Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01436-CR

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CARRY GIPSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 759,026

O P I N I O N

Appellant was charged by indictment with the offense of robbery. TEX. PENAL CODE ANN. § 29.02(a)(2). The indictment also alleged two prior felony convictions for enhancement purposes. TEX. PENAL CODE ANN. § 12.42(d)(1). The jury convicted appellant of the charged offense. Following appellant's pleas of true to the enhancement allegations, the jury found the enhancement allegations to be true and assessed punishment at sixty years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises three points of error. We affirm.

I. Factual Summary

On July 24, 1997, the complainant was working the 3 - 11 p.m. shift as a cashier at a Chevron Gas station convenience store in Houston. Appellant entered the store and asked for cartons of cigarettes. The complainant told him she could not sell cartons, only packs of cigarettes. Appellant walked to the front door, but returned and leaned over the counter. Appellant stated that he had a pistol and demanded all the cigarettes. When stating he had a pistol, appellant placed one of his hands behind his back. Although the complainant did not actually see a pistol, she testified that she believed appellant was armed and that she might be harmed if she did not comply with appellant's demand. The complainant filled two plastic bags with approximately fifty packs of cigarettes and appellant left the store. The complainant wrote down a partial license plate number from appellant's car and called the police. Later the complainant went to the police station and identified appellant in a lineup. The jury convicted appellant of robbery by threat.

At the punishment phase, appellant pleaded "true" to the enhancement allegations. The State presented evidence that appellant had engaged in a three day crime spree in which he robbed eight convenience stores. Further, four complainants testified appellant entered their stores and demanded cigarettes, telling them he had a pistol. The jury assessed punishment at sixty years confinement.

II. Lesser Included Offense

In his first point of error, appellant contends the trial court erred in denying his request to instruct the jury on the lesser included offense of theft. Appellant argues the instruction was warranted because by not exhibiting a firearm and being polite in his demand for cigarettes, he did not place the complainant in fear of imminent bodily injury or death.

We employ the two-part test of *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993), to determine whether a defendant is entitled to a jury instruction on a lesser included offense. *See Enriquez v. State*, 988 S.W.2d 899, 902 (Tex. App.—Houston [14th Dist.] 1999, pet. granted). The first prong requires that the lesser offense be included within the proof necessary to establish the offense charged. The second prong requires some record evidence that would permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser offense. *See Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998); *Rousseau*, 855 S.W.2d at 673; *Enriquez*, 988 S.W.2d at 902; and *Jones*

v. State, 900 S.W.2d 103, 105 (Tex. App.—Houston [14th Dist.] 1995, no pet.). The evidence may be weak, incredible, controverted, or in conflict with other evidence and yet still require an instruction on a lesser included offense. *See Havard v. State*, 800 S.W.2d 195, 216 (Tex. Crim. App. 1989). A "lesser included offense may be raised if evidence either affirmatively refutes or negates an element establishing the greater offense." *See Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996). Thus, if evidence from any source raises the issue of a lesser included offense, a charge on that offense must be included in the court's charge. *See Enriquez,* 988 S.W.2d at 902 and *Jones*, 900 S.W.2d at 104 (citing *Saunders v. State,* 840 S.W.2d 390, 391 (Tex. Crim. App. 1992)).

At the outset, we find theft is a lesser included offense of robbery. *See Bignall v. State*, 887 S.W.2d 21 (Tex. Crim. App. 1994); *Earls v. State*, 707 S.W.2d 82, 84 (Tex. Crim. App. 1986); *Jacob v. State*, 892 S.W.2d 905, 909 (Tex. Crim. App. 1995) (citing *Earls*, 707 S.W.2d at 84); *Jones v. State*, 843 S.W.2d 92, 99 (Tex. App.—Dallas 1992, pet. ref'd). We now turn to whether there is any record evidence that if guilty, appellant is guilty only of the offense of theft.

Appellant argues that because he was "very nice" when he demanded the cigarettes, did not actually harm the complainant, and never exhibited a pistol, the jury could have concluded he never placed the complainant in fear of imminent bodily injury or death. The complainant testified appellant entered the store and asked her for cartons of cigarettes. When she said she could not sell in cartons, appellant ordered the complainant to give him all the cigarettes, and stated that he had a pistol. Appellant gestured by putting his hand behind his back, which led the complainant to believe appellant was armed. The complainant testified she was afraid of appellant due to the possibility that he had a pistol. On cross-examination, the complainant agreed with defense counsel that appellant was calm and reassuring during the robbery, telling the complainant she would not be harmed if she cooperated by giving him the cigarettes. Nevertheless, the complainant maintained that she was afraid appellant would harm her if she did not comply.

Despite a vigorous cross-examination, appellant failed to raise any evidence that the complainant was never placed in fear of serious bodily injury or death. Accordingly, we find the second part of the *Rousseau* test that, if guilty, appellant was guilty only of theft, has not been met. Therefore, we hold

appellant was not entitled to an instruction on the lesser included offense of theft. Appellant's first point of error is overruled.

III. Theories of Criminal Liability

In his second point, appellant contends the trial court committed fundamental error in submitting a jury charge that permitted the jury to convict on a theory of criminal liability not alleged in the indictment. The indictment alleged appellant committed the offense of robbery by threatening *and* placing the complainant in fear of imminent bodily injury and death. However, the charge permitted the jury to convict if it found appellant threatened *or* placed the complainant in fear of imminent bodily injury or death.

Appellant argues that by pleading in the conjunctive and charging in the disjunctive, the trial court permitted the jury to convict on a theory of liability not alleged in the indictment. In support of his argument, appellant relies upon *Martinez v. State*, 641 S.W.2d 526 (Tex. Crim. App. 1982), where the defendant was charged with aggravated robbery. The indictment charged Martinez "exhibited" a gun, but the jury charge permitted a conviction if he "exhibited or used" a gun. *Id*. at 527. A plurality of the court held "use" and "exhibit" constituted separate and distinct theories of the offense and, therefore, permitted conviction under both theories, which broadened the substance of the charged offense and erroneously permitted the jury to convict the defendant under a theory of the offense that had not been charged. *Ibid*. *See also, Dowling v. State*, 885 S.W.2d 103, 107 (Tex. Crim. App. 1992)(fatal variance occurred where indictment failed to charge drugs included adulterants and dilutants, but jury charge permitted conviction based upon drugs containing adulterants and dilutants.).

We believe, however, that the instant case is controlled, not by *Martinez*, but rather, by *Anderson v. State*, 717 S.W.2d 622 (Tex. Crim. App. 1986). In *Anderson*, the Court of Criminal Appeals specifically recognized a distinction between permitting a conviction on a theory that was not charged in the indictment, and permitting a conviction on alternate theories, which, although pled conjunctively in the indictment, were charged disjunctively in the jury charge. *Id*. at 631-632. Moreover, in a prosecution for robbery, the State may allege the "threaten" and "place in imminent fear" elements conjunctively yet prove them in the disjunctive at trial. *See Vaughn v. State*, 634 S.W.2d 310, 312

(Tex. Crim. App. 1982); *Banks v. State*, 638 S.W.2d 532, 535 (Tex. App.—Houston [1st Dist.] 1982, pet. ref'd). Consequently, we hold the trial court did not err in charging the jury as it did. Appellant's second point of error is overruled.

IV. Effective Assistance of Counsel

In his final point of error, appellant contends trial counsel rendered ineffective assistance under the United States and Texas Constitutions at the punishment phase of trial. Specifically, appellant complains of counsel's failure to object to hearsay testimony by a police officer regarding appellant's commission of an extraneous robbery.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the effective assistance of counsel.[1] *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-2064, 80 L.Ed.2d 674 (1984); *Ex parte Jarrett*, 891 S.W.2d 935, 937 (Tex. Crim. App. 1995). The Supreme Court in *Strickland* outlined a two-step analysis to determine whether a defendant has received ineffective assistance of counsel at trial: first, the reviewing court must decide 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 confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. 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, 104 S.Ct. at 2064. *See also Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App.1991). We employ the two-prong analysis from *Strickland* when determining the effectiveness of counsel at the punishment phase of non-capital trials. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999).

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[1] We will address appellant's federal and state constitutional claims together under the same standard of protection since appellant fails to separately argue and brief these contentions. *Riddle v. State*, 888 S.W.2d 1, 7-8 (Tex. Crim. App. 1994); and, *Arnold v. State*, 873 S.W.2d 27, 29 n.2 (Tex. Crim. App. 1993).

A claim of ineffective assistance of counsel must be determined on 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). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Strickland*, 466 U.S. at 689; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). Stated another way, "competence is presumed and appellant 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,* 813 S.W.2d at 506.

Appellant has the burden of proving ineffective counsel by a preponderance of the evidence. *Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded. *See Jimenez*, 804 S.W.2d at 338. However, while a defendant must overcome the presumption that the complained of errors are supported by trial strategy, counsel's conduct will not be supported by the presumption of competence where counsel's actions cannot be attributed to any reasonable trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Even "a single error of omission can constitute impermissibly ineffective assistance [of counsel]." *See Howard v. State*, 972 S.W.2d 121, 129 (Tex. App. – Austin 1998). A court should not presume from a silent record that counsel had no trial strategy for the particular conduct, but when a "cold record" clearly indicates that no reasonable trial counsel could have made such trial decisions, the court should not hesitate to find ineffective assistance. *See Weeks v. State*, 894 S.W.2d 390, 392 (Tex. App. — Dallas 1994, no pet.). *See also, Nelson v. State*, 832 S.W.2d 762, 766 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (based upon trial record, counsel's decision not to challenge unqualified prospective venireman not supported by sound trial strategy).

Turning to the facts of the instant case, we must first determine whether trial counsel's performance at the punishment phase fell below objective professional standards when he failed to timely object to Houston Police Officer L.V. Gibbs' hearsay testimony regarding appellant's alleged theft of cigarettes from the complainant, Hung Huynh, at a Mobil gas station on July 22, 1997.

Gibbs testified he was dispatched to a robbery call at a Mobil gas station on July 22, 1997. Gibbs was informed by the complainant that a person matching appellant's description and driving the same car with the same license plate as appellant, demanded cigarettes and told the complainant he had a pistol. Defense counsel did not object to Gibbs' testimony at the time it was offered. The complainant in the robbery, Hung Huynh, did not testify at trial.

Gibbs' testimony was excludable, either on the grounds of hearsay, or that it constituted a denial of appellant's right to confrontation. *See, Idaho v. Wright*, 497 U.S. 805, 814-815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638 (1990) (Confrontation Clause protections exceed those of hearsay rule and promote preference for face-to-face confrontation of witnesses at trial). Although the trial record is devoid of trial counsel's reasons for not objecting to this testimony, counsel's actions cannot be attributed to any reasonable trial strategy. *See Jackson v. State*, 877 S.W.2d at 771. Consequently, we find no valid strategic reason for trial counsel permitting Gibbs' hearsay testimony. This finding is underscored by the fact that counsel did, in fact, object to Gibbs' testimony at the conclusion of the punishment phase of trial, far too late to preserve the error. *See Johnson v. State*, 878 S.W.2d 164, 167-168 (Tex. Crim. App. 1994) (in order to timely preserve error, objection must be made at time evidence is offered, or when it becomes apparent that evidence is objectionable).[2] Therefore, we hold the first prong of *Strickland* has been established.

We now turn to the second prong to determine whether there is a reasonable probability that, but for defense counsel's failure to object, the results of the punishment phase would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. For the following reasons, we believe they would not. Appellant pleaded "true" to the two enhancement allegations in the indictment, alleging the offenses of robbery and delivery of a controlled substance. During punishment, the State presented testimony by the complainants of four convenience stores whom appellant had robbed as a part of his three-day crime spree.

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[2] We observe that defense counsel likewise failed to lodge a timely objection to similar testimony by Houston Police Officer K.M. Overby who testified regarding statements made to him by complainant Amiruddin Momin regarding a robbery of cigarettes at the Bama Food Mart on July 21, 1997. The complainant did subsequently testify.

The State also presented testimony, without objection, by Houston Police Officer F. E. Braune that appellant was being investigated for a total of eight robberies. In light of this evidence, we hold appellant was not prejudiced by trial counsel's failure to object to Gibbs' testimony. Consequently, appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Justices Fowler, Frost, and Baird.[3]

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