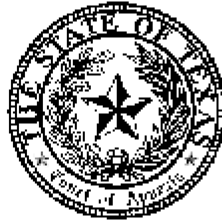
Affirmed and Opinion filed May 31, 2001.



In The

Fourteenth Court of Appeals

____

NO. 14-99-00987-CR

____

KENNETH WAYNE COLBERT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 790,824

O P I N I O N

Appellant, Kenneth Wayne Colbert, appeals from a conviction for aggravated kidnapping and a sentence of life imprisonment. We affirm.

BACKGROUND

In August 1998, appellant and his associate, Anwar Chandler used a gun to force the

complainant, Theddeus Prophet, and two of Prophet's female companions, RR and DM,[1] into a second-floor apartment where other men and women had gathered. Appellant and Chandler claimed to be searching for a missing dog. After forcing their way into the apartment, appellant and Chandler ordered Prophet and DM to remove a window unit air conditioner, a television, and another electronic device. Appellant and Chandler then forced Prophet, at gun point, to load the stolen items into their car. Appellant and Chandler forced all of the occupants of the apartment to strip. They ordered the women into a back bedroom and ordered the men to lie on the floor. As the men were getting on the floor, appellant fired the gun, almost hitting one of the older men, known as "Lester," in the head.

Appellant and Chandler used the gun to restrain Prophet and others from leaving the apartment and to force them to perform sex acts, to submit to beatings, and to endure various acts of torture, including being burned with boiling oil and hot forks. Chandler heated a pan of grease on the stove, stuck forks in the pan, and announced they were going to have "fried nigger." Appellant and Chandler burned Prophet on his right hand, burned the women on their arms and buttocks, and poured boiling oil onto Prophet's back, into Lester's eyes, and onto the women's bare skin. They beat Lester with their fists. Appellant grabbed an electric pedestal fan and beat Prophet with it until it broke, then continued beating him with the cord.

Appellant told the three women he would let them live if they performed oral sex on one another. After the women did this for about twenty minutes, appellant took DM to the bathroom, made her bend over, and stuck the gun barrel into her vagina. Chandler and appellant then sexually assaulted each of the three women orally, vaginally, and anally, with appellant and his partner taking turns holding the firearm. After these assaults, appellant ordered DM to remain in the bathroom. From that location, DM could hear the screams of the men being tortured in the next room.

[1] Because testimony showed that appellant and his partner sexually assaulted the female victims, we will refer to them by their initials.

After three or four hours, appellant and Chandler left the apartment, locking the burglar bars on the front door as they departed. Most of the victims escaped through a rear window and climbed down a tree. The victims flagged down a police officer, who called for backup and for an ambulance. When the police arrived, the victims described the perpetrators as two black males and gave estimations of height and weight.

Appellant was apprehended and charged with the felony offense of aggravated kidnapping. He entered a plea of not guilty and stood trial before a jury. The jury found appellant guilty as charged. The trial court sentenced appellant to life imprisonment in the Institutional Division of the Texas Department of Criminal Justice. Appellant did not file a motion for new trial.

ISSUES PRESENTED FOR REVIEW

Appellant challenges his conviction and sentence, raising four points of error. In his first two points, appellant asserts that the evidence was legally and factually insufficient to support his conviction for aggravated kidnapping. In his third point of error, appellant complains that the trial court abused its discretion in sentencing him to life imprisonment. In his final point of error, appellant contends he was denied effective assistance of counsel.

LEGAL AND FACTUAL SUFFICIENCY

We first address appellant's contention that the State's evidence was legally and factually insufficient to establish that he committed aggravated kidnapping as alleged.[2] The essential elements of aggravated kidnapping are: (1) a person; (2) intentionally or knowingly; (3) abducts; (4) another person and (5) uses or exhibits a deadly weapon during the

---

[2] The indictment alleged that appellant committed the offense of aggravated kidnapping of complainant by "intentionally and knowingly abduct[ing] Theddeus Prophet . . . without his consent, with intent to prevent his liberation by using and threatening to use deadly force, namely, by pointing a firearm at the complainant and during the commission of said offense the defendant used and exhibited a deadly weapon, namely, a firearm." This is an offense under Texas Penal Code section 20.04(b). *See* TEX. PEN. CODE ANN. § 20.04(b) (Vernon Supp. 2001).

commission of the offense. TEX. PEN. CODE ANN. § 20.04(b) (Vernon Supp. 2001). Appellant challenges the evidence of (1) his participation in the offense and (2) use and exhibition of a firearm during the offense.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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.'" *Clewis*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996) (quoting *Jackson*, 443 U.S. at 319). We presume that the jury resolved any conflicting inferences from the evidence in favor of the prosecution, and we defer to that resolution. *Id.* & n.13 (citing *Jackson*, 443 U.S. at 326).

In evaluating evidence for factual sufficiency, we do not view the evidence in the light most favorable to the prosecution. *Id.* at 134. Instead, we consider all the evidence and set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* at 129 (quoting *Stone v. State*, 823 S.W.2d 375 (Tex. App.—Austin 1992, pet. ref'd, untimely filed). However, appellate courts "are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." *Id.* at 135 (citations omitted). In other words, the reviewing court will not substitute its judgment for that of the jury. *Id.* at 133. To find the evidence factually insufficient to support a verdict, the appellate court must conclude that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Id.* at 135.**

Appellant asserts that the evidence was legally and factually insufficient to establish appellant's identity as the perpetrator and his use of a firearm because (1) the witnesses merely saw photos of appellant, without identifying appellant in a lineup with an attorney present; (2)

no DNA tests were performed, despite the sexual assault allegations; (3) despite a three to four hour captivity, there were no fingerprints or other "physical evidence" offered at trial; (4) the witnesses gave inconsistent identification testimony regarding appellant's nickname and whether it was "Skeet," "Squeaky," "K.C" or "Skip;" and (5) neither a firearm nor bullets was produced.

Three of the victims testified at trial: the complainant (Prophet), his girlfriend (RR), and her friend (DM). Among other compelling testimony, each of these victims described in detail the three to four hour captivity and the physical and sexual torture appellant and his accomplice inflicted upon them with the threat of a gun. Their in-court identifications of appellant as one of their assailants was clear and unequivocal. Each of the three victims not only identified appellant independently, but also recognized him from a photo identification.

Prophet, who testified that he was able to get a good look at his assailants, was certain appellant was the one who had beaten him with the fan and tortured him with boiling oil. DM testified that she recognized appellant as a man she had encountered before the assault. During the ordeal, DM saw appellant at least four or five times and was certain it was appellant who had assaulted her. DM also testified that appellant held a gun on her. She, too, was positive in her identification, pointing out that she not only knew appellant before the incident but that she also recognized him from the two-teardrop tattoo on his face.

Like Prophet and DM, RR was also able to positively identify appellant as one of the perpetrators. During captivity, she looked at the perpetrators several times. She recounted how she would never forget the faces of the two men who held her captive and tortured her. She was also certain appellant was the one who had pointed the gun at her and who had beaten Prophet.

Examining all the evidence in the light most favorable to the verdict, we find a rational trier of fact could have found, beyond a reasonable doubt, that appellant was properly identified as one of the assailants and that he used a firearm in his commission of the offense. The

evidence is legally sufficient. Accordingly, appellant's second point of error is overruled.

Turning to appellant's factual sufficiency challenge, we note that the evidence of appellant's guilt is ample and compelling. Appellant contends the evidence is factually insufficient because (1) no gun or bullets was produced at trial and (2) the evidence indicates this was a case of mistaken identity because (a) testimony regarding appellant's nickname (Squeaky, Skip, K.C., or Skeet) was inconsistent; (b) no fingerprints were produced at trial; and (c) appellant was identified in a photo spread and not in a line up with an attorney present. While true, these facts do not render the remaining evidence factually insufficient to support the jury's finding that appellant participated in the kidnapping offense and used a firearm in doing so. As noted, three witnesses independently identified appellant as one of the gun-wielding assailants. Each identified appellant in court and recounted that he not only threatened the apartment's occupants with the gun but also fired it, almost hitting one of the captives. DM, who was familiar with appellant before the assault, testified that appellant sexually assaulted her at gun point and later thrust the gun barrel into her vagina. Prophet testified that he was able to identify appellant in court from observing him at the apartment, not from viewing him in the photo spread.

When viewed objectively, the verdict is not against the great weight and preponderance of the evidence nor is it clearly wrong, manifestly unjust, shocking to the conscience, or clearly demonstrative of bias. *See Cain v.* State, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). *See Clewis*, 922 S.W.2d at 135. Giving due deference to the jury's assessment of the credibility of the witnesses and the weight to be given their testimony,[3] we find the evidence factually sufficient to support the verdict, and overrule appellant's first point of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

---

[3] *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

In his fourth point of error, appellant complains that his trial counsel was ineffective because he (1) failed to object on numerous occasions; (2) admitted during trial he had not seen the police report; and (3) opened the door to questions from the State regarding appellant's trait of peacefulness.

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). This right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92. Moreover, the defendant bears the burden of proving his claims of ineffective assistance by a preponderance of the evidence. *Jackson*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

Any case analyzing effective assistance of counsel begins with the strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume defense counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant has the burden to rebut this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* An appellant cannot meet this burden if the record does not specifically focus on the *reasons* for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or through a motion for new trial. *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see Jackson*, 973 S.W.2d at 957 (reiterating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim). When, as here, the record is silent as to trial counsel's reasons for

his conduct, finding counsel ineffective would cause the court to engage in mere, and unnecessary, speculation. *McCoy v. State*, 996 S.W.2d 896, 900 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (citing *Jackson*, 877 S.W.2d at 771–72)).

Appellant points to nothing in the record which explains why trial counsel took the actions of which appellant complains. Appellant did not file a motion for new trial or a habeas corpus petition and, therefore, failed to develop evidence of trial counsel's strategy for the decisions he now challenges as constituting ineffective assistance of counsel. We cannot speculate as to counsel's strategy or rationale. In light of the silent record, we can only conclude that appellant has failed to overcome the presumption that trial counsel's decisions were reasonably professional and counsel's trial strategy sound. Moreover, even if appellant had demonstrated trial counsel's performance was deficient, he still could not establish ineffective assistance because he has failed to demonstrate how such deficient performance affected the outcome of his case. Thus, appellant has not met his burden under either prong of *Strickland*. Accordingly, we overrule appellant's fourth point of error.

CRUEL AND UNUSUAL PUNISHMENT

In his third point, appellant asserts the trial court abused its discretion in sentencing him to life imprisonment. Specifically, appellant complains that this sentence was disproportionate to the offense committed because he was given the harshest punishment possible despite the fact that "[n]o one in the instant case was killed or disfigured." Appellant's argument fails for at least two reasons.

First, appellant failed to lodge any objection to his punishment during the punishment hearing or in a motion for new trial. As a result, he failed to preserve this issue for appellate review. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Chapman v. State*, 859 S.W.2d 509, 515 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds*, 921 S.W.2d 694 (Tex. Crim. App.1996) (finding that failure to object to sentence as cruel and unusual waives error).

Even in the absence of waiver, however, appellant's contention is wholly without merit. All that is required to rebut an assertion of "cruel and unusual punishment" is to establish that the sentence falls within the statutory range of punishment. *Cooks v. State*, 5 S.W.3d 292, 298 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972).[4] In Texas, aggravated kidnapping is a first degree felony. TEX. PENAL CODE ANN. § 20.04(c) (Vernon 1994). "An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE ANN. § 12.32 (Vernon 1994). Because the trial court sentenced appellant to a punishment within the statutorily prescribed limits, the punishment was not cruel and unusual. *Cooks*, 5 S.W.3d at 298; *Samuel*, 477 S.W.2d at 614.

Moreover, the notion that a life sentence constitutes cruel and unusual punishment because "no one was killed or disfigured" not only assumes a standard not recognized by law (i.e, lack of disfigurement or death) but also is belied by the evidence in the record. That evidence strongly suggests that the victims likely will suffer lasting disfigurement as a result of the vicious beatings and the pouring of boiling oil onto flesh and into eyes.

Appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

---

[4] We acknowledge that "'[a]lthough a sentence may be within the range permitted by statute, it may nonetheless run afoul of the Eighth Amendment prohibition against cruel and unusual punishment.'" *Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)). However, because appellant argued only that his sentence was cruel and unusual under Texas law, we confine our analysis to Texas law. Texas courts have traditionally held that as long as the punishment is within the range prescribed by the Legislature in a valid statute, the punishment is not excessive, cruel, or unusual. *See, e.g., Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973).

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed May 31, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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