AFFIRMED; Opinion Filed July 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00890-CR

CURTIS DEWIGHT NELSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 59th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 068322

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

Curtis Dewight Nelson appeals his conviction for evading arrest or detention with a vehicle. TEX. PENAL CODE ANN. § 38.04(b)(2)(A). In a single issue, he asserts his trial attorney's failure to object to testimony concerning extraneous offenses deprived him of his right to effective assistance of counsel. We affirm the trial court's judgment. Because all issues are settled in the law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Appellant was charged by indictment with the offense of evading arrest or detention with a vehicle. The State sought to enhance appellant's punishment with prior felony convictions.[1] Appellant entered a not guilty plea, and the case proceeded to trial before a jury. Appellant's defensive theory was that he was not the individual driving the vehicle on the evening in question. Appellant claimed his uncle, Dewayne Nelson, was the individual who evaded the peace officer. The jury found appellant guilty of the charged offense, found the enhancement paragraphs to be true, and assessed punishment at fifty years' confinement.[2]

EVIDENCE

At trial, the State's sole witness was Sherman Police Officer Austin Ross. Officer Ross testified that on April 16, 2017, he was on patrol duty from 6 p.m. onward. At the beginning of his shift, he was briefed on outstanding arrest warrants. Appellant was one of the individuals with outstanding warrants, and a description of appellant and his picture were distributed to the officers. Officer Ross had interacted with appellant in the past and knew he drove a gold Mercedes. While on patrol,

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[1] Appellant had previously been convicted of the felony offenses of "Conspiracy Manufacture, Distribute, Possess, Dispense Cocaine Base (Crack)/Marijuana," "Possession of Controlled Substance, Penalty Group Two, more than one gram but less than four grams," and "Tampering with Physical Evidence".

[2] Due to the enhancements, appellant faced a range of punishment of life, or any term of years of not less than twenty-five years nor more than ninety-nine years. *See* TEX. PENAL CODE ANN. § 12.42(d).

Officer Ross observed a gold Mercedes at the intersection of Travis and College streets. The driver side window of the vehicle was down, and Officer Ross made eye contact with the driver and recognized him to be appellant. He pursued appellant with his emergency lights and siren activated as appellant drove through a residential area. The speed limit was 30 miles per hour. Appellant, however, drove at speeds in excess of 60 miles per hour and failed to yield stop signs. A video of the pursuit recorded by Officer Ross' patrol car was admitted into evidence. Officer Ross explained appellant's actions put citizens at risk for serious injury or death, and consequently, he terminated his pursuit. On cross, Officer Ross acknowledged that, while on patrol, he had pulled over appellant's uncle, Dewayne Nelson, a few times and on one occasion may have mistakenly called him Curtis.

Appellant called his ex-girlfriend, Tiffany Baxley, his uncle, Dewayne Nelson, and his 18-year-old daughter, Shakira Nelson, to testify. Tiffany recalled that on April 16, 2017, they were having trouble with the radio and speakers on the Mercedes and that appellant's uncle, Dewayne Nelson, was working on the vehicle.

Dewayne testified he had encountered Officer Ross in the past and suggested that officers had pulled him over several times thinking he was appellant. Dewayne further recalled that on one occasion Officer Ross told him the police were looking for appellant in connection with an incident that occurred at an Applebee's during which it was alleged appellant assaulted his girlfriend and then fled from police.

Dewayne indicated Officer Ross asked if he knew where appellant could be found and he responded "no." Dewayne acknowledged that he had heard of appellant running from the police[3] and that on April 16, 2017, he was working on appellant's Mercedes, installing a speaker box in the back of the car. When shown the video from Officer Ross' dash cam, Dewayne identified the Mercedes as being appellant's vehicle and denied that he was the one driving the car.

Appellant then re-called Tiffany. She testified there had been an altercation at Applebee's and that she was knocked down when she held onto a man's arm and his elbow hit her. She denied appellant's involvement in the incident.

Shikira testified that April 16, 2017, was Easter. She recalled driving around with her dad on that day in a white car owned by Tiffany, visiting various relatives and friends. She stated they drove the white car because someone was working on the Mercedes.

After the defense rested, the State recalled Officer Ross. Officer Ross testified that he had encountered appellant three times and on each occasion he attempted to arrest appellant and appellant fled. Officer Ross had no doubt that it was appellant he saw in the gold Mercedes on April 16, 2017.

[3] Appellant's counsel objected to the question that elicited this testimony. The trial court overruled the objection. Appellant does not complain about that ruling on appeal.

DISCUSSION

I. Standard of Review

To obtain a reversal because of ineffective assistance, appellant must show: (1) that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the sixth amendment and (2) that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *Garza v. State*, 213 S.W.3d 338, 347 (Tex. Crim. App. 2007).

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Strickland*, 466 U.S. at 689)). We do not judge trial counsel's performance with the benefit of hindsight. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). Nor do we speculate on strategy in the absence of a record of the reasoning behind counsel's actions. *See Weeks v. State*, 894 S.W.2d 390, 392 (Tex. App.—Dallas 1994, no pet.) (citing *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994)). In *Weeks*, this Court reviewed a complaint about counsel's failure to object to certain testimony. We held that "*Jackson* prohibits our speculating on whether we could justify trial counsel's actions." *Weeks*, 894 S.W.2d at 392.

Any allegation of ineffectiveness must be firmly founded in the record, and

the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. In most instances, a silent record that provides no explanation for counsel's actions or inactions will not overcome the strong presumption of reasonable assistance. *Id.* at 814.

Only when the record clearly confirms that no reasonable trial counsel could have made such trial decisions is it not speculation to hold counsel ineffective. *See Weeks*, 894 S.W.2d at 392. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Thompson*, 9 S.W.3d at 813.

II. Application of the Law to the Facts

Appellant contends trial counsel rendered ineffective assistance by failing to object to testimony concerning (1) his alleged assault of his girlfriend; (2) his flight thereafter; and (3) his history of fleeing from the police. Under rule 404(b) of the Texas Rules of Evidence, extraneous bad acts are not admissible to show the defendant's bad character in order to show action in conformity therewith. TEX. R. EVID. 404(b). However, such acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *Id.*; *see also Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1991). This list is illustrative, not exhaustive. For example, though not specifically listed in Rule 404(b), extraneous-offense evidence may be

admissible when a defendant raises an affirmative defense or a defensive issue that negates one of the elements of the crime. *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004).

Extraneous offense evidence may be admissible to prove identity by rebutting a defensive theory that someone other than the defendant committed the offense alleged. *Id.* at 220. By raising a defensive theory, the defendant opens the door for the State to offer rebuttal testimony regarding an extraneous offense if the extraneous offense has common characteristics with the offense for which the defendant is on trial. *Id.* at 221.

In this case, given the video recording of an individual fleeing from Officer Ross in a vehicle commonly driven by appellant, the only defensive theory available to appellant was a claim someone other than he was driving the vehicle at the time. It is not surprising, then, that this was in fact appellant's theory. Appellant's identity was put at issue by his assertion that Dewayne was driving the vehicle Officer Ross pursued and attempt to discredit Officer Ross's ability to distinguish between appellant and Dewayne.

Extraneous offense evidence might be relevant under Rule 404(b) to prove identity by rebutting a defensive theory that someone other than the defendant committed the charged crime. *See, e.g.*, *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). In such a case, evidence of another act of misconduct could be

offered to show that it was the defendant, and not some other person, who committed the charged offense, because the defendant committed another act very similar to the charged act. *Johnston*, 145 S.W.3d at 220–21. Proof of identity is a legitimate non-character purpose under rule 404(b). *Id.* at 221. Evidence of another act may be admitted if the State shows the defendant is in fact the person who committed the other act. *Id.*

Here, the evidence showed appellant committed similar acts in the past. Such evidence was arguably admissible to rebut appellant's defense on the issue of identity and attempt to discredit the State's sole witness. Counsel may have reasoned that the victim's testimony regarding appellant's extraneous acts of fleeing from law enforcement might have been admissible on the issue of identity. Thus, trial counsel could have concluded that the evidence would have been admissible and that any objection was fruitless. *See Broderick v. State*, 35 S.W.3d 67, 79 (Tex. App.—Texarkana 2000, pet. ref'd). Moreover, because appellant questioned Officer Ross's ability to accurately identify him, Officer Ross's testimony concerning other instances where appellant fled from him was admissible to demonstrate his ability to recognized and identify appellant. *See Lane*, 933 S.W.2d at 519 (issue of identity may be raised by defendant during cross-examination of State's witnesses); *see also Schultz v. State*, 957 S.W.2d 52, 70 (Tex. Crim. App. 1997). As to appellant's alleged assault of Tiffany, it was intertwined with evidence appellant fled from law

enforcement and showed the context in which the evasion occurred. *See e.g.*, *Ballard v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). Moreover, Dewayne blurted out this testimony when responding to a discrete question. It appears from the record, that rather than highlight the testimony by objecting to his own witness's statement in response to direct examination, defense counsel chose to dispel the assertion through additional examination of Tiffany.

We conclude appellant has failed to rebut the presumption that trial counsel's decision not to object to testimony concerning other occasions upon which appellant fled from law enforcement and may have assaulted Tiffany was reasonable. Therefore, appellant has failed to make the required showing of deficient performance in order to meet the first requirement of the ineffective assistance of counsel test. *See Strickland*, 466 U.S. at 688; *Garza*, 213 S.W.3d at 347. We conclude this evidence was admissible and his counsel's failure to object to same did not render his assistance ineffective. We overrule appellant's sole issue.

CONCLUSION

We conclude appellant has not demonstrated ineffective assistance of counsel with regard to trial counsel's failure to object to the extraneous offenses. We

therefore affirm the trial court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CURTIS DEWIGHT NELSON, Appellant	On Appeal from the 59th Judicial District Court, Grayson County, Texas
No. 05-18-00890-CR V.	Trial Court Cause No. 068322. Opinion delivered by Justice Schenck. Justices Molberg and Nowell participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 17th day of July, 2020.