Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01129-CR

RUSSELL LOVELL SIMPSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th Judicial District
Harris County, Texas
Trial Court Cause No. 793,776

O P I N I O N

Appellant, Russell Lovell Simpson, appeals his conviction for delivery of at least 400 grams of cocaine. We affirm.

I. BACKGROUND

While working as a peace officer on the Texas Southern University ("TSU") campus, appellant devised and executed a plan to obtain cocaine from a drug dealer, under the guise of a traffic stop, and take it to someone he knew as "Nick" in exchange for money. Unbeknownst to appellant, Nick was actually an undercover officer with the Houston Police Department ("HPD"). Nick asked whether appellant would help him "get

back" at someone from whom Nick had been buying drugs.[1] Nick and appellant arranged the "traffic stop" through meetings and phone calls. However, appellant maintains that he actually planned, all along, to make a "felony stop" and take the drug dealer and the evidence to the TSU Police Department. Nick described the supplier who would be bringing drugs into the area and the vehicle that person would be driving. The night of the actual drug transaction, appellant, in uniform, patrolled parts of the TSU campus and called the TSU dispatcher to report that certain buildings were secured and locked.

Appellant found the vehicle Nick had described parked at a gas station near the TSU campus. Inside the abandoned vehicle, appellant found a duffel bag containing two brown packages, which he placed inside his patrol vehicle. Appellant testified that "because . . . [he] needed somebody with more experience in it than what . . .[he] had," he told the gas station clerk to summon the HPD to the gas station. Appellant testified he then planned to go back to TSU to get his sergeant because "it was dope; and . . . [he] didn't know what to do with it. So, . . . [he] was going to bring it to . . . [his] sergeant and ask his advice on what to do with it." Appellant, however, *passed* the TSU police station after leaving the gas station, ostensibly to meet and arrest Nick at a nearby Burger King restaurant. Upon his arrival at the Burger King, appellant put the brown packages containing narcotics behind a gate, where he intended to exchange the drugs for money with Nick. Nick arrived, retrieved the duffel bag and got a bag of money out of his car, purportedly to pay appellant for the drugs. After Nick returned to his car, an HPD vehicle pulled up with two S.W.A.T. officers. Just as appellant was trying to explain that he was "getting ready to make an arrest," the HPD officers arrested appellant.

Appellant was charged by indictment with the felony offense of delivery of at least 400 grams of cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D)(i); 481.112(a), (f) (Vernon Supp. 2001). He entered a plea of not guilty to the offense.

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[1] Nick thought that, because appellant was a police officer, he might be able to help him "get back" at the alleged supplier.

At trial, appellant admitted he took the drugs from the vehicle at the gas station and took them to the Burger King restaurant expecting to trade the drugs for cash from Nick. Appellant maintained, and the State disputed, that he actually took the drugs intending to arrest the supplier (also an undercover police officer) and Nick.

The jury found appellant guilty of the offense charged and assessed punishment at thirty years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a fine of $1,000.00 Appellant filed a motion for new trial alleging ineffective assistance of counsel and complaining that omission of defensive instructions deprived appellant of his constitutional right to a fair trial by an impartial jury. The trial court denied appellant's motion after an evidentiary hearing. Appellant now challenges his conviction, raising eight points of error.

II. Issues Presented for Review

In his first three points of error, appellant contends the trial court committed reversible error by omitting from the jury charge defensive instructions regarding public duty, mistake of fact, and necessity. In his fourth point of error, appellant asks whether the omission of "any" statutory defense in the trial court's final charge violated his constitutional rights. In his fifth point of error, appellant contends the trial court committed reversible error by including in the jury charge an inapplicable sentencing instruction regarding good conduct time. In his sixth point of error, appellant contends his trial counsel rendered ineffective assistance for failing to object to the inapplicable jury instruction. In his seventh point of error, appellant contends the trial court deprived him of a "free, fair, and full" hearing of evidence in support of his motion for new trial, specifically, his ineffective assistance claim. In his eighth and final point of error, appellant contends the trial court failed to follow the rules of appellate procedure governing bills of exception.

II. DEFENSIVE INSTRUCTIONS

In his first four points of error, appellant complains that he was denied a fair trial when his attorney failed to request that the trial court include in the jury charge defensive instructions regarding necessity, public duty, mistake of fact, and "any other" applicable defense. Appellant argues these defensive instructions were integral to his defense and that, without them, he effectively had "no defense," and the jury had no choice but to convict him. Appellant acknowledges that normally, to preserve appellate review, trial counsel must request defensive instructions and object to their omission from the jury charge; trial counsel did neither in this case. However, appellant argues that because absence of the defensive instructions rendered his trial unfair and infringed upon his constitutional rights, no objection was needed to preserve error.

Generally, to preserve error, a party must object. *See* TEX. R. APP. P. 33.1(a). The Court of Criminal Appeals carved out an exception to this general rule for jury charge error in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985). *Webber v. State*, 29 S.W.3d 226, 231 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In interpreting Article 36.19 of the Texas Code of Criminal Procedure, which governs review of the jury charge on appeal, the *Almanza* court held that if the defendant does not object to error in the jury charge, he must show the error was fundamental to complain about it on appeal. 686 S.W.2d at 171.[2] However, in *Posey v. State*, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998), the Court of Criminal Appeals concluded that *Almanza* does not apply to the omission in the jury charge of defensive issues that have not been properly preserved by a defendant's request or objection.

Almanza outlined the "basic framework for analysis" on appeal for preserved and unpreserved "errors" in the jury charge based on the court's interpretation of Article 36.19, and its statutory predecessors, which the court has construed as separately

[2] Fundamental error in the jury charge is error that is so egregious and causes such harm as to deprive the accused of a fair and impartial trial. *Webber v. State*, 29 S.W.3d 226, 231 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

containing the "harm" standards for both "fundamental error and ordinary reversible error" in jury charges. *Posey*, 966 S.W.2d at 60 (citing *Almanza*, 686 S.W.2d at 171). As interpreted by *Almanza*, neither "harm" standard set out in Article 36.19 applies unless an appellate court first finds "error" in the jury charge. *Id.* (citing *Almanza*, 686 S.W.2d at 174) (finding that error in the court's charge to the jury begins – not ends – the inquiry). Neither "harm" standard, for jury charge "error," applies unless the record first shows that any requirement of various statutory provisions referenced in Article 36.19 "has been disregarded." *Id.* Article 36.14 is the primary statutory provision referenced in Article 36.19 that could apply or be "disregarded" in cases such as this. *See id.* Article 36.14 requires that, before the charge is read to the jury, "the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection . . . ." TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 2001)

In considering whether "any requirement" of Article 36.14 "has been disregarded," the *Posey* court concluded that, consistent with the rules of procedural default, the "plain" language of Article 36.14 requires a defendant to object to the charge before complaining on appeal about "errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts." *Posey*, 966 S.W.2d at 61. The *Posey* court concluded that, under this portion of Article 36.14, there generally is no "error" in the charge unless the defendant objects in writing to claimed "errors" of commission and omission in the charge. *Id.* Moreover, under general rules of procedural default, when an appellate court holds a defendant has procedurally defaulted a claim by not timely raising it in the trial court, the appellate court does not concede that "error" has occurred. *Id.* Rather, in this situation, all the appellate court decides is that it will not address the merits of a claim raised for the first time on appeal. *Id.* This is significant in that *Almanza* does not apply unless the appellate court first finds "error" in the jury charge. *Id.* (citing *Almanza*, 686 S.W.2d at 174).

Finally, the *Posey* court found that Article 36.14's requirement that a trial court submit a charge setting forth the law "applicable to the case," does not impose upon the trial court a duty to *sua sponte* instruct the jury on unrequested defensive issues.[3] *Id.* at 62.

Here, because appellant neither requested defensive instructions nor objected to their omission from the jury charge, the defensive issues he now urges were "not applicable" to his case. *See Webber v. State*, 29 S.W.3d 226, 233 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("[A] defensive issue is not part of the law applicable to the case unless the accused requests it to be or objects to its omission.")) Thus, we do not make a finding of error in the jury charge and conclude that the trial court did not err in failing to *sua sponte* instruct the jury on any defensive issues. Having made no finding of error, the *Almanza* harm analysis does not apply.

Accordingly, we overrule appellant's first four points of error.

III. JURY INSTRUCTION: "GOOD CONDUCT" TIME

In his fifth and sixth points of error, appellant complains that (1) his trial counsel rendered ineffective assistance of counsel by failing to object to inclusion of an inapplicable 37.07 "good conduct" instruction and that (2) the mandatory inclusion of an article 37.07 instruction is unconstitutional, violating due course and due process of law, because it requires the trial court to inform the jury about the effects of good conduct time on sentencing regardless of whether the defendant's sentence may be reduced with good conduct time.[4] *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (Vernon Supp. 2001).

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[3] "Moreover, with one exception . . . . [inapplicable here] this Court has never held a trial court commits "error" by failing to *sua sponte* instruct the jury on a defensive issue." *Posey*, 966 S.W.2d at 62.

[4] The mandatory nature of this instruction has recently been challenged in several courts of appeals, to determine if this instruction is misleading or unconstitutional when the defendant is not eligible for an award of good conduct time, and three petitions for review have recently been granted by the Texas Court of Criminal Appeals. *See Edwards v. State*, 10 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 1999, pet. granted); *Luquis v. State*, 997 S.W.2d 442, 443 (Tex. App.—Beaumont 1999, pet. granted); *Jimenez v. State*, 992 S.W.2d 633, 636–38 (Tex. App.—Houston [1st Dist.] 1999, pet. granted; pet. denied); *see also*

Appellant made no objection to the charge. *Id.* In *Espinosa v. State*, 29 S.W.3d 257, 260 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd), the appellant failed to object to the same charge at issue in this case, yet argued on appeal the issues appellant now asserts. This court held that the issues appellant raised were not properly before it on appeal because appellant failed to object to the charge at trial. Generally, to preserve an issue for appellate review, the party voicing the complaint must have presented it to the trial court by a timely request, objection, or motion, stating the specific grounds for the ruling sought. *See* TEX. R. APP. P. 33.1(a). Here, appellant has not cited, nor have we found, any portion of the record where he raises a constitutional challenge to Article 37.07, section 4. Having failed to raise the issue in the court below, appellant has waived this complaint. *See Espinosa*, 29 S.W.3d at 260.

Appellant's fifth point of error is overruled.

IV. INEFFECTIVE ASSISTANCE

In his sixth point of error, appellant asserts that trial counsel rendered ineffective assistance because he failed to object to inclusion of the 37.07 "good conduct time" instruction.

A defendant in a criminal case is entitled to reasonably effective assistance of counsel. *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). In determining whether a defendant has received effective assistance of counsel, Texas follows the two-prong standard articulated in *Strickland v. Washington*. *See* 466 U.S. 668, 687 (1984); *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997). A defendant must first demonstrate that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. *Valencia*, 946 S.W.2d at 83. Judicial scrutiny of the reasonableness of trial counsel's performance must be

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Cagle v. State, 23 S.W.3d 590 (Tex. App.—Fort Worth 2000, pet. filed); *Hill v. State*, 30 S.W.3d 505, 507 (Tex. App.—Texarkana 2000, no pet.); *Hyde v. State*, 970 S.W.2d 81, 88–89 (Tex. App.—Austin 1998, pet. ref'd); *Martinez v. State*, 969 S.W.2d 497, 499–501 (Tex. App.—Austin 1998, no pet.).

highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Thus, to prevail on an ineffective assistance claim, a defendant must rebut the presumption that the challenged action or inaction is considered sound trial strategy. *Id.* at 688–89.

If the first prong is met, the defendant must also show that his counsel's performance prejudiced his defense. *Id.* at 686–89. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* A defendant has the burden of making this showing by a preponderance of the evidence. *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000), *cert. denied*, 121 S.Ct. 2196 (2001).

When addressing the second prong under *Strickland*, we examine counsel's errors not as isolated incidents, but in the context of the overall record. *Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995). However, we need not reach the second *Strickland* prong if we determine the first cannot be met. *Strickland*, 466 U.S. at 697. This two-prong standard is equally applicable to both the guilt/innocence and punishment phases of trial. *Valencia*, 946 S.W.2d at 83.

Generally, when the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). For the most part, when confronted with a silent record, we may not speculate on trial counsel's actions. *Id.* "[I]f there is any basis for trial strategy to have been a reason for trial counsel's action, then further inquiry is improper." *Newsome v. State*, 703 S.W.2d 750, 755 (Tex. App.—Houston [14th Dist.] 1985, no pet.). However, if a silent record clearly indicates no reasonable attorney could have made such trial decisions, it is not speculation to find counsel ineffective. *Vasquez*

v. State, 830 S.W.2d 948, 950–51 (Tex. Crim. App. 1992).

Appellant's entire argument for the first prong of *Strickland* consists only of his observations that trial counsel (1) failed to object to the 37.07, section 4(a) instruction; (2) admitted he was unaware appellant was ineligible for good conduct time; and (3) admitted his failure to object was not a product of trial strategy. Merely pointing us to alleged errors, without argument, is insufficient to prove "that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms . . . ." *Rosales v. State*, 4 S.W.3d 228, 238 (Tex. Crim. App. 1999). Because appellant has failed to meet this burden, we conclude he has not met the first prong of *Strickland.*

In support of the second *Strickland* prong, appellant merely asserts that "to the extent that charging error flowing from such erroneous statutory instruction either was or was *not* preserved by his posttrial objection, he was harmed . . . by the jury sentencing him to imprisonment for thirty-three (33) stiff years."[5] This mere assertion, without more, does not demonstrate that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Thus, appellant has failed to meet the second prong of *Strickland*.

Appellant's sixth point of error is overruled.

V. FAIR EVIDENTIARY HEARING

In his seventh point of error, appellant asserts the trial court failed to provide him a free, full, and fair evidentiary hearing[6] on his motion for new trial, meaningful in time and manner, by depriving appellate counsel an opportunity to thoroughly and fully examine trial counsel on issues of ineffective assistance of counsel and consequent

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[5] The jury sentenced appellant to thirty, not thirty-three, years' imprisonment.

[6] Appellant complains that the evidentiary hearing on his motion for new trial motion was not "full" in that it lasted, in aggregate, only 88 minutes dispensed in approximately three, thirty–minute segments during which counsel was "repeatedly interrupted by the State's objections." Appellant complains that the court sustained thirty–five of the State's objections and permitted appellant's trial counsel to answer only 47 questions.

prejudice to appellant. Appellant argues this deprivation of a proper hearing denied appellant of effective assistance of counsel on direct appeal. Appellant also argues that the trial court ignored appellate counsel's objections that he was not allowed to be heard. Additionally, appellant contends that the hearing was unfair because the trial court "was belligerent towards, as well as made professional accusations against, the undersigned lawyer."

The right to a hearing on a motion for new trial is not an "absolute right." *See, e.g.*, *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993); *Moore v. State*, 4 S.W.3d 269, 278 (Tex. App.— Houston [14th Dist.] 1999, no pet.). Instead, the trial court abuses its discretion in failing to hold a hearing on a motion for new trial that raises matters which are not determinable from the record. *Reyes v. State*, 849 S.W.2d 812, 815–16. To hold otherwise would deny the accused meaningful appellate review. *McIntire v. State*, 698 S.W.2d 652, 660 (Tex. Crim. App. 1985).

The record shows that the trial court provided ample opportunity to allow appellant's objections to be heard. For each instance appellant claims the court refused to hear his objections, the court was about to recess but allowed appellant to resume his argument after the recess. The court specifically stated in one instance, "I will come back this afternoon to do it. I will be back this afternoon during normal working hours. It's your obligation to get these matters heard." The court soon recessed, and when proceedings resumed, the court stated, "You may continue." In another instance, after the court stated it would take a recess, appellate counsel attempted to make a bill of exceptions "right now." The trial court did not acquiesce in counsel's proposed scheduling, stating instead that appellant could make the bill "when we get back." Appellate counsel then objected to the court's refusal. The court responded: "Mr. Freeman [appellate counsel], I don't know if you understood what I did. I simply recessed this matter. I have not shut it off. You'll have an opportunity to come back at a later time and make all your bills and make any other questions you want to. You're simply just not going to do it right now." Still, appellate counsel persisted, and the court responded, "you will be allowed to be

heard, just not at your convenience."

In addition, appellant's counsel had several opportunities to, and did, examine both trial counsel and appellant during the hearing on appellant's motion for new trial. Specifically, appellate counsel examined trial counsel concerning his knowledge of possible defensive instructions,[7] their applicability, and whether their exclusion from the jury charge was a product of counsel's trial strategy.

The record indicates that appellate counsel voluntarily completed and naturally terminated his examination of trial counsel. Interestingly, the record also demonstrates that appellate counsel's *own* time restrictions impacted the brevity and disjointedness of the hearing. At the conclusion of his examination of trial counsel, appellate counsel stated:

> *That's all I have on Mr. Davis* [trial counsel]. I've made the offer of proof that I made earlier outside before he even came back. And because I've only got 20 minutes left *until I've got to leave* – [8]

The record also reveals several attempts by appellate counsel to ask *whether* trial counsel made certain objections during trial. The State repeatedly objected to, and the trial court repeatedly sustained objections to, these questions as seeking information apparent from the record. Several questions regarding the inclusion of defensive instructions were duplicative of those already asked of trial counsel. Understandably, the trial court's patience began to wear thin, not with appellate counsel's persistence in making his bills of exception and in having objections heard, to which he had an absolute right, but with his relentless insistence upon doing so *after* the court had announced its intent to recess and *after* the court had repeatedly sustained objections to counsel's inquiry as to whether trial counsel made certain objections at trial.

Moreover, we do not find that the evidentiary hearing was unfair because of the trial

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[7] Appellate counsel examined trial counsel regarding defensive instructions for mistake of fact, mistake of law, public duty, necessity, etc.

[8] Emphasis added.

court's purported belligerence or insults to appellate counsel's professionalism. Considering the portions of the record appellant cites in support of this point, it appears the trial court was much more likely referring to appellate counsel's occasionally misplaced persistence.

To the extent appellant was entitled to and received a hearing to adduce facts not apparent from the record, we find that appellant received a fair evidentiary hearing.

Appellant's seventh point of error is overruled.

VI. BILL OF EXCEPTIONS

In his eighth and final point of error, appellant complains that the trial court failed to follow Texas Rule of Appellate Procedure 33.2, which governs bills of exception, by neither signing nor noting its refusal to sign bills of exception filed by appellant.[9] Appellant contends the trial court, thus, prevented appellant's attorney from effectively assisting him during critical stages of his post-trial proceedings.

Rule 33.2 requires that a party file a formal bill of exception to complain on appeal about a matter that would not otherwise appear in the record. TEX. R. APP. P. 33.2.(c)(2). Formal bills of exception must be presented to the trial judge for her allowance and signature. The procedure the court then takes depends upon whether the parties agree to the contents of the bill of exception. *See* TEX. R. APP. P. 33.2.(c)(2). If the parties agree on the contents, the court must sign the bill and file it with the trial court clerk. TEX. R. APP. P. 33.2(c)(2). However, if the parties disagree on the contents of the bill, the trial court must – after notice and hearing – do one of the following, depending upon whether the trial court finds the filed bill is correct:

> (A) If the court finds that the filed bill is correct – sign the bill and file it with the trial court clerk;

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[9] The only purported bill signed by the trial court, filed May 4, 2000, and captioned "Accused's Request to Present Formal Bill of Exceptions," was denied as "not timely under Rule 33.2(e)(2) or (e)(3)," on May 5, 2000.

> (B) If the court finds the filed bill is incorrect – suggest to the complaining party those corrections it believes are necessary to accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or
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> (C) If the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.

Id. Appellant asserts the trial court "had an opportunity, but failed, to follow our Texas Rules of Appellate Procedure governing formal bills of exception." However, nothing in the clerk's record indicates the trial court, in fact, had *any* opportunity to consider any timely filed bills or to suggest corrections to them, as evidenced by the absence of the trial judge's signature on any of the "bills" purportedly timely filed with the court below.

Appellant did not follow the proper procedures for making a formal bill of exception. While bills purportedly were filed with the trial court clerk, the only one the trial court signed, it denied as untimely filed and, for the others, the trial court did not sign them or suggest or file corrections. Additionally, appellant did not follow the procedure for making a bystander's bill. *See* TEX. R. APP. P. 32.2(c)(2). A formal bill of exceptions not approved by the trial court or opposing counsel, and not a bystanders bill, is inadequate to preserve a complaint on appeal. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied). Therefore, the purported bills filed with the trial court in this case do not comply with the governing provisions of Rule 33.2 and, therefore, present nothing for this court's review.

Appellant's eighth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Edelman, Frost, and Lee.[**********]

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

[**********] Senior Justice Norman R. Lee sitting by assignment.