Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01277-CR
NO. 14-97-01282-CR

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JAMES LEE LONDON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause Nos. 749,128 and 734,617

O P I N I O N

Appellant was charged in two separate indictments with the offenses of aggravated robbery and aggravated assault on a public servant. Each indictment contained an enhancement allegation. The jury convicted appellant of both offenses, found the enhancement allegations true and assessed punishment at (1) 30 years confinement in the Texas Department of Criminal Justice--Institutional Division and a fine of $1,000.00 in the aggravated robbery case, and (2) 20 years confinement in the Texas Department of Criminal

Justice--Institutional Division in the aggravated assault case. As these two cases were consolidated for trial, we will consider them jointly in this opinion. We affirm.

I. Aggravated Robbery

Appellant raises four points of error each alleging the ineffective assistance of trial counsel.

A. Standard of Review

The standard by which we review the effectiveness of counsel at all stages of a criminal trial was articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 2052 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The Supreme Court in *Strickland* outlined a two-step analysis. First, the reviewing court must decide whether trial counsel's performance failed to constitute "reasonably effective assistance." Stated differently, the question is whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below the objective standard, the reviewing court then must determine 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 undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. Absent both showings, an appellate court cannot conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* at 687. *See also Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991); *Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993).

Under *Strickland*, we are required to employ a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and that counsel's actions constituted sound trial strategy. 466 U.S. at 689. In this light, "the party asserting ineffective assistance must rebut this presumption by proving that his attorney's

representation was unreasonable under prevailing professional norms and that the challenged action was not sound trial strategy." *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). To rebut this presumption, the defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *See Riascos v. State*, 792 S.W.2d 754, 758 (Tex. App.--Houston [14th Dist] 1990, pet. ref'd). A claim of ineffective assistance of counsel must be determined upon the particular facts and circumstances of each individual case. *See Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.--San Antonio 1991, pet. ref'd). The fact that another attorney might have pursued a different course of action or tried the case differently will not support a finding of ineffective assistance of counsel. *See Owens v. State*, 916 S.W.2d 713, 716 (Tex. App.--Waco 1996, no pet.).

B. Points of Error

1. Point of Error One

The employees of the Cash America Pawn shop were robbed in October of 1996 by three individuals. Debbie Revels was the only employee able to identify appellant as one of the actors. Revels testified that during the robbery, appellant was the principal actor and in control of the situation. Revels stated that appellant ordered a co-defendant to shoot Revels. When the robbery was foiled, appellant surrendered to Revels and she escorted him out of the store.

Contrary to Revels' testimony, appellant testified that he was not a willing participant in the robbery. Appellant testified he was at a McDonald's restaurant awaiting two friends, who were pawning a ring. When his friends did not return, appellant entered the pawn shop and discovered his friends robbing the employees. Appellant asked his friends to stop the robbery and to leave. While one friend followed appellant's advice, the remaining friend did not. Instead, that remaining friend put a pistol to appellant's head and ordered appellant

to get the money from the cash register or be killed. Appellant complied.

Appellant's testimony raised the affirmative defense of duress and the jury was so instructed. During his closing argument, trial counsel argued that Revels' testimony was unreliable because of her emotional state during the robbery. Trial counsel did not argue, however, that appellant should be acquitted as a result of the duress defense.

In his first point of error, appellant contends trial counsel was ineffective in not arguing for an acquittal on the basis of duress. The State responds that Revels "was the one witness who testified that appellant was in control. Thus by challenging [Revels'] recollection of the events and speakers, defense counsel was in essence challenging the sole witness who contradicted appellant's duress defense." We agree.

Revels testified that during the robbery she feared for her life. At trial, she was still shaken by the events of the robbery. As noted earlier, she was the only witness who identified appellant and inculpated him as being the principal actor. Therefore, trial counsel's strategy was to argue that Revels' testimony, because of her emotional state, was unreliable. Had the jury accepted this argument, appellant could well have been acquitted on the basis of duress because his testimony established that he was not a willing participant in the robbery.

When we review the particular facts and circumstances of the instant case, *see Jimenez*, 804 S.W.2d at 338, in light of the strong presumption that trial counsel's actions constituted sound trial strategy, *see Strickland*, 466 U.S. at 689, we find appellant has not met his burden of proving that trial counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound trial strategy. *See Stafford*, 813 S.W.2d at 506. Therefore, we hold appellant has not met the first prong of *Strickland*. We overrule appellant's first point of error.

2. Point of Error Two

In his second point of error, appellant contends trial counsel was ineffective in failing to object to extraneous evidence of appellant's drug use. When claiming ineffective assistance for failing to object, appellant must demonstrate that if trial counsel had objected, the trial court would have committed error in refusing to sustain the objection. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996); *Cooper v. State*, 707 S.W.2d 686, 689 (Tex. App.--Houston [1st Dist.] 1986, pet. ref'd) (holding that attorney's failure to object to admissible testimony is not ineffective assistance). The State argues no objection could have been lodged because appellant opened the door to the extraneous evidence.

As noted earlier, appellant testified and raised the duress defense. On cross-examination, the State asked about appellant's activities before the robbery. The following colloquy occurred:

Q. Had you-all been together all day?
A. Since about 12:00 that evening.
Q. From –
A. About 12:00
Q. 12:00 that evening. You mean noon, 12:00?
A. Yes, ma'am.
Q. What were you-all doing?
A. Just riding around, *smoking weed*.
* * *
Q. When this-the day this robbery happened, where-did you have a job?
A. No, ma'am.
Q. And so where did you the that $160.
A. My mom and my sister.
Q. They just gave you money?
A. They give me money.

Q. Walking money?

A. Yes, ma'am.

Q. Just to hang out?

A. Yes, ma'am.

Q. Buy dope?

A. No ma'am.

* * *

Q. And who buys your dope for you?

A. Who buy [sic] it? I buy it myself.

(emphasis added).

Under our law, the State may not rely on its own questioning on cross-examination to contradict the defendant and get collateral matters in evidence. *See Hatley v. State*, 533 S.W.2d 27, 29 (Tex. Crim. App. 1976); *Els v. State*, 525 S.W.2d 11, 14 (Tex. Crim. App. 1975); *Roberts v. State*, 298 S.W.2d 599, 599-600 (Tex. Crim. App. 1957). There is, however, an exception to this general rule. When a defendant voluntarily testifies concerning extraneous matters on cross examination, the State may make further inquiry into the voluntary response. *See generally Martinez v. State*, 728 S.W.2d 360, 361-62 (Tex. Crim. App. 1987). This is the situation presented here. Appellant opened the door to this line of questioning when he volunteered that he had been smoking "weed" prior to the robbery. Moreover, even if the statements were inadmissible, the failure to object may have been an appropriate strategic choice by counsel. *See Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex. Crim. App. 1994); *Delrio v. State*, 840 S.W.2d 443, 446-47 (Tex. Crim. App. 1992). We overrule the second point of error.[1]

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[1] Finally, we note that had the evidence of this unadjudicated extraneous offense been inadmissible and not the result of appropriate trial strategy, we would hold its admission does not undermine our (continued...)

3. Point of Error Three

In his third point of error, appellant contends trial counsel was ineffective in failing to object to the State eliciting facts about appellant's prior convictions. Specifically, appellant complains of the following testimony:

> Q. [Y]our attorney asked you about your criminal record. Have you ever been convicted of a felony before?
>
> A. Yes, ma'am.
>
> Q. What felony?
>
> A. Unauthorized use and a state jail felony.
>
> Q. Unauthorized use of a motor vehicle?
>
> A. I mean, possession of cocaine, felony, and a state jail unauthorized use.
>
> Q. And when were you convicted of the unauthorized use of a motor vehicle?
>
> A. I think it's '95.
>
> Q. In '95?
>
> A. '95 or '96.
>
> Q. Okay. And when were you convicted of the offense of possession of a controlled substance?
>
> A. 9 — I had got convicted in '92, but they – they sentenced me in '93.
>
> * * *
>
> Q. And what sentence did you receive from Judge Barr on that case?
>
> A. But before I had got that, came back in '93, they had sentenced me in '92 to boot camp probation.
>
> Q. Okay. So, you got boot camp and probation.
>
> A. Yes, ma'am.
>
> Q. And they you got revoked on that?

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[1] (...continued)
confidence in the verdict because appellant was impeached with two other prior convictions, one of which resulted in confinement in the Texas Department of Criminal Justice--Institutional Division.

A. Yes, ma'am.

Q. Because you didn't do your probation, right?

A. Yes, ma'am.

As this Court noted in *Fuentes v. State*: "It is well settled that no details of the prior conviction with which the witness has been impeached is admissible." 832 S.W.2d 635, 639 (Tex. App.–Houston [14th Dist.], 1992, pet. ref'd) (citing *Stevens v. State*, 671 S.W.2d 517 (Tex. Crim. App. 1984); *Murphy v. State*, 587 S.W.2d 718 (Tex. Crim. App. 1979)). Appellant contends that the fact that his probation was revoked because he did not do his probation "right" violates this rule of law. We disagree. We read this rule of law as prohibiting the details of how the underlying offense was committed. *See, e.g., Villalobos v. State*, 756 S.W.2d 847, 851 (Tex. App.--Corpus Christi 1988, no pet.) (holding that trial court erred in permitting State to elicit from appellant the fact that he used a firearm during commission of an aggravated assault.) We do not interpret this rule of law as prohibiting the State from establishing that the defendant had first been accorded probation for the prior offense. This is especially true in the instant case where appellant volunteered that he had first been placed on probation. Moreover, it is axiomatic that probation is revoked only when the probationer has failed to comply with the terms and conditions of that probation. Accordingly, we do not believe trial counsel's objection to the State's final question would have been sustained. *See Vaughn*, 931 S.W.2d at 566. Therefore, we hold trial counsel was not ineffective in failing to lodge an objection. We overrule appellant's third point of error.

4. Point of Error Four

In the fourth and final point of error related to the aggravated robbery, appellant contends he received ineffective assistance of counsel as a result of the cumulative effect of the errors in points of error one, two and three. Having determined, however, that trial

counsel was not ineffective in those preceding points, we must overrule the fourth point of error.

II. Aggravated Assault on a Public Servant

Appellant raises six points of error related to the aggravated assault charge.

A. Standard of Review

In reviewing the legal sufficiency of the evidence in a direct or circumstantial evidence case, the reviewing court asks whether, based on the evidence viewed in the light most favorable to the verdict, a rational jury could have found all the essential elements beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Whitaker v. State*, 977 S.W.2d 595, 598 (Tex. Crim. App. 1998). If the answer is yes, then the evidence underlying the conviction is legally sufficient.

When determining whether the evidence is factually sufficient to support the verdict, an appellate court must view all the evidence without the prism of "in the light most favorable to the prosecution" 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." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). When performing this review, the appellate court must be "appropriately deferential" to avoid substituting its judgment for the fact finder's. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis*, 922 S.W.2d at 133. This level of deference ensures that the appellate court will not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony. *See Santellan,* 939 S.W.2d at 164.

B. Points of Error

1. Points of Error One Through Four

Points of error one, two, three and four are identical to those numbered points of error in the aggravated robbery case. Therefore, for the reasons stated above, we overrule points of error one, two, three and four.

2. Point of Error Five

In his fifth point of error, appellant contends the evidence is legally insufficient to support the jury's verdict. Specifically, appellant argues the evidence is insufficient to prove he intentionally or knowingly threatened the complainant.

a. The Indictment and Jury Charge

A person commits the offense of aggravated assault against a public servant with a deadly weapon if he intentionally or knowingly threatens a person whom the actor knows is a public servant lawfully discharging an official duty with imminent bodily injury and uses or exhibits a deadly weapon during the commission of the assault. See TEX. PEN. CODE ANN. §§ 22.01(a)(2), 22.02(a)(2), 22.02(b)(2) (Vernon 1994). In tracking that statutory language, the indictment alleged that appellant did:

> . . .intentionally and knowingly threaten with imminent bodily injury R. W. Irving, hereafter called the Complainant, while the Complainant was lawfully discharging an official duty, bu using and exhibiting a deadly weapon, namely a motor vehicle, knowing that the Complainant was a public servant.

The jury charge provided the definitions of intentional and knowing set forth in sections 6.03 (a) and (b) of the Texas Penal Code. *See* TEX. PEN. CODE ANN. § 6.03(a), (b) (Vernon 1994). The application paragraph provided:

> Now, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, on or about the 26th day of March, 1997, the defendant, James Lee London, did then and there unlawfully, intentionally or knowingly threaten with imminent bodily injury R. W. Irving, while R. W. Irving was lawfully discharging an official duty, by using or exhibiting a deadly weapon, namely, a motor vehicle, knowing that R. W. Irving was a public servant, then you will

find the defendant guilty as charged in the indictment.

b. The Evidence

The evidence viewed in the light most favorable to the verdict may be summarized as follows. Officer Troy Blando ("Blando") was assigned to the Auto Theft Division proactive squad of the Houston Police Department on March 26, 1997. During his surveillance of a motel, Blando observed a Dodge Caravan, entered its license plate number into a mobile data terminal, and discovered the vehicle was stolen. Blando continued his surveillance and radioed for assistance. In response to that dispatch, fellow Houston Police Officer R. W. Irving ("Irving") arrived. Both officers put on their raid jackets and hung identification from their necks to identify themselves as police officers.

Subsequent to Irving's arrival, three suspects left the hotel, entered the Caravan, and began driving to the front of the motel. Irving pulled in front of the Caravan, blocking its forward progress. Blando pulled behind the vehicle blocking its egress. As Irving exited his vehicle and approached the Caravan, the driver of the Caravan put the vehicle in reverse and struck Blando's vehicle. By this time, Irving was directly in front of the Caravan. The driver then put the Caravan in drive, spun out and drove forward. Blando testified that Irving jumped out of the way and that Irving had to fire a shot to prevent being run over by the Caravan. The Caravan turned, and drove over the curb, the grass, and part of the driveway. The Caravan then entered the service road and sped away.

Officer Robert Irving testified that he exited his vehicle with his weapon drawn, identified himself as a peace officer, and commanded the driver of the Caravan to exit the vehicle. At this point, the driver of the Caravan put the vehicle in reverse and struck Blando's vehicle. The Caravan's driver then put the vehicle in "drive."

THE STATE: All right. What happened then?

IRVING: He got it in drive, the tires started spinning, the van started coming

at me.

THE STATE: What did you do when you saw the van coming at you?

IRVING: First thing I did, I backed up as far as I could to the fence, the back of my truck. I was in fear of my life. I fired my weapon one time.

* * *

THE STATE: Did you think he was going to hit you and hurt you with the car?

IRVING: I believed I was going to be rammed, yes.

THE STATE: And cause serious bodily injury to you?

IRVING: Yes.

Irving identified appellant as the driver of the Caravan.

L. D. Garretson of the Houston Police Department homicide division testified that a motor vehicle was capable of causing serious bodily injury or death and that it can be used as a deadly weapon in that manner.

Finally, Shameika Hill testified that she was a passenger in the Caravan and that the vehicle was driven by appellant.

c. Resolution

We begin by noting that threats can be conveyed in ways other than a verbal manner. *See McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984); *Horn v. State*, 647 S.W.2d 283, 284 (Tex. Crim. App. 1983); *Church v. State*, 552 S.W.2d 138, 140 (Tex. Crim. App. 1977). A threat may be communicated by action or conduct as well as words. *See Horn*, 647 S.W.2d at 284; *Berry v. State*, 579 S.W.2d 487, 489 (Tex. Crim. App. 1979). The testimony set forth above establishes that appellant placed the automobile in gear and accelerated towards Irving. Irving was wearing clothing that identified him as a police officer and Irving verbally identified himself to appellant as a peace officer. The direction of the Caravan required Irving to take evasive action. Irving feared for his life

when he saw the Caravan approaching. Appellant fled from the scene. An automobile is capable of causing serious bodily injury or death. Viewing this evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that appellant intentionally or knowingly threatened Irving. Appellant's fifth point of error is overruled.

3. Point of Error Six

In his sixth point of error, appellant contends the evidence is factually insufficient to support the jury's verdict.

a. The Evidence

The evidence, viewed without the prism of "in the light most favorable to the prosecution," establishes the following. On direct examination, Irving was asked whether he thought appellant was aiming the Caravan at him (Irving). Irving responded: "It's hard to say. I didn't believe they were. I didn't believe there was room for them to get out. I believed I blocked him in sufficiently where there wasn't any room to get by me."

Similarly, Edward Gibson, a wrecker driver who responded to Blando's dispatch in the hopes of towing the stolen Caravan, saw the incident and testified that the driver of the Caravan was trying to *run from* Irving, who was out of his vehicle. Specifically, Gibson stated: "After hitting [Blando's vehicle], [the driver of the Caravan] then proceeded forward and turning his wheels to turn out, but his wheels were still turned in the same direction he backed up and it veered toward [Irving].

> THE STATE: So, from where you were sitting, did it appear that [the Caravan's driver] was driving in the direction of [Irving]?
>
> GIBSON: Not – he went in the general direction. Not so much as if he was trying to actually run the officer over, but he just didn't turn the wheels back to go out the opposite direction.

In this vein, Shameika Hill testified that she was a passenger in the Caravan and that after appellant struck Blando's vehicle, she saw Irving standing in front of the Caravan. Hill testified that appellant drove the Caravan away from Irving to flee the scene.

Finally, appellant testified that he was neither the driver of the Caravan nor present at the scene.

b. Resolution

We must begin by noting that the jury carefully considered this evidence and, during deliberations, even asked the court reporter to read a portion of Irving's testimony. This must be our starting point because we must be "appropriately deferential" to avoid substituting our judgment for the of the jury's. *See Santellan*, 939 S.W.2d at 164; *Clewis*, 922 S.W.2d at 133.

While we believe this evidence could be viewed as bringing into question appellant's intent, we cannot say that this evidence is so contrary to the overwhelming weight of the evidence as to render the jury's verdict clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. Accordingly, we overrule the sixth point of error

III. Conclusion

The trial court's judgments in both of these cases are affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Justices Fowler, Edelman and Baird.[2]

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

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