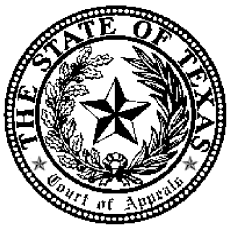
Affirmed and Opinion filed October 25, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00709-CR

JASON ANTHONY RUIZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 830,676

O P I N I O N

Appellant Jason Ruiz appeals from a conviction for aggravated assault. Appellant asserts that the trial court abused its discretion during his trial in two ways: (1) allowing the improper impeachment of his alibi witness; and (2) overruling his motion for mistrial after the State commented on his incarceration pending trial. Appellant also complains that he was denied the right to effective assistance of counsel under both the United States and Texas Constitutions because his counsel failed to object to the prosecutor's improper commentary during summation. For the reasons stated below, we affirm.

PROCEDURAL HISTORY

Appellant was indicted for the felony offense of aggravated assault. One enhancement paragraph was alleged. Appellant pleaded not guilty and was tried before a jury. The jury found appellant guilty. Appellant entered a plea of "true" to the enhancement paragraph, and the trial court assessed his punishment at 60 years in the Institutional Division of the Texas Department of Criminal Justice. Appellant timely filed a notice of appeal.

FACTS

On June 4, 1999, appellant drove his car, containing four passengers, to Gabriela Rios' home. Upon seeing her in the front yard, appellant parked the car, got out, and fired a gun in her direction. The bullet from appellant's gun missed Gabriela, but struck the glass window in the screen door of the home, apparently causing glass fragments to scratch her face. Appellant drove away. He was subsequently arrested and tried for the felony offense of aggravated assault of Gabriela Rios.

At trial, three of the four passengers in the car identified appellant as the person who drove the car and fired the gun in Gabriela's direction. The fourth passenger, appellant's sister, was deceased at the time of trial. Gabriela and her sister also identified appellant as her attacker. A neighbor who witnessed the incident testified that he would probably not recognize the driver if he saw him again, but stated that appellant "is like" the person he saw fire the gun. The neighbor testified that he had called the police to report an altercation between two young girls at the Rios home and was waiting for the police to arrive when he saw the shooting incident. A police officer who responded to the call testified that the call was received at 5:00 p.m. and he arrived at 5:20 p.m. to find physical evidence that a gun had been fired.

In appellant's defense, he produced two alibi witnesses, his wife, Jessica Ruiz, and his uncle, Rudolfo Ruiz. Jessica testified that she was with appellant the entire day on June

4, 1999, and testified that, among other things, they had visited a pawn shop that day. In support of her testimony, she produced a pawn ticket signed by appellant and bearing the time of "13:37" (1:37 p.m.). Rudolfo testified that he was with appellant and Jessica two times that day: first at a Texaco from 3:15 p.m. to 4:15 p.m. and later that evening at the Ruiz home, where Rudolfo and his wife met the appellant and Jessica to go shopping, between 6:30 and 7:00 p.m. Jessica's testimony of her and appellant's whereabouts was consistent with Rudolfo's testimony.

The jury found appellant guilty of aggravated assault with a deadly weapon. Appellant also entered a plea of "true" to an enhancement paragraph regarding a prior conviction for the felony of forgery. The trial court assessed appellant's punishment at 60 years in the Institutional Division of the Texas Department of Criminal Justice.

ANALYSIS

1. Improper impeachment

In his first issue, appellant alleges that the trial court erred in allowing improper impeachment of his uncle, Rudolfo Ruiz. On direct examination, Rudolfo testified regarding the time he spent with appellant on June 4, 1999. Although Rudolfo had a criminal history, it was not probed on direct or re-direct examination. On cross-examination, Rudolfo was asked if he had ever been in trouble with the law. He responded affirmatively, and admitted he had a prior theft conviction. The prosecutor then asked if, in the last ten years, Rudolfo had been convicted of a felony or crime of moral turpitude, and Rudolfo again mentioned the misdemeanor theft conviction. On re-cross, the prosecutor asked Rudolfo whether the theft conviction was the last time he was in trouble, and Rudolfo said "yes." The prosecutor then asked: "What about four months later when you were convicted of the offense of evading arrest and given ten days in jail? Did you forget that?" When trial counsel objected on the grounds of improper impeachment, the prosecutor responded that the witness had twice represented to the jury that the theft conviction was the only time he

had trouble with the law, and he was "correcting the false impression." The trial court overruled the objection and allowed the prosecutor to prove that the witness was convicted of evading arrest in 1995. Rudolfo explained that he had forgotten about that incident, and also mentioned that he served no jail time for it.

In the prosecutor's closing argument, he referenced the exchange as follows:

> They've advanced the theory of alibi, that is, that he was somewhere else at the time this offense was committed. So, again, I ask you where is the proof? I mean, what are you gong to rely on other than the word of a convicted thief and otherwise criminal who forgets his criminal record conveniently when he gets up on the stand?

Appellant contends on appeal that the trial court erred in allowing the testimony, and that the error was harmful. The state responds that appellant waived this argument because the evidence was admitted elsewhere without objection, and any error was harmless.

The prosecutor was permitted to prove up the evading arrest conviction immediately after the trial court expressly overruled appellant's counsel's objection of improper impeachment because "he (Rudolfo) opened the door." Appellant's trial counsel was not required to again object to Rudolfo's testimony regarding the evading arrest conviction that followed the court's ruling on the objection. We therefore reject the State's contention that error was waived, and address the merits of appellant's argument.

An appellate court reviewing a trial court's ruling on the admissibility of evidence must utilize an abuse-of-discretion standard of review. *Weatherred v. State,* 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). An abuse of discretion occurs when the trial court acts without reference to any guiding principle or rules. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1991).

The general rule is that a witness cannot be impeached by a prior offense with which he has been charged unless the charges resulted in a final conviction for either a felony

offense or an offense involving moral turpitude, neither of which is too remote. *Prescott v. State*, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988); TEX. R. EVID. 609. An exception to this general rule arises when a witness, during direct examination, leaves a false impression as to the extent of either his prior arrests, convictions, charges, or "trouble" with the police. *Id*. However, the State may not bootstrap its way to such impeachment by eliciting for the first time on cross-examination the blanket statement that the accused has never before been "in trouble," and then contradicting it. *Hammett v. State*, 713 S.W.2d 102, 105, n.4 (Tex. Crim. App. 1986). Having broached the question, the State is bound by the answer it receives. *Id*. (citing *Shipman v. State*, 604 S.W.2d 182 (Tex. Crim. App.1980)).

Here, Rudolfo's criminal history was not probed on direct or redirect examination. The state elicited the information regarding Rudolfo's misdemeanor theft conviction on cross-examination, and then further attempted to impeach him on recross-examination by asking if that conviction was the last time he was in trouble, eliciting an affirmative response, and then bringing up the evading arrest conviction. We find that the State's line of questioning was the type of "bootstrapping" not permitted under *Hammett* and *Shipman*. The trial court abused its discretion in permitting the prosecutor to pursue this line of questioning over appellant's counsel's objection.

However, we do not find that the trial court's error was harmful. Under Texas Rule of Appellate Procedure 44.2(b), the appellate court must disregard the error if it does not affect an appellant's substantial rights. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). In considering harm, the entire record must be reviewed to determine if the error had more than a slight effect on the verdict. If we find that it did, we must conclude that the error affected the defendant's substantial rights in such a way as to require a new trial. *Id*. Also, if we have grave doubts about the error's effect on the outcome, we must remand for a new trial. *Id*. Otherwise, we must disregard the error. *Id.*

At trial, the victim, Gabriela Rios, and several witnesses to the shooting identified appellant as the individual that fired the gun in Gabriela's direction. In contrast, the only witnesses that testified in support of appellant's alibi were appellant's wife, Jessica, and his uncle, Rudolfo. Rudolfo testified to being with appellant that day at various times before and after the incident, but was unaware of appellant's whereabouts during the approximate time of the incident, and could not support appellant's alibi. Further, Rudolfo had previously been impeached with the theft conviction. Therefore, taking the entire record into account, we do not find that the error affected appellant's substantial rights.

2. Improper commentary regarding appellant's incarceration

Appellant next asserts that the trial court erred in overruling his motion for mistrial after the prosecutor commented during the state's cross-examination of appellant's wife, Jessica, that appellant was jailed pending trial. Appellant contends this unconstitutionally infringed upon his presumption of innocence.

The State responds that appellant's trial counsel's general objection was insufficient to preserve error, and the same evidence was admitted elsewhere without objection. Further, the state contends that even if the prosecutor's comment regarding appellant's incarceration was improper, any error was harmless because the trial court instructed the jury to disregard it, and evidence of appellant's incarceration was admitted elsewhere without objection.

The record indicates that when the prosecutor, Mr. Trent, began questioning Jessica as to why she had not come forward with the evidence of his whereabouts on June 4, 1999, the following exchange took place:

Q: (BY MR. TRENT) And yet Jason Ruiz has spent at least since November in the custody of the Harris County Jail after his bond was revoked, correct?

MR CARTER: I'm going to object.

THE COURT: Sustained.

MR. CARTER: Judge, I'm going to ask them to –

THE COURT: Ladies and gentlemen, you're instructed not to consider

the last statement of the District Attorney for any purpose.

MR CARTER: And I ask for mistrial.

THE COURT: That will be denied.

Q: (BY MR. TRENT): He's been in custody?

A: Yes.

Q: And you didn't come forward to tell anybody your alibi story even when he was locked up in the Harris County Jail?

A: I did not, sir.

* * *

Q: (BY MR. TRENT). . . He was locked up in the Harris County Jail?

A: He got out on bond.

MR. CARTER: I object to his arguing with the witness.

THE COURT: Overruled.

MR. CARTER: But –

THE COURT: It's cross-examination.

MR. CARTER: He said he was locked up and she said, no, he wasn't.

THE COURT: Counsel, its cross-examination.

MR. CARTER: He shouldn't tell her, no, that didn't happen.

THE COURT: Counsel, its cross-examination.

* * *

Q: (BY MR. TRENT) Instead you've let him be charged with this and sit in jail –

MR. CARTER: I object to "let him." I'm going to object.

THE COURT: I haven't heard the rest of his question. Will you let him –

MR. CARTER: It doesn't matter what he said next.

THE COURT: Overruled, Mr. Carter.

Q: (BY MR. TRENT) Instead you have allowed him to sit in jail and be charged with this offense for almost a year?

MR. CARTER: I'm going to object.

THE COURT: Before you answer, let me hear his objection. What's

your objection?

MR. CARTER: First of all, he knows what he said is not true. He knows this person has not been in jail continuously. He knows that and he's making an impression –

THE COURT: Well, Counsel, if that's your objection, I don't know.

MR. CARTER: He is intentionally presenting false information by way of a question.

THE COURT: Overruled. I'll let you clarify on redirect.

MR. CARTER: Your Honor –

THE COURT: Sit down, Counsel. You're making a standard argument-type objection. If you've got an objection make it. Sit down and let's move along.

MR. CARTER: Let me make my objection.

THE COURT: I'll let you do that later. Sit down and let's finish this witness.

Q: (BY MR. TRENT) Go ahead.

A: So you're asking me if I let Jason sit in jail?

Q: You allowed him to spend time in jail and be charged with this offense without trying to get any kind of documentation to prove his whereabouts on the afternoon of June 4th, other than that pawn ticket.

MR. CARTER: Your Honor, I'm going to object to the question you allowed. And, further, that he's been in jail continuously for a year. He knows that's not true and if she –

THE COURT: Counsel, I'm overruling you. It's the same objection you made a minute ago. You're overruled again.

You can answer that question.

THE WITNESS: Jason has not sat in jail continuously for 11 months.

Q: (BY MR. TRENT) I didn't say that. Answer my question.

MR. CARTER: Your Honor, he is arguing with –

THE COURT: Just a minute, Mr. Carter. The Court gave you a lot of latitude on your questions and with no objection. He has a right under the law to cross-examine a witness. There's nothing improper about this question and I've already ruled.

You've objected three times and I've already overruled you three times. Let him ask his questions. Okay.

You may continue.

Q: (BY MR. TRENT) Ms. Ruiz, he has not been in jail continuously the whole time, has he?

A: No, he has not.

Q: Just the last few months, correct?

A: The last almost four months he has.

Q: And you have not put forth any of this prior to today, correct?

A: No, sir.

This exchange reveals that the trial court initially sustained appellant's counsel's general objection to the prosecutor's question, and instructed the jury to disregard the prosecutor's statement. The asking of an improper question, by itself, will seldom call for a mistrial. *Hernandez v. State*, 805 S.W.2d 409, 413 (Tex. Crim. App.1990), *cert. denied*, 500 U.S. 960, 111 S. Ct. 2275, 114 L.Ed.2d 726 (1991); *Gonzales v. State*, 685 S.W.2d 47, 49 (Tex. Crim. App.), *cert. denied*, 472 U.S. 1009, 105 S. Ct. 2704, 86 L.Ed.2d 720 (1985). In most cases, any harm from such a question may be cured by an instruction to disregard the question. *Hernandez*, 805 S.W.2d at 413-414. A mistrial is required only when the question is "clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on their minds." *Gonzales*, 685 S.W.2d at 49. In the present case, there is nothing in the record to indicate that the statement was so inflammatory that an instruction to disregard would not have cured any prejudicial effect.

Further, we note that as the exchange between the prosecutor and Jessica continued, the subject of appellant's incarceration continued to be addressed, but appellant's counsel at no time raised the constitutional grounds now urged on appeal. In order for an issue to be preserved on appeal, there must be a timely objection that specifically states the legal basis for the objection. *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991), *cert.*

denied, 502 U.S. 870, 112 S. Ct. 202, 116 L.Ed.2d 162 (1991). An objection stating one legal basis may not be used to support a different legal theory on appeal. *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App.1990). Appellant therefore waived any error by failing to timely object that his constitutional rights were violated. *See Gibson v. State*, 726 S.W.2d 129, 131 (Tex. Crim. App. 1987). Appellant's second point of error is overruled.

3. Ineffective assistance of counsel

Lastly, appellant raises two issues involving the denial of effective assistance of counsel at trial by counsel's failure to object to the prosecutor's argument. Appellant contends that the prosecutor's summation included an improper comment on appellant's in-court demeanor and election not to testify, and that counsel's failure to object denied appellant his right to effective assistance of counsel under the United States and Texas Constitutions.

Specifically, appellant complains about the following comments by the prosecutor during summation at the guilt/innocence phase of the trial:

> I don't always know what is going to come out of the mouth of my witnesses. They differ in details at times. They got some things wrong. We know from either the physical evidence or the witnesses, but I think they all agreed on the important thing which is that the person who pulled the trigger is sitting right in front of you today wearing the same smirk that he's worn throughout the whole trial – Mr. Jason Ruiz.

In response, the State asserts only that appellant has not brought forward any evidence to rebut the presumption that his counsel's conduct was reasonable, and does not address the merits of appellant's arguments.

In *Strickland v. Washington*, the United States Supreme Court established a two-prong test to determine whether counsel is effective at the guilt/innocence phase of a trial. *Osorio v. State*, 994 S.W.2d 249, 252 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. *Id.* Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Id.* Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *Id*.

Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). 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. *Id.* There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.* Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id*.

In *Thompson*, the Texas Supreme Court held that 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." *Id*. at 814. Where no record has been developed in support of appellant's ineffective assistance claim, the *Thompson* court instructs that an appellate court should be especially hesitant to declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation behind counsel's actions. *Id.* at 814.

In the present case, no motion for new trial appears in the record, and the record is otherwise silent as to why appellant's trial counsel failed to object to the prosecutor's comment. It is conceivable, however, that appellant's counsel reasonably believed that it

would be better not to object to the "smirk" comment so as not to draw the jury's attention to it, or perhaps he concluded that the comment could not seriously prejudice appellant's case, in light of the strong evidence of appellant's guilt, which included five positive identifications. Because the record reflects no reasons for trial counsel's conduct, we are unable to conclude that his conduct was deficient, and therefore overrule appellant's third and fourth issues. *Id.*; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).[1]

We affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed October 25, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Even if we were to assume the prosecutor's comment was objectionable, we find that no harm resulted from the remark that would satisfy the two prongs of the *Strickland* test.