Affirmed and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00494-CR

DONALD THOMAS ORCHARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 32,610

O P I N I O N

Over his plea of not guilty, a jury found appellant, Donald Thomas Orchard, guilty of the felony offense of driving while intoxicated ("DWI"). The jury recommended a sentence of seven years' probation and a $5,000.00 fine. The judge sentenced appellant according to the jury's verdict, and, as a term of probation, ordered appellant to serve 30 days in the Brazoria County jail on weekends.

Appellant appeals his conviction, complaining of multiple claims of ineffective assistance of counsel, and of errors in the State's closing argument. For the reasons set out below, we affirm.

FACTUAL BACKGROUND

On November 30, 1996, Officer Robert Soliz, of the Richwood Police Department, saw a pick-up truck, driven by appellant, cross onto the shoulder of business highway 288. Soliz observed appellant's truck sway back and forth on the road. When Soliz attempted to stop appellant, appellant did not immediately pull over. According to Soliz, appellant smelled of alcohol. Soliz asked appellant to perform several field sobriety tests. Appellant reportedly failed these tests. Appellant told Soliz that he had just come from "Kicks," a local dance hall and bar. Based on these observations, Soliz concluded that appellant had lost the use of his physical and mental faculties. Soliz testified that appellant refused to take a breath test, but would not sign the breath test refusal paperwork.

At trial, the State called Soliz, who testified to the above information. The State also played the videotape of this scene for the jury. After the State rested, appellant called three witnesses. The first witness, Alicia Rachunek, testified that she was a close friend of appellant's, that appellant had been sober for three years, but that she did not know whether appellant had been drinking on November 30, 1996 because she was not with him. The second witness, Ronnie Foley, testified that he saw appellant at "Kicks" in the early morning of November 30, but that appellant only drank part of a beer, and that appellant was not drunk. However, Mr. Foley admitted that by the time he saw appellant, he had consumed about four beers. He also added that he thought appellant could drink all night without becoming intoxicated. Finally, appellant took the stand. He admitted to his two prior DWI convictions. He also stated that after the incident on November 30, 1996, he stopped drinking entirely. He explained that he had problems doing the field sobriety tests because of injuries to his back, hip, knee, and ankle. He stated that the reason he swerved on the road was because he was on the phone, talking to his wife, and that he drove close to the edge of the road because he had a bad eye.

DISCUSSION AND HOLDINGS

I. Ineffective Assistance of Counsel

In his first point of error, appellant complains that his trial counsel did the following:

> 1. Failed to interview and subpoena two available witnesses to contradict Officer Soliz's testimony that appellant was intoxicated;
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> 2. Failed to use a peremptory strike on veniremember Greutzmacher, whose husband had been killed by a drunk driver;
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> 3. Failed to object to prosecutor's improper statement of law regarding normal use of mental or physical faculties;
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> 4. Made a misstatement of law during voir dire;
>
> 5. Failed to conduct a complete voir dire examination; and
>
> 6. Failed to stipulate to appellant's two prior misdemeanor convictions.

For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by Texas in *Hernandez v. State.* 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 55.

Appellant carries the burden to prove, by a preponderance of the evidence, the ineffectiveness of his trial counsel. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland,* 466 U.S. at 688-89; *Thompson,* 9 S.W.3d at 813. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in the record. *Thompson*, 9 S.W.3d at 813-14. The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Appellant filed a motion for new trial and the court conducted a hearing thereon, thus, appellant did make a record as to some of his

claims of ineffective assistance of counsel. We will address those claims first.

A. Failure to Subpoena Witnesses

Appellant first contends that his trial counsel was ineffective because he failed to contact or subpoena Patricia Dyke and Meri Grimes. In the motion for new trial hearing, appellant, his trial counsel, Ms. Dyke, and Ms. Grimes all testified. Appellant first called his trial counsel, who testified that appellant provided him with a list of potential witnesses including Ms. Dyke and Ms. Grimes. Appellant's trial counsel claims he asked appellant to get in touch with these witnesses and that before trial appellant told him that the only witness on the list that he could get in touch with was Ronnie Foley, who was present to testify. Appellant's trial counsel testified that appellant told him one of those two women had moved away and that he could not get in touch with the other one. Appellant's trial counsel, who has practiced criminal law for several years, explained that he likes to interview witnesses before he obtains subpoenas on them for trial. He added that appellant never told him that he needed to issue subpoenas in order to bring these witnesses to the trial.

At the motion for new trial hearing, Ms. Dyke stated she had known appellant for 30 years, and informed the court that appellant's sister is married to Ms. Dyke's brother. Ms. Grimes testified that she had known appellant for 5 or 6 years. Appellant acknowledged that his trial counsel told him to contact these witnesses, and stated that he told his trial counsel that the only witness he knew would come was Ronnie Foley. However, he claimed that he told his trial counsel that he probably would have to subpoena Ms. Dyke and Ms. Grimes.

Ms. Dyke testified that appellant never contacted her, and she also testified that she would have told the jury she was on the phone with appellant when he was pulled over. This is in direct contradiction to appellant's testimony that he was speaking to his wife on the phone at the time he was pulled over.

Ms. Grimes testified that appellant did contact her. However, as to her testimony, Ms. Grimes testified that she saw appellant leave "Kicks" at 10:00 pm on November 29th. She stayed at "Kicks" until closing time at 2:00 am, and never saw appellant return. It is undisputed that appellant was arrested at 2:20 am on November 30th. Ms. Grimes stated that she did not know what appellant had been doing between 10:00 pm and 2:20 am.

Appellant fails to meet the test to prove ineffective assistance of counsel. First, he has not shown by a preponderance of the evidence that failing to call these witnesses was not objectively reasonable trial strategy. Appellant's trial counsel did not speak with the witnesses before trial and stated that he typically does not call witnesses whom he has not interviewed prior to trial.

Assuming, without deciding, that appellant's trial counsel's representation was unreasonable in this regard, appellant cannot show that, but for these errors, the result of the proceeding would have been different. Ms. Dyke's testimony directly contradicted appellant's testimony. And, Ms. Grimes could not account for what appellant was doing between 10:00 pm, when she last saw him, until 2:20 am, when appellant was arrested.

An attorney's strategic decision not to call a witness will be reversed only if there is no plausible basis for failing to call the witness to the stand. *Valasquez v. State*, 941 S.W.2d 303, 310 (Tex. App.—Corpus Christi 1997, pet. ref'd). Further, the failure to call a witness may support an ineffective assistance of counsel claim only if it is shown that the witness was available and the defendant would have benefitted from the testimony. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983).

B. Failure to strike a potential juror whose husband was killed by a drunk driver

Appellant next complains of his trial counsel's failure to strike veniremember Gruetzmacher who stated that her husband had been killed over 18 years ago by a drunk driver. Gruetzmacher, acknowledging that this had happened long ago, stated that she "do[es] not feel like it would sway [her] one way or another." Additionally, Gruetzmacher did not raise her hand when asked if anyone on the panel would hold appellant's prior DWI convictions against him, or when asked if anyone on the panel could not be fair and impartial as a juror in this type of case.

During the hearing on the motion for new trial, when asked whether he would strike a juror whose husband had been killed by a drunk driver, appellant's trial counsel replied that he would. In fact, he stated that such a juror would be one of the first he would strike. However, when appellant's trial counsel was asked this question, he stated that he did not remember this juror's statements. Appellant's motion for new trial attorney failed to inform appellant's trial counsel, when asking this question, that the death occurred between 18 and 19 years ago, that she stated that she could be a fair juror, and that her

other answers indicated she would be beneficial to the defense.

After reviewing this evidence, we find that appellant failed to prove by a preponderance of the evidence that his trial counsel's efforts on his behalf fell below the objectively reasonable norm of acceptable professional assistance.

C. Failure to object to prosecutor's statements during voir dire about intoxication

Appellant complains that the prosecutor misstated the law during voir dire by telling the jury that the standard to determine intoxication is,

> . . . can he operate his motor vehicle like a normal non-intoxicated person? Does he have the use of his physical or mental faculties like a normal non-intoxicated person? That's the standard we're looking at. Does anybody have a problem with that definition or that standard?
>
> I mean, if there's some kind of handicap or something like that, I would assume that we hear about it, but barring that, barring knowing about any handicaps or illnesses or things like that, it's not the defendant's normal use. It's the normal non-intoxicated person.

This description of the standard of intoxication is accurate. *Fogle v. State*, 988 S.W.2d 891, 894 (Tex. App.—Fort Worth 1999, pet. ref'd) (holding that an allegation that appellant did not have normal use of his mental and physical faculties means that the faculties which must be tested belong to appellant, and that evidence of inability to use his faculties as a normal non-intoxicated person is sufficient, unless the jury finds the inability to perform was not due to intoxicants). As a result, any objection by trial counsel would have been properly overruled. The failure to object to admissible evidence does not constitute ineffective assistance of counsel. *Webb v. State*, 991 S.W.2d 408, 419 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

We also note that the jury was properly charged with the law of intoxication. The jury is presumed to have followed the language set out in the jury charge. *King v. State*, 17 S.W.3d 7, 18 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

Appellant has therefore failed to show that his trial counsel was ineffective in this respect.

D. Incorrect statement of law by appellant's trial counsel during voir dire

Appellant contends that his trial counsel made an incorrect statement of law during voir dire when he said, ". . . and I know that it is not wise to drive after you have consumed some alcohol; and I think that is a good law; and it ought to be followed." According to appellant, this led the venire to the inaccurate belief that driving after drinking any amount of alcohol is illegal.

Contrary to appellant's assertions, when we look at this statement with the language that surrounded it, it is clear that appellant's trial counsel was attempting to persuade the venire that he was not complaining about the DWI law itself. Rather, he was asking the venire to consider that appellant was not legally impaired, though he did drink some alcohol before driving. In the sentence immediately following the one complained of by appellant, his trial counsel stated, ". . . I'm not in dispute with the DWI law, ... However, it's not against the law to drive after you've consumed some alcohol. It is against the law to drive after you have consumed too much alcohol, and that's the point on which I am here representing and defending Mr. Orchard today."

The statement complained of, when looked at in isolation, is a misstatement of law. However, when we look at the statements surrounding this isolated statement, as we must, we find that trial counsel's statement was not improper. *See Ferguson v. State*, 639 S.W.2d 307, 310 (Tex. Crim. App. 1990).

Appellant has failed to prove that in making this statement, his trial counsel was ineffective. The right to effective counsel is not the right to error-free counsel. *Hernandez v. State*, 726 S.W.2d at 58. The statement appellant complains of, when read in context, does not fall outside the wide range of reasonable professional assistance.

E. Incomplete Voir Dire

Appellant complains that counsel was ineffective for failing to conduct an adequate voir dire relating to the issues of breath test refusal, victims of drunk drivers, knowledge of members of the district attorney's office, knowledge of the arresting police officer, presumption of innocence, indictment not being evidence, burden of proof, proof beyond a reasonable doubt, range of punishment, probation eligibility, victims of crime, and appellant's prior DWI convictions.

We begin by noting that of all the above topics which appellant complains his trial

counsel did not discuss on voir dire, only two – whether anyone on the venire knew Officer Soliz, and whether anyone on the venire were victims of crimes in general – were not already addressed by the trial court or the State. Appellant's trial counsel only had 30 to 45 minutes to conduct voir dire. Instead of rendering counsel ineffective, it appears more likely that trial counsel was effective by avoiding replicating issues already covered by the trial court, or the State, during the limited amount of time he had to conduct voir dire.

Additionally, appellant's trial counsel covered many pertinent issues during voir dire, such as the definition of "intoxication," whether anyone belonged to Mothers Against Drunk Driving, whether anyone had a problem arising out of contact with a driver who was intoxicated, whether anyone would give more credibility to the testimony of a police officer, and whether anyone would hold against appellant his refusal to take a breath test. He also asked the venire if they had any questions of him.

Judicial review of an ineffective assistance of counsel claim must be highly deferential to the counsel and avoid using hindsight to evaluate counsel's actions. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). The fact that counsel did not cover some issues that appellant, in hindsight, thinks that he should have does not render counsel ineffective. The questions critical to the type of case for which appellant was tried were covered during voir dire. On the state of this record, we find that appellant did not prove that counsel's conduct during voir dire fell below the standard for reasonable professional assistance.

F. Failure to Enter Into a Pre-Trial Stipulation Regarding Prior DWI Convictions

In the remaining ineffective assistance claims, appellant claims that his trial counsel was ineffective for failing to enter into a pre-trial stipulation regarding his prior DWI convictions.

The indictment, containing the two prior DWI convictions was read to the jury, and appellant pled true to these two prior DWI convictions before the jury. During the State's investigation of Officer Soliz, the arresting officer, after eliciting testimony of appellant's date of birth, the State offered State's Exhibits 1, 2, and 3 into evidence. Appellant's counsel had no objection to exhibits 1 and 2, and objected to 3 as hearsay. Over that objection all three were admitted by the trial court. State's Exhibits 1 and 2 were the conviction packets for the two prior DWI convictions, and State's Exhibit 3 was

appellant's redacted DPS driving record.

We begin our review of counsel's effectiveness on this issue by noting that whether the State is required to prove two previous DWI convictions in order to prosecute a defendant for felony DWI or if a defendant's stipulation admitting those previous convictions is sufficient was not decided in Texas until the court of criminal appeals' January 5, 2000 decision in *Tamez v. State*. 11 S.W.3d 198, 201 (Tex. Crim. App. 2000). Appellant's trial on guilt/innocence occurred on December 14, 1999. Basing an ineffective assistance claim on an unsettled area of the law entails engaging "in the kind of hindsight examination of effectiveness of counsel [that] the Supreme Court expressly disavowed in *Strickland* . . . ." *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) (quoting *Ex Parte Davis*, 866 S.W.2d 234, 241 (Tex. Crim. App. 1993). Appellant had already pled true to these prior DWI convictions. While that made the admission of State's exhibits 1, 2, and 3 redundant, without an adequate appellate record describing why appellant's trial counsel did not object to the admission of these exhibits, we simply cannot presume that it was not trial counsel's strategy to minimize the prejudicial effect of these exhibits by failing to object to them. He did not have the benefit of *Tamez* to forcefully argue the inadmissibility of the exhibits.

In summary, on this point, the record does not adequately reflect the failings of trial counsel. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). There exists a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693 (1984). To defeat the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Indeed, in a case such as this, where the alleged ineffectiveness is in the form of omissions, rather than commissions, collateral attack may be the only vehicle by which a thorough and detailed examination of the alleged ineffectiveness may be developed. Appellant failed to adequately develop his evidence as to this claim of ineffective assistance. We will not presume that, based on the state of the law at the time this case was tried, appellant's trial counsel's performance fell below an objective standard of reasonableness in failing to object to these exhibits.

For the foregoing reasons, we overrule appellant's first point of error.

II. Jury Argument

In his second point of error, appellant contends that the trial court erred in overruling his objection to the State's jury argument that the jury does not have to wait until someone is killed or injured before convicting a person of DWI.

Proper jury argument must fall within one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's arguments; or (4) a plea for law enforcement. *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985). Improper closing arguments include references to facts not in evidence or incorrect statements of law. *Parks v. State*, 843 S.W.2d 693, 695 (Tex. App.—Corpus Christi 1992, pet. ref'd). An argument must be considered in light of the record as a whole, and, to constitute reversible error, the argument must be extreme or manifestly improper, violate a mandatory statute, or inject new facts, harmful to the accused, into the trial proceedings. *Brandley*, 691 S.W.2d at 712-13.

The argument appellant complains of occurred as follows:

> **THE STATE**: We talked about sympathy, and we talked – and I hope you listened to Defense Counsel's argument because a majority of his argument was not based on the facts of this case. The majority of his argument was based on extraneous, tug-at-the-heart-string kind of arguments based on freedom, based on liberty, based on things like that that [sic] don't prove or disprove whether Mr. Orchard was driving while intoxicated that night or not. That's not what you're here to decide.
>
> You heard evidence that he was out of work. You heard him say repeatedly that there was no accident in this case. Well, thank God. You know, do we have to – here's another thing I want you to think about when you're considering this evidence, when you're listening to me argue, when you're deciding what to do with this case. Do we have to wait before somebody is killed? Do we have to wait before somebody is seriously injured?
>
> **DEFENSE**: Object to this type of argument, your Honor. It is prejudicial and outside the record.
>
> **THE COURT**: I'll overrule the objection.
>
> **THE STATE**: I'm responding to his arguments. Do we have to wait? He's making a big deal that there was no accident. He says no one was

endangered. Well, thank God no one was on the shoulder when he happened to be driving on it on and off. We don't have to wait. The law does not require us to wait until somebody is maimed or seriously injured before they're guilty of a felony offense of Driving While Intoxicated.

We talked about it in voir dire. It's a safety law. That's why we have it. Hopefully somebody learns from it when they get convicted of it. That's why it's here. That's why we're here to talk about it today. We don't have to wait till somebody dies before we enforce the law.

DEFENSE: Can I have a running objection to that type of argument, your Honor?

THE COURT: Yes, sir.

During closing argument, appellant's trial counsel stated that appellant "wasn't endangering anyone at all." He also stated that "we don't have any wreck here," and "we don't have any aggravating circumstances whatsoever . . . ."

We hold that the State's argument was permissible as an answer to appellant's closing argument. *Brandley*, 691 S.W.2d at 712. Furthermore, the State's argument was also permissible as a plea for law enforcement. *Pittman v. State*, 9 S.W.3d 432, 434-35 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *Strahan v. State*, 172 Tex. 478, 358 S.W.2d 626, 627 (1962)); *Bice v. State*, 642 S.W.2d 263, 267 (Tex. App.—Houston [14th Dist.] 1982, no pet.). As a result, we overrule appellant's second point of error.

Having overruled both of appellant's points of error, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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