No. 01-24-00090-CR

IN THE

COURT OF APPEALS

FOR THE

FIRST DISTRICT OF TEXAS

AT HOUSTON

Cause no. 1833930
In the 184th District Court
of Harris County, Texas

MICHAEL WAYNE STEWART
Appellant

v.

THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF ON APPEAL

PATTI SEDITA
State Bar No. 00787484
3 Sugar Creek Ctr Blvd.
Suite 100
Sugar Land, TX 77478
Counsel for Appellant

ORAL ARGUMENT IS NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to **TEX. R. APP. PROC.** 38(e), Appellant does not request oral argument in this case.

IDENTIFICATION OF THE PARTIES

In order that the members of this Court may determine disqualification and recusal under the **TEX. R. APP. PROC**. 38.1(a), Appellant certifies that the following is a complete list of the parties, attorneys, and other persons with an interest in the outcome of this lawsuit:

Honorable Kathrine Thomas	*Presiding Judge in the 184th District Court*
Jerome Godinich	*Defense counsel at trial*
Patti Sedita	*Defense counsel on appeal*
Kim Ogg	*Harris County District Attorney*
Marcus Wilson	*Assistant Harris County District Attorney*
Michael Wayne Stewart	*Appellant*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF THE CASE

Appellant was charged by indictment in cause number 1833930 with the offense of harassment of a public servant, alleged to have been committed on August 31, 2023. (CR:37). On January 18, 2024 the case proceeded to trial by jury. (CR:80). On January 23, 2023 the jury returned a verdict of guilty of as charged in the indictment. (CR:111). Appellant elected the judge assess punishment in the event of a guilty verdict. (CR:88). On January 24, 2024 the judge assessed Appellant's punishment at confinement for 25 years in the Texas Department of Criminal Justice, Institutional Division. (CR:114). The judgment and sentence was signed January 24, 2024. (CR:117). On that same day Appellant gave notice of appeal. (CR:124).

STATEMENT OF THE FACTS

The State's first witness was Robert Rodgers, a Harris County Sheriff's Office jail detention officer ("DO"). (RR5:15,33). He told the jury that on August 31, 2023 he was working overtime after an evening shift at the Harris County jail. (RR5:17). He told the jury he had never met Appellant Michael Stewart but encountered him during rounds of K-Pod that day. (RR5:18). He testified that Appellant appeared upset and he enquired if he was ok. (RR5:18). When moving on to the next cell and inmate, he felt a liquid hit his uniform emblem and run down his pant leg to his boot. (RR5:19-20). As he continued, he smelled the aroma of urine and feces that he thought was coming from his uniform. (RR5:20). He told the jury he didn't see Appellant throw anything, just felt liquid on his uniform. (RR5:34). He was clear that he didn't smell anything for a minute or so and not when at Appellant's door. (RR5:36). Appellant's cell was never searched to see if he had a bottle or other item containing urine. (RR5:37). This detention officer wore this uniform the remainder of his shift and only changed when he went home. (RR5:35). The uniform was not turned over to the Sherriff's office for any forensic testing. (RR5:36).

The State's second witness was Detention Officer Calyn Cutler. (RR5:41). He told the jury that on August 31 was escorting a maintenance crew and saw

detention officer Rodgers having a conversation with an inmate named Stewart. (RR5:43). He testified that he saw liquid come out of a gap in the door that smelled "foul". (RR5:46). Despite this he didn't go up to DO Rodgers or engage with him in anyway. (RR5:50).

The third witness called was Deputy Rachel Rossel-Ortiz, a member of the Harris County Sheriff's office assigned to the Baker Street Jail. (RR5:55). She was assigned the investigation into this incident. (RR5:57). She told the jury that when she spoke to DO Rodgers his clothing was dry but she was of the opinion that the scent of urine lingered. (RR5:58).

The State also called a witness to extraneous conduct, DO Sabastian Chapa. (RR5:76). DO Chapa told the jury that on January 8, 2024 he was cleaning out Appellant's cell. (RR5:78). After he escorted Appellant back to the cell and closed the door, he observed another inmate go to the door and strike up a conversation. (RR5:80). He told the jury that he then saw a light brown substance he believed was feces and urine come out of the edges of the cell's "pan hole". (RR5:80). He saw the inmate jump back and look down at his arm. (RR5:83). No pictures or video of the incident were admitted and that the area in question is only about the thickness of two envelopes. (RR5: 89). The State rested and the defense proceeded with its case.

Appellant took the stand in his own defense. (RR5:93). He told the jury that on August 31st DO Rodgers came to his cell with a medication cart nurse and when the nurse explained she did not have his medications he became upset. (RR5:97). At that time Appellant had his hands out of the food slot to receive his medication, placing them there after DO Rodgers opened the slot. (RR5:101). As Appellant was continuing to ask for the medication, DO Rodgers slammed the slot on his hands, resulting in Appellant going to medical to get treatment. (RR5:101). When he returned from medical, he saw DO Rodgers by the cell and called out to him, asking why he had hurt his hands. (RR5:102). Appellant admitted he threw a substance through the door slot in anger but maintained it was not urine or feces but a common jail concoction. (RR5:103). This concoction contained peanut butter, water, jack mac juice and pickle juice. (RR5:104). This mixture sits for about a week. (RR5:105). This mixture was even shown to DO Rodgers to prove what had been thrown but the bottle was not tagged as evidence nor its contents tested. (RR5:106).

POINTS OF ERROR

FIRST POINT OF ERROR

Appellant was rendered ineffective assistance of counsel at trial when his trial lawyer failed to investigate the case in any way.

SECOND POINT OF ERROR

Appellant was rendered ineffective assistance when his trial lawyer failed to properly preserve error on an improperly offered extraneous offense.

THIRD POINT OF ERROR

Appellant was rendered ineffective assistant based on the cumulative errors made during this jury trial.

ARGUMENT AND AUTHORITIES

Appellant was rendered ineffective assistance of counsel. He was let down by his trial lawyer when the lawyer failed to conduct the most basic investigation of the issues of the case. Trial counsel admitted on the record that he did not contact witnesses nor ask for a continuance to do so. He failed to investigate Appellant's defense. Trial counsel also failed to object to an offered extraneous, one that should never have been admitted. The cumulative nature of these mistakes also rendered ineffective assistance of counsel, resulting in Appellant essentially having no lawyer at all.

The right to counsel affords an accused an attorney reasonably likely to render and rendering reasonably effective assistance. ***Stafford v. State***, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). To establish deficient performance, Appellant must show that trial counsel was not acting as a reasonably competent attorney, and his advice and actions were not within the range of competence demanded of attorneys in criminal cases. ***Id.*** Appellant must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. ***Id.*** Therefore, Appellant must overcome the presumption that, under the circumstances, any challenged action might be considered sound trial strategy. ***Id.*** The reasonableness of an attorney's performance is judged according to the prevailing professional norms and

includes an examination of all the facts and circumstances involved in a case. ***Id.*** An appellate court must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. ***Id.***

In reviewing claims of ineffective assistance of counsel, appellate courts apply a two-prong test. ***Salinas v. State***, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (*citing* ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). To establish ineffective assistance of counsel, appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation was deficient in that it fell below that standard of prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. ***Id.*** A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Mallett v. State***, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

Failure to preserve error on an improperly admitted extraneous offense

The State offered testimony from detention officer Chapa that Appellant had thrown something, perhaps urine and/or feces, on someone just a week or so before trial began. Despite this allegation having no path to admissibility, trial counsel failed to log a coherent objection, certainly not one that would be reviewable on appeal. He half-heartedly stated to the court that the evidence lacked probative value while failing to cite to any rule, statute or case. He also

failed to even ask the State for notice of an extraneous offenses. He failed to ask for a continuance to investigate this allegation, to see if there was video, locate the inmate involved or do anything to establish that this extraneous was not proven.

The State had a deputy testify about Appellant throwing a liquid on an inmate about 2 weeks before trial. Appellant's trial lawyer made a half hearted objection to this evidence but failed to articulate an objection that is sufficient for appellate review. He also failed to ask for notice of any extraneous offenses. He did not ask the court to question the witness outside the jury's presence. (RR5:66-68, 75). Appellant might as well have been representing himself in this scenario.

Failure to properly investigate the case or prepare for trial

Trial counsel failed to investigate, call, interview or even articulate the names of witnesses that could have testified potentially that the substance thrown by Appellant was not urine but some other foul-smelling liquid. Trial counsel argued that he had just learned of these witnesses that very day, the final day of trial. However in a pretrial hearing, Appellant implored the court to remove Mr. Godinich, saying "he has been my lawyer over a year and I have seen him twice. Yesterday and a year ago. I saw him yesterday after you told him to go show him the tape." (RR2:10) Appellant wrote letters to the court, detailing how his

trial lawyer had not contacted him at the jail or done any investigation of the case. (CR:22). During deliberations the jury clearly wrestled with this central issue in the case, based on the notes sent out. Appellant himself testified as to what he threw, never denying that act but firm in the fact that it was not urine.

During their deliberations, the jury enquired if they had to believe the substance thrown was urine to convict, clearly indicating they had some deliberations on this issue. (CR:101). They requested the transcript of one of the state's witnesses, Deputy Ortiz, who investigated the incident. (CR:112). After several hours of deliberations, the jury appeared to be hung, prompting an Allen charge. (CR:102). The jury went out at 4:20 PM on January 22nd and received the Allen charge within the next hour as they were dismissed for the day at 5:37. They returned a verdict at 2:27 PM on January 23. The docket sheet indicates that the jury was out for six hours on two hours of testimony. (CR:133).

At one point early on, on a September 6, 2023 court setting, the state offered appellant 4 years in TDC and dismissal of other pending charges. (CR:313). Appellant maintained his innocence and chose to litigate his case. Appellant took the witness stand and told the jury that he did in fact throw a liquid at the detention officer and explained what it was. He testified to any number of facts that, if his lawyer had done his work, could have been investigated and substantiated.

For example, Appellant stated that he went to medical after his initial encounter with DO Rodgers that day. A simple subpoena to the custodian of records would have proven that. That simple act, one most lawyers do daily, would have gutted the entire testimony of Rodgers. Had a subpoena shown the information to be untrue, perhaps that would have led to a successful plea bargain. Either way the investigative steps should have been undertaken. Appellant testified that this altercation was based on an issue with the medication nurse. Again, a simple subpoena to the custodian of medical records would have shown what medication Appellant was on, what he was taking and most importantly, the name of the nurse in question. She could have been questioned and potentially gutted the testimony of Rodgers. A fundamental duty of a trial lawyer is to investigate a case, to challenge the State's proof. Nothing of the kind was done here.

Based on the notes sent out by the jury and the time the jury deliberated, it cannot be said that the failures of this trial lawyer had no impact on the verdict. This trial was short, just a few hours. In such a short trial, ineffective assistance looms large and is easier to detect. This case also only had one issue- what was it that Appellant threw at DO Rodgers? That information would have been known to the trial lawyer from day one. To take no action, zero investigation, to determine what the substance was and whether the State's allegations were true,

is shocking.

Appellant was entitled to a lawyer who would actually investigate the factual issues. He was owed a lawyer who would argue the law and the facts of the case. The United States and Texas Constitutions demand he have a lawyer who lives up to a standard of professional competence. Under all the standards in this vast body of case law, the legal work done here fails that standard. This conviction should be reversed and Appellant given a new trial.

CONCLUSION AND PRAYER FOR RELIEF

The record shows fundamental errors of fairness warranting reversal which occurred during Appellant's trial. Appellant was given ineffective assistance of counsel, essentially no counsel at all. This Court should find the standard has been met and reverse this conviction.

Respectfully submitted,

Patti Sedita

PATTI SEDITA
State Bar No. 00787484
Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that I delivered a copy of the Appellant's Brief to the Harris County District Attorney's Office- appellate division, via *efiletex.gov*, on this the 23rd day of August 2024.

Patti Sedita

Patti Sedita
Attorney for Appellant

STATEMENT OF WORD COUNT

In compliance **TEX. RULE OF APP. PROC.** 9.4, the number of words in the brief as counted by the word processing program used is 2586.

Patti Sedita

Patti Sedita
Attorney for Appellant

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Patti Sedita
Bar No. 00787484
patti@seditalawgroup.com
Envelope ID: 91246400
Filing Code Description: Brief Not Requesting Oral Argument
Filing Description: brief
Status as of 8/23/2024 9:43 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Kimbra Ogg	15230200	ogg_kim@dao.hctx.net	8/23/2024 9:30:34 AM	SENT