Affirmed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00360-CR

XAVIER WRIGHT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 755,925

O P I N I O N

The State charged appellant, Xavier Wright, with the felony offense of forgery. Appellant pleaded not guilty to the charge. A jury found him guilty and assessed punishment at confinement in the Texas Department of Criminal Justice, State Jail Division for eighteen months and a $600 fine. The trial judge probated the sentence for a period of five years. In two points of error, appellant contends that the evidence is legally and factually insufficient to support the conviction and that he received ineffective assistance of counsel. We affirm.

Sufficiency of the Evidence

In his first point of error, appellant contends that the evidence is legally and factually insufficient to prove that appellant (1) committed forgery, (2) knew the check was forged, or (3) possessed the requisite intent to harm or defraud any person.

Standard of Review

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App.1996). We accord great deference "to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id*. (*quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution. *Id*. at n.13 (*quoting Jackson*, 443 U.S. at 326, 99 S.Ct. at 2793). In our review, we determine only whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. (*quoting Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789) (emphasis in original).

In reviewing the factual sufficiency of the evidence, we view "all the evidence without the prism of 'in the light most favorable to the prosecution.'" *Id*. at 129 (*citing Stone v. State*, 823 S.W.2d 375, 381 (Tex. App.--Austin 1992, pet. ref'd, untimely filed)). We may only set aside the verdict if it is so weak as to be clearly wrong and manifestly unjust or the adverse finding is against the great weight and preponderance of the evidence. *See id*; *Johnson v. State*, No.1915-98, slip op. at 17, 2000 WL 140257, at *8 (Tex. Crim. App. Feb.9, 2000). In performing this review, we are to give appropriate deference to the fact finder. *Clewis*, 922 S.W.2d at 136. We may not reverse the fact finder's decision simply because we may disagree with the result. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App.1997). Instead, we may find the evidence factually insufficient only where necessary to prevent manifest injustice. *See id*.

Forgery

Section 32.31(b) of the Texas Penal Code required the State to prove beyond a reasonable doubt that appellant (1) with intent to defraud or harm another, (2) passed, (3) a writing, (4) that purported to be the act of another, and (5) that other person did not authorize the act. *See Williams v. State*, 688 S.W.2d 486, 488 (Tex. Crim. App.1985); *Oldham v. State*, 5 S.W.3d 840 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *see also* TEX. PEN. CODE ANN. § 32.21(a) & (b) (Vernon 1989). The intent to defraud or harm may be established by circumstantial evidence. *Williams*, 688 S.W.2d at 488. Proof of intent to defraud is also derivative of other elements. In the case of forgery, the culpable mental state requires proof of knowledge that the check is forged. *Id*. If there is sufficient evidence to establish an actor's theft of the instrument ultimately forged, the evidence is deemed sufficient to show knowledge of the forgery, and therefore sufficient to show an intent to defraud or harm. *See Wallace v. State*, 813 S.W.2d 748, 751 (Tex. App.–Houston [1st Dist.] 1991, no pet.).

The record shows that around 3:00 p.m., appellant and an unidentified male drove to a Nationsbank in Houston to cash a check. Appellant presented the check to the teller. On examining the check, the teller immediately became suspicious. The check was made payable to appellant for $600 for housekeeping; the signature of the payor was misspelled; and appellant used his initials to correct a mistake made on the legal line (the maker of the check is supposed to initial corrections). The teller called the complainant to see if she had authorized the check. The complainant told the teller that she did not write the check, nor did she authorize the transaction. In fact, her checkbook was stolen and she recalled seeing a black person running from her office earlier in the day. Although the complainant could not give a specific time when she saw the black person running from her office, she narrowed the time period between 1:30 p.m. to 3:00 p.m.

While the teller had this conversation with the complainant, appellant got out of the car and approached the teller's window. He demanded to have the check and his drivers license back. At that point, the unidentified person, who was in the car with appellant, drove away from the bank. When appellant saw the unidentified person drive away, he ran away from the teller's window. He left the check and his license in the teller's possession. The teller gave the license to bank security the same day. Several days later, she picked appellant out of a photographic line-up. He was subsequently arrested and charged for forgery.

Appellant testified on his own behalf. He said he attended real estate class on the date of the arrest and that his class met all day except for a lunch break between 1:00 and 2:00 p.m. He had lunch with Donetta Anderson. Anderson said that they ate together between 1:20 and 1:50 p.m. She also testified that appellant called her at 3:00 p.m. to tell her he had a flat tire and was late to his class. Appellant's instructor, Karen Baird, said that appellant attended class and was not marked tardy. It was her ordinary practice to give a fifteen minute grace period before marking a student tardy. Appellant introduced Baird's time sheet to show that he had not been late to class. As to his license, appellant said that it was stolen in 1995 in Compton, California.

Viewing the record in the light most favorable to the verdict, the evidence was sufficient to show that appellant passed a writing that purported to be the act of another, with the intent to defraud or harm another. Thus, the evidence is legally sufficient to support appellant's conviction because any rational finder of fact could have found the essential elements of the offense beyond a reasonable doubt.

The evidence is also factually sufficient to support the conviction. Appellant contends that he was not the person who presented the check to the teller. However, the jury is permitted to believe or disbelieve any part of a witness' testimony. *See Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App.1998). It is clear in this case that the jury chose to reject appellant's testimony and the testimony of his witnesses. This Court will not disturb a jury's credibility finding. *See id.* Viewing all the evidence in the record, including evidence favorable to appellant, we conclude that the jury's finding is not "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See Clewis*, 922 S.W.2d at 129. We find that evidence is factually sufficient to support the jury's verdict. Appellant's first point of error is overruled.

Ineffective Assistance of Counsel

In his second point of error, appellant contends that he received ineffective assistance from counsel when his trial counsel (1) failed to request an alibi charge and application paragraph in the jury charge, (2) failed to file pre-trial-discovery motions, (3) failed to investigate the case, and (4) failed to subpoena witnesses.

Standard of Review

Both the federal and state constitutions guarantee an accused the right to have assistance from counsel. See U.S. Const. Amend. VI; Tex. Const. Art. I, § 10; TEX. CODE CRIM. PROC. ANN. Art. 1.05 (Vernon 1977). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App.1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App.1999).

The first prong requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts and/or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and/or omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App.1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App.1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id*.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption. *See id*. The appellant cannot meet this burden if the record

does not specifically focus on the reasons for the conduct of trial counsel. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd).

When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.–Houston [1st Dist.] 1996, no pet.) (*citing Jackson v. State*, 877 S.W.2d at 771). An appellate court will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court. Even though the appellant may file a motion for new trial, failing to request a hearing on a motion for new trial may leave the record bare of trial counsel's explanation of his conduct. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd).

Appellant first contends that he was entitled to an alibi defense instruction in the jury charge. A defendant is not entitled to an alibi instruction because the instruction constitutes an unwarranted comment on the weight of the evidence by the trial court. *See Giesberg v. State*, 984 S.W.2d 245, 246-247 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1147, 119 S.Ct. 1044, 143 L.Ed.2d 51, 67 (1999). Appellant's trial counsel can not be found ineffective for failing to request an improper instruction. *See Green v. State*, 928 S.W.2d 119, 125 (Tex. App.–San Antonio 1996, no pet.). Appellant failed to show that trial counsel fell below an objective standard of reasonableness under prevailing professional norms.

Appellant's remaining claims are not supported by the record. On direct appeal, appellant did not file a motion for new trial. The record is silent as to why appellant's trial counsel did not file pre-trial motions, investigate the case, or subpoena additional witnesses. Without such evidence, we cannot determine whether his action was based on strategy or the result of negligent conduct. *See Thompson*, 9 S.W.3d at 814. Appellant has not shown what further investigation would reveal or who would be called if additional subpoenas were issued. We hold that appellant did not defeat the strong presumption that the decisions of his counsel during trial fell within the wide range of reasonable professional assistance. We overrule appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed May 25, 2000.

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

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

* Senior Justices Ross A. Sears, Bill Cannon and D. Camille Hutson-Dunn sitting by assignment.