Affirmed and Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01109-CR
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FRANK EUGENE GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Burleson County, Texas
Trial Court Cause Nos. 11,959 and 11,960

O P I N I O N

Appellant was charged in two separate indictments with the offenses of aggravated sexual assault and sexual assault. The complainant was the same in each case. The cases were tried jointly and a jury convicted appellant of each alleged offense. The jury assessed punishment at sixty and fifteen years confinement in the Texas Department of Criminal Justice--Institutional Division, respectively. Appellant raises nine points of error. We affirm.

I. Denial of Confrontation.

The first point of error contends appellant was denied his right to confront and cross-examine the complainant regarding a possible conflict between her family and appellant. On three separate occasions, appellant sought to question the complainant on this subject. Each time, the trial court sustained the State's objection on relevancy grounds. Appellant concedes this issue was not preserved for appellate review because trial counsel did not make an offer of proof or present a bill of review as to what the complainant's testimony would have been. *See* TEX. R. APP. P. 33.2. The first point of error is overruled.

II. Punishment Argument.

The second point of error contends the State engaged in improper argument at the punishment phase of trial by asking the jury to punish appellant for a collateral crime. The State counters that the issue is not preserved for appellate review because no objection was lodged. The failure to object to a jury argument forfeits the right to complain about the argument on appeal. *See Saldivar v. State*, 980 S.W.2d 475, 502-3 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd). The second point of error is overruled.

III. Presumption of Innocence.

The third point of error contends appellant's presumption of innocence was infringed upon when he was seen by the jury in handcuffs.

A. Factual Summary.

At the conclusion of voir dire, the trial court excused the jury and the following exchange occurred:

THE COURT: Before we go, you wanted to put something else on the record?

DEFENSE COUNSEL: Yes, sir.

THE COURT: You can do it from there, that's fine.

DEFENSE COUNSEL: [Appellant], you have an item for the Judge to – with regard to how you were brought into the courtroom today, in handcuffs and in the presence of the prospective jury.

APPELLANT: Yes, when I came up out of the elevator I was brought up handcuffed and all the people were staring at me and I figured that maybe they would picture me as a criminal, with handcuffs on, and I thought it was my right that they not see me like that.

THE COURT: May I tell you how we've handled it in the past, and see if that's agreeable. And that is, I would like to go through the entire trial and before the jurors are excused at the end I may ask the jurors if any of them noticed something like that and if they did notice it I may even follow up with it and ask them if it influenced their decision on the jury. Do you have any comments?

THE STATE: Judge, we would object to the motion being made at this time, for the purpose and fact that if that were in fact an issue counsel was aware of it and it could have been raised before we went through the selection process and if there was a problem this panel could have been discharged and dismissed.

THE COURT: Okay. I'm satisfied with the jury, and I'm aware of the complaint, and probably what I will do is just ask the jury as a whole, before I excuse them at the end of the trial, if they noticed it and if it affected any of their deliberations. It's something that I'm aware of and I'll address it then.

The following day, the State presented its case-in-chief and the jury was excused. Thereafter, in open court the following exchange occurred:

THE COURT: Go ahead, sir.

DEFENSE COUNSEL: [Appellant], what experience did you have in the elevator this morning?

APPELLANT: I was in handcuffs and when we were coming off the elevator one of the jurors was coming on to the elevator at the third floor and he rode up to the fourth floor with me, and when the elevator door opened I was witnessed by one of the jurors in handcuffs, and that means that the juror was tainted.

THE COURT; Do you know which juror it was?

APPELLANT: Yes, I can identify him.

THE COURT: Do you know a name?

APPELLANT: I don't know, sir.

THE COURT: When the trial is over we'll get the jury in here and I'll ask each one of them if they viewed that if that caused them concern or influenced their verdict.

DEFENSE COUNSEL: This is the second verse of a theme we've already started.

THE COURT: Okay, let's go home, see you Monday.

After the jury returned its verdict at the punishment phase of the trial, the following exchange occurred:

THE COURT: Now before I discharge you I have something I need to ask you about. There may have been one or two of you, or more, that may have seen the defendant in handcuffs prior to reaching a decision that he was guilty in these cases, and that's something the Court is interested in, and there may have been one or two riding up in the elevator with him, and if you did see that the Court needs to be aware of that. Did any of you happen to see the defendant in handcuffs prior to your returning a verdict of guilty in this case? (Silence).

JUROR SUZANNE HOWARD SHANKS: I may have but I didn't realize it was

him.

* * * * *

THE COURT: Let me ask you this, did it influence your decision in the jury room when you were deliberating?

JUROR SUZANNE HOWARD SHANKS: No, sir.

THE COURT: Was that fact mentioned to any of the other jurors?

JUROR SUZANNE HOWARD SHANKS: No, sir.

JUROR DONALD JOE HAWTHORNE: I may have saw somebody but I didn't know it was him.

* * * * *

THE COURT: Did that influence you in your decision?

JUROR DONALD JOE HAWTHORNE: No, sir.

THE COURT: Did you mention it during your deliberations?

JUROR DONALD JOE HAWTHORNE: No, sir.

THE COURT: Okay, I'm satisfied with that.

B. Analysis.

It is improper for an accused to be brought into the courtroom or into the view of the

jury or jury panel while physically restrained by handcuffs or leg shackles because it infringes his constitutionally guaranteed presumption of innocence. *See Cooks v. State*, 844 S.W.2d 697, 722 (Tex. Crim. App.1992); *Long v. State*, 823 S.W.2d 259, 282 (Tex. Crim. App. 1991); *Mouton v. State*, 155 Tex.Crim. 450, 235 S.W.2d 645, 650 (Tex. Crim. App. 1950). Thus, every effort should be made to prevent the jury from seeing the defendant in shackles, except where there has been a showing of exceptional circumstances or a manifest need for such restraint. *See Long*, 823 S.W.2d at 282; *Clark v. State*, 717 S.W.2d 910, 919 (Tex. Crim. App. 1986). The rules are different, however, where jurors see a defendant under physical restraint outside the courtroom. *See Pina v. State*, 38 S.W.3d 730, 741 (Tex. App. –Texarkana 2001, pet. ref'd). A momentary, inadvertent, and fortuitous encounter away from the courtroom between a handcuffed accused and members of the jury does not necessarily call for a mistrial or reversal. *See Hernandez v. State*, 805 S.W.2d 409, 414-15 (Tex. Crim. App. 1990); *Clark*, 717 S.W.2d at 919.

In support of this point of error, appellant relies upon *Moore v. State*, 535 S.W.2d 357, 358 (Tex. Crim. App. 1976), *overruled on other grounds*, 670 S.W.2d 262 (Tex. Crim. App. 1984), where the defendant was brought into the courtroom in the presence of the jury multiple times without justification and over objection. However, the instant case presents a chance exposure. *See Smith v. State*, 675 S.W.2d 300, 302 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd); *Garber v. State*, 671 S.W.2d 94, 96 (Tex. App.—El Paso 1984, no pet.). Apparently, appellant was transported from the jail to the courthouse in handcuffs and was taken to the courtroom in an elevator, which was open to the public. Appellant remained handcuffed until he entered the courtroom. The inquiry of the jurors by the trial court after the verdict reveals that two jurors saw an inmate restrained, but neither juror was sure appellant was the person handcuffed. Even if the jurors saw appellant in handcuffs, this limited chance exposure outside the courtroom does not rise above a momentary, inadvertent, and fortuitous encounter. *See Hernandez*, 805 S.W.2d at 414-15; *Clark*, 717 S.W.2d at 919. There is no indication in the record that the exposure was deliberate or so prejudicial as to deprive appellant of a fair trial.

See Smith, 675 S.W.2d at 302-03. The third point of error is overruled.[1]

IV. Ineffective Assistance of Counsel.

The remaining points of error contend appellant was denied his right to effective assistance of counsel. Specifically, appellant argues trial counsel was ineffective as follows: point of error four – failure to conduct a full and proper voir dire; point of error five – failure to properly investigate and prepare for trial; point of error six – failure to object to admission or request limiting instruction related to an extraneous offense; point of error seven – failure to present evidence of the complainant's prior sexual conduct; point of error eight – failure to make an offer of proof or present a bill of review when cross-examination was prohibited;[2] failure to object to improper impeachment of appellant.

The standard under which we review a claim of ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 2062-2063 (1984). Under this standard, the reviewing court must first decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below this standard, the reviewing court must decide whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability sufficient to

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[1] While we are mindful that restraint of the defendant during transportation to and from the courtroom is a reasonable precaution, we note that in the instant case no steps were taken to ensure the jurors did not see appellant restrained. We are especially troubled that the trial court permitted this exposure to happen repeatedly. And, from the above colloquy, this was clearly not the first time the trial court had dealt with this situation. To that end, we urge the trial court to take reasonable steps to ensure that restrained defendants are not placed in a position to be seen by the venire or jurors. Finally, we note that the trial court waited until after the trial to inquire as to whether any of the jurors had seen appellant restrained. Our research reveals that the better practice would be to provide an appropriate instruction when the matter is first brought to the trial court's attention. *See Wright v. Texas*, 533 F.2d 185, 188 (5th Cir.1976)("It must be assumed that rational jurors would understand and follow a proper instruction that handcuffing persons in custody for transportation to and from the courtroom is a reasonable precaution that in no way reflects upon the presumption of innocence or the individual propensities of any defendant.").

[2] See point of error one, *supra*.

undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998); *Riascos v. State*, 792 S.W.2d 754, 758 (Tex. App.—Houston [14th Dist] 1990, pet. ref'd). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded and affirmatively demonstrated in the appellate record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997); *Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.—San Antonio 1991, pet. ref'd). When handed the task of determining the validity of a defendant's claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).

To avoid engaging in hindsight and speculation when considering *Strickland's* first prong, the Supreme Court established a presumption of competence and the defendant must overcome the presumption that the challenged action of trial counsel "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Accordingly, we presume trial counsel "made all significant decisions in the exercise of reasonable professional judgment." *See Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992). In light of this presumption, a substantial risk of failure accompanies a claim of ineffective assistance of counsel on direct appeal because the record is simply underdeveloped and cannot adequately reflect the failings of trial counsel. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). Such a record is best developed *via* a motion for new trial hearing or through the habeas process. *See Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex. Crim. App. 1994); *Bohnet v. State*, 938 S.W.2d 532, 536 (Tex. App.—Austin 1997, pet. ref'd).

The State argues that each of these points of error are directed to conduct that was arguably pursued on the basis of some sound or reasonable strategy. We agree. Because the

record is silent as to why counsel engaged in the complained of conduct, we hold the appellate record is not sufficient to rebut the presumption that the challenged conduct was the result of trial strategy.[3] Accordingly, the fourth, fifth, sixth, seventh, eighth and ninth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Anderson, Fowler, and Baird.[4]

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

[3] This holding does not prevent appellant from bringing these allegations by way of habeas corpus. *See Ex parte Varelas*, ___ S.W.3d ___ 2001 WL 76964 (Tex. Crim. App. January 31, 2001).

[4] Former Judge Charles F. Baird sitting by assignment.