Affirmed and Opinion filed June 15, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00391-CR

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ROBINSON WILLIAM RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 787,491

O P I N I O N

After a two day trial, a jury convicted appellant, Robinson William Rodriguez, of aggravated robbery and sentenced him to five years imprisonment. On appeal, he complains that he was given ineffective assistance of counsel, warranting a new trial. He also claims the State made improper arguments during the punishment phase of his trial, constituting reversible error. We affirm.

BACKGROUND

The testimony at trial revealed that a robbery occurred at the residence of Minh and Lee Huynh on May 15, 1998. That evening, the couple were returning home from their jobs at the two liquor stores they owned. Mrs. Huynh gathered the weeks profits from both stores and placed them in a paper bag to carry home. The profits totaled $10,000.00 in cash. Due to the large amount of cash they were carrying, Mr. Huynh was armed with a pistol.

Upon their arrival home, Mrs. Huynh exited the vehicle and entered the house to turn off the alarm. As Mr. Huynh exited the vehicle, two armed men hiding in the nearby bushes rushed out and attacked him, one of them hitting him in the head with the butt of a gun. Two other men rapidly arrived and forced Mr. Huynh into the house.

Once inside, the attackers tied up Mr. and Mrs. Huynh, covered the Huynhs' faces, and told the Huynhs they would kill them if they looked at the attackers. The attackers ransacked the house and repeatedly kicked and hit Mr. Huynh as they ordered him to tell them the location of the money. They also took Mr. Huynh's gun from him. Eventually, they left the house and were picked up by another vehicle that drove off into the night.

An investigation of the attack was undertaken by Houston Police Officer Cherry. A short time after the attack, he showed several books of photographs to the Huynhs separately. Mr. Huynh identified appellant as a regular customer at his liquor store, but was unable to identify him as one of his attackers since he did not see their faces clearly enough to recognize them. Mrs. Huynh, however, saw the faces of the assailants and identified appellant as the attacker who tied her up, pointed a gun at her, and threatened to kill her.

Appellant was arrested following a traffic stop over two months after the robbery. Officers investigating a possible drug sale pulled over a vehicle that had committed several traffic violations after leaving the scene of the suspected sale. Appellant was sitting in the front seat of the vehicle. When the officers found two other passengers to have handguns, and removed appellant from the car, they found a handgun matching the description of the gun stolen from Mr. Huynh underneath the appellant's seat. The officers confirmed that this was

Mr. Huynh's gun and arrested appellant for the aggravated robbery of the Huynh residence.

ANALYSIS

Appellant raises two points of error, complaining that his trial counsel was ineffective and that the State made improper arguments during the punishment phase of his trial. In his first point of error, appellant claims that his counsel was ineffective because he failed to recall him during the punishment phase of trial to testify that he was eligible for probation. In his second point of error, appellant contends the State made an improper argument during the punishment phase of trial, warranting a new hearing on punishment. Finding no reversible error based on the record in this case, we affirm the judgment of the trial court.

INEFFECTIVE ASSISTANCE OF COUNSEL

Since the Court of Criminal Appeals' decision in *Hernandez v. State*, we apply the two-pronged test elucidated in *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel regardless of whether the error occurred in the punishment or guilt-innocence stage of trial. *See* 988 S.W.2d 770, 772-74 (Tex. Crim. App.1999). Under the *Strickland* test, the appellant must first demonstrate his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. Second, the appellant must prove that but for counsel's deficiency the result of the trial would have been different. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Under this analysis, trial counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged to be ineffective. *See id.* at 500. Appellate courts will not speculate about counsel's effectiveness. *See Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.–Houston [14th Dist.] 1992, no pet.). Rather, such a claim must be firmly supported by the record. *See McFarland*, 928 S.W.2d at 500.

Here, appellant complains that his counsel was ineffective because he failed to recall him during the punishment phase of trial to prove his eligibility for community supervision.

Appellant filed a pretrial motion containing an affidavit in which he averred he had no prior felony convictions, thus laying the groundwork for his eligibility for community supervision. Appellant testified during the guilt-innocence phase of trial, but failed to testify that he had not been convicted of a felony, although he did testify that he had been convicted of a firearm possession charge at some time prior to trial. During the punishment phase, appellant's trial counsel wanted to prove his community supervision eligibility by calling the court clerk and proving his eligibility through her testimony. The trial court advised appellant's trial counsel that her testimony would be insufficient, and appellant's counsel objected to that ruling, preserving it for appellate review.

Appellant has failed to illustrate that his trial counsel was ineffective. Because he failed to secure testimony regarding why appellant's counsel failed to recall him to prove his eligibility for community supervision, we are left to speculate about his reasons. Further, though appellant's counsel failed to call him, appellant controls whether he will testify, not his counsel. *See Burnett v. State*, 642 S.W.2d 765, 768 n. 8 (Tex. Crim. App. 1982); *see also Graves v. State*, 803 S.W.2d 342, 346 (Tex. App.–Houston [14th Dist.] 1990, pet ref'd). The record does not reflect that appellant was willing to testify, nor does it reflect that his trial counsel either refused to allow him to testify or advised him not to testify. This decision is purely within the realm of trial strategy.

When, as here, the record is silent as to counsel's trial strategy, we cannot speculate why counsel acted as he did. *See Davis v. State*, 930 S.W.2d 765, 769 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd). This is particularly true when that strategy concerns the defendant's decision to testify. *See Fugon v. State*, 963 S.W.2d 135, 137 (Tex. App.-Houston [1st Dist.] 1998, pet ref'd). Thus, appellant has failed the first prong of the *Strickland* test.

Further, appellant has failed to show that the result would have been any different had appellant recalled him to prove his eligibility for community supervision. There is no evidence in the record to show that appellant had no felony convictions at the time of trial.

Because appellant has failed to sustain his burden of proof on both elements of the *Strickland* test, we overrule his first point of error.

THE IMPROPRIETY OF THE STATE'S ARGUMENT

Appellant claims that the State made an improper argument during the punishment phase of trial. On three separate occasions, appellant objected to the State's argument. During one portion of the argument, the prosecutor argued:

> This aggravated robbery, this violation of Mr. Huynh and his wife inside of their own home was a trigger pull away from a capital murder and there are plenty of what goes on here. What if he had struggled, Mr. Huynh had struggled just a little more? What if he had looked around when they told him not to look around? What if he tried to help his wife out? Certainly any man wants to do [sic] in this situation. What if for some other reason they decided to pull the trigger on him? What if they brought their child home with them instead of leaving Christopher?

Appellant's attorney objected to the prosecutor's argument, but the trial court overruled his objection.

On two other occasions, the prosecutor argued to the jury that appellant would commit other crimes. On the first occasion, the prosecutor told the jury, "Right now, the only certainty is that all that stands between [appellant] and the next Mr. or Mrs. Huynh is the twelve of you." On another occasion, the prosecutor stated, "[Y]ou [the jury] only have yourselves to blame for the next aggravated robbery that this man commits when he is free." Again, appellant's trial counsel objected to these arguments and his objection was overruled.

Without deciding if the State's argument was improper,[1] we find no evidence of harm on this record. Impermissible prosecutorial argument is not reversible error unless, in light of the entire record, the argument is extreme or manifestly improper, violates a mandatory

[1] We note that the State's first argument was, if not improper, very close to being improper. *See, e.g.,Everett v. State*, 707 S.W.2d 638, 640-41 (Tex. Crim. App. 1990).

statute, or injects new facts harmful to the accused in the trial proceeding. *See Harris v. State*, 996 S.W.2d 232, 237 (Tex. App.–Houston [14th Dist.] 1999, no pet.). Here, appellant does not claim the argument violated a mandatory statue, nor that it was extreme or manifestly improper. Rather, appellant argues that the State's argument, through speculation, injected new facts harmful to the appellant.

We fail to see how appellant was harmed by the State's argument, if it were improper, especially in light of the fact that he received the minimum sentence for the crime the jury convicted him of committing. *See Cifuentes v. State*, 983 S.W.2d 891, 896 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd). Because we cannot find appellant was harmed by the State's argument, we overrule this point of error and affirm the trial court's judgment.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed June 15, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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