE"

In his second point of error, appellant complains that trial counsel did not make a single objection to the testimony presented at the punishment hearing. However, we have examined the record and find no instance when an objection should have been sustained.

The Code of Criminal Procedure sets out very liberal rules regarding the admissibility of evidence during the punishment phase of trial. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 §3 (a)(1) (Vernon 1981) (allowing evidence "as to any matter the court deems relevant to sentencing, including but not limited to the prior record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and . . . any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he had previously been charged with or finally convicted of the crime or act."). Appellant's specific claim that counsel should have made hearsay objections to some of the testimony is without merit because, in each instance, the testimony elicited would have fallen under an exception to the hearsay rule. Therefore, we overrule appellant's second issue for review.

2. FAILURE TO CALL AN EXPERT WITNESS TO SUMMARIZE AND EXPLAIN APPELLANT'S MEDICAL RECORDS

Under appellant's first issue for review, he complains that (1) trial counsel was ineffective because he failed to call an expert witness to summarize and explain appellant's medical records, and (2) counsel argued these records to appellant's detriment.

Indeed, three hundred thirty-seven pages of medical records were introduced into evidence, and defense counsel did not employ an expert to interpret the records or point out their most relevant points in an effort to mitigate appellant's punishment.

Initially, we point out that because there was no hearing on a motion for new trial, counsel has not had an opportunity to explain why he did not call an expert to testify or whether an expert would have helped appellant. Counsel may have spoken with an expert and concluded that it would be more helpful not to have one. On this record, we cannot tell. This alone would be reason to affirm. *Tong*, 25 S.W.3d at 714.

However, counsel had an obvious overall strategy—to garner the jury's sympathy. More specifically, as to the records, it appears from counsel's closing argument and the testimony of appellant's father and platoon leader that counsel had a two-fold purpose in introducing the evidence. First, it appears that counsel wanted to be able to (1) argue that appellant had been diagnosed as having a 100% disability due to post-traumatic stress syndrome, (2) give the jury a definition of that disease, and (3) have a practical explanation of that disease from two soldiers experienced in combat. Second, counsel clearly wanted to show that appellant was trying to get help for an obvious problem, but that in recent years, he was not receiving practical help from the doctors at the V.A. Hospital. Relying on the records, counsel was able to point out at closing that appellant had made many visits to the V.A. Hospital, that his condition was worsening, and yet the doctors were not helping him other than to give him medication. After each visit, the doctors would release him—even after concluding that he had a 100% disability due to post-traumatic stress syndrome. Counsel used this information to try to convince the jury to be lenient with appellant,

arguing that appellant served his country, witnessed horrific events and, as a result, returned disabled.

As to appellant's claim that counsel used these medical records to appellant's detriment, again, applying our standard, we disagree. Counsel was fighting an uphill battle. Guilt was not contested. An insanity defense was not pleaded. In deciding to use the medical records, counsel chose the only route available to him—to try to arouse the jury's sympathy by arguing that appellant essentially sacrificed his own health for his country. Appellant knew he was not well, but alleged his doctors at the V.A. Hospital were not giving him the tools to control his illness. In making this point, counsel had appellant's father testify about his son before he went to Vietnam and had his platoon leader give a layman's explanation of why appellant was so affected by his service in Vietnam—appellant was quite young when he went to Vietnam. Counsel made a rather impassioned plea, asking the jury not to desert appellant as his doctors had. To make this plea, counsel had to rely on the medical records and would have risked compromising that plea by calling an expert who might testify that nothing else could be done. In short, we discern an overall strategic design to counsel's actions. *Thompson*, 9 S.W.3d at 814. We overrule issue number one.

3. DURING FINAL ARGUMENT, COUNSEL DID NOT "ASSERT ANY POSITION ON BEHALF OF APPELLANT AND [ARGUED] THE EVIDENCE TO THE APPELLANT'S DETRIMENT"

Appellant's third issue for review is similar to his first issue. He claims that counsel failed to assert any position on behalf of appellant in closing argument. We disagree.

Counsel repeatedly asked the jury for leniency and, at the beginning of his argument, pointed out that appellant was eligible for parole. His intent was to be humble before the jury. His overarching theme was (1) for the jury to "temper justice with mercy" for this man who had done the right thing and served his country, and (2) to paint appellant as a broken man who had tried to get help. At one point, counsel reminded the jury that appellant was 51 years old, and that he would be 71 years old if he had to serve twenty years. He

repeatedly asked the jury to give a lesser sentence so that appellant would have the opportunity to seek help after his prison sentence. He asked the jurors to sentence appellant, but to give appellant a shorter sentence that would afford him an opportunity at the conclusion of his sentence to " . . . have some measure of his life outside the confines of the battlefield in Vietnam, the rice paddy, a jungle, a V.A. hospital or a jail cell." Unquestionably, counsel was asking for a sentence that would require appellant to serve less than twenty years, and this had to have been clear to the jury. If the jury had agreed with counsel's argument, it would not have sentenced appellant to 99 years.

Counsel's argument obviously did not work with this jury. That is not to say that it might not have been effective with a different jury. We cannot use hindsight to say that counsel was ineffective or that other counsel would have chosen a different strategy. *Hawkins*, 660 S.W.2d at 75; *Edwards*, 37 S.W.3d 511 at 513. Appellant's third point of error is overruled.

Appellant's fourth issue complains that the cumulative effect of counsel's errors alleged in points one through three rendered trial counsel's representation ineffective. This issue raises nothing for review. *Stoker v. State*, 788 S.W.2d 1, 18 (Tex. Crim. App. 1989); *Lape v. State*, 893 S.W.2d 949, 953 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (holding that the cumulative effect of two or more errors by the trial court is not a proper issue for review).

SUMMARY

In summary, counsel was representing a defendant who strangled his girlfriend to death and did not contest guilt, who was violent when the police arrested him, who, over the years, had violently assaulted six people, and who had flashbacks to combat. Counsel could let the jury assume that appellant was committing these acts merely because that was his nature or because he had become debilitated by his service in Vietnam. He chose to give a reason. We cannot use hindsight to say this was ineffective assistance of counsel.

The judgment of the trial court is affirmed.

/s/

Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed February 28, 2002.

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

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