

No. 01-24-00346-CR
IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

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DEBORAH M. YOUNG
Clerk of The Court

DEREK NICK OLGUIN
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1813575
From the 230th District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Not Requested

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

JANI MASELLI WOOD
Assistant Public Defender
Harris County, Texas
TBN. 00791195
1310 Prairie St., 4th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 437-4322

Counsel for Appellant

IDENTITY OF PARTIES AND COUNSEL

Appellant:	Derek Nick Olguin TDCJ# 02505334 Gist Unit 3295 FM 3514 Beaumont, TX 77705
Prosecutors:	John Hyde (trial) Ryan Trask (trial) Jessica Caird (appeal) Assistant District Attorneys Harris County, Texas 1201 Franklin St., 6th Floor Houston, Texas 77002
Defense Trial Counsel	Neil Krugh 1221 Studewood St. Houston, TX 77008
Judge	Presiding Judge Chris Morton 230th District Court Harris County, Texas Houston, Texas 77002
Defense Counsel on Appeal:	Jani Maselli Wood Assistant Public Defender Harris County, Texas 1310 Prairie St., 4th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

- Nature of the Case:** This is an appeal of a conviction for the offense of aggravated robbery with a deadly weapon. [C.R. 160]. The State of Texas charged the defendant, Derek Nick Olguin, while in the course of committing theft of property owned by Dehuma Hernandez, and with the intent to obtain and maintain control of the property, intentionally and knowingly threaten and place Dehuma Hernandez in fear of imminent bodily injury and death, and the Defendant did then and there use and exhibit a deadly weapon, namely a firearm. [CR 36].¹
- Trial Court:** The 230th Judicial District Court, Harris County, Texas, the Honorable Chris Morton presiding. The guilt/innocence portion of the trial and punishment was heard by a jury.
- Trial Court's Disposition:** Mr. Olguin entered a plea of not guilty. A jury heard evidence and convicted Mr. Johnson of aggravated robbery as charged in the indictment. [CR 157]. The jury assessed punishment at six years imprisonment in the Texas Department of Criminal Justice. [CR 145].
- Jurisdiction:** The trial court granted Mr. Olguin the right to appeal. [CR 165]. Mr. Olguin timely filed notice of appeal from his conviction and sentence. [C.R. 199]. *See* TEX. R. APP. P. 26.2 (1)(A).

¹ The State filed a motion for leave to amend the indictment. [CR 134]. The record shows an order attached to the motion, but it is unsigned. [CR 136].

ISSUE PRESENTED

Issue One: The accused maintains the presumption of innocence throughout the trial and the right to a fair trial. The State proffered the testimony of the court liaison officer who had conducted the risk assessment of Mr. Olguin and who also provided numerous examples of negative behavior that the interview contained. There was no objection by the defense. Did Mr. Olguin receive ineffective assistance of counsel by his attorney not objecting to the prejudicial testimony by the probation officer?

STATEMENT OF FACTS

Overview

Mr. Olguin was accused and convicted of aggravated robbery with a deadly weapon.

Mr. Olguin's version of the events

Mr. Olguin testified he was 23 and had a GED after being home-schooled. [3 RR 138]. He had worked as a butcher, but currently worked as a landscaper. [3 RR 139]. On the day of the offense, he had gone to see his girlfriend after an argument. [3 RR 139-40]. He dropped her off because of the argument and proceeded to get gas for his vehicle. [3 RR 141]. She was not in the car at the time of the offense. [3 RR 140-41].

He was driving down the street trying to avoid a bulldozer, when the complainant's truck door was wide open. [3 RR 141]. He was surprised to hit the truck because he had been trying to avoid both the truck and the bulldozer. [3 RR 142]. The street was one way, and he proceeded further before turning around. [3 RR 144]. He returned to the truck because he wanted to see who owned the truck. [3 RR 144]. Mr. Olguin stated he had a gun with him because it was a bad neighborhood. [3 RR 144]. He was shot at in that neighborhood previously. [3 RR 158]. He was fearful and kept the gun at his side. [3 RR 145].

Mr. Olguin stated he was seeking insurance information from Jesus Dehuma Hernandez, the complainant, and denied asking him for money. [3 RR 147]. He stated that the complainant offered him money. [3 RR 148]. Mr. Olguin was waiting for the complainant to give him the insurance information. [3 RR 148-49]. But Mr. Olguin stated that the complainant was going to get money while he waited in the area. [3 RR 150-51]. Mr. Olguin stated that when he took the phone from the truck he did not know who it belonged to. [3 RR 151-52]. He was parked two blocks away at his girlfriend's house and could see the truck from there. [3 RR 153]. While he was waiting, the police showed up. [3 RR 153].

Mr. Olguin denied intending to steal the complainant's phone. [3 RR 153]. He denied intending to threaten the complainant. [3 RR 153]. His only intention was to get the insurance information. [3 RR 154]. Mr. Olguin told the police that he had found the phone on the street. [3 RR 165].

The complainant's version of events

The complainant Jesus Dehuma Hernandez was working clearing lots for the building of new homes on the day of the offense. [3 RR 99]. As he was working, he heard a car coming very fast and then he heard a small bump. [3 RR 100]. The vehicle was a grayish/pinkish Mercedes. [3 RR 101]. He was worried because the car had hit his work truck. [3 RR 101]. He did not see any damage to the truck upon inspection. [3 RR 101-02]. About five to ten minutes later a young man came back. [3 RR 101].

Mr. Olguin asked the complainant why he had left his door opened and explained it had damaged his car. [3 RR 103-04]. The complainant refused to pay and told Mr. Olguin that he was going to call the police. [3 RR 103-04]. The complainant stated that Mr. Olguin held a gun to his side, pointing downwards - he never waved it at the complainant or pointed it in his direction. [3 RR 104-05]. The complainant called his boss from his friend's phone and told him about the gun - his boss advised him to just give the money to Mr. Olguin. [3 RR 105, 118]. He wanted to pay so there would not be any trouble. [3 RR 108]. The complainant also told the police there had been a woman in the car. [3 RR 89].

A colleague of the complainant saw Mr. Olguin take the phone from the complainant's truck. [3 RR 107, 120]. The complainant had put his phone in the glove compartment or on top of the middle console of his truck. [3 RR 107, 122]. The phone was taken before Mr. Olguin had the gun. [4 RR 107].

The complainant did not call the police, but he did speak with them when they arrived. [3 RR 109-11]. Later, when he was driving home, he saw the police with Mr. Olguin and his phone was returned to him. [3 RR 110-11].

Witness calls 9-1-1

Kimberly Clegg was a passer-by of the incident and called 9-1-1. [3 RR 17-18]. She stated she saw a gun being waved around and thought there might have been an accident and the parties were upset with each other. [3 RR 18-19]. She described the gun as resembling a rifle. [3 RR 19]. The person waving the gun was a Hispanic male

in a black t-shirt. [3 RR 20]. She identified Mr. Olguin in court. [3 RR 21-22]. In her call to 9-1-1, she described the vehicle Mr. Olguin was in and also gave the license plate number. [3 RR 22-22].

The investigation

Houston Police Officer James Lagrone responded to the call about a disturbance with a weapon. [3 RR 31-33]. He was with his partner Officer David Reinhold. [3 RR 70]. Officer Reinhold spoke with the complainant because Officer Lagrone did not speak Spanish. [3 RR 36, 73]. They received information about the vehicle and went searching for it in the neighborhood. [3 RR 40]. The car description was a silver Mercedes Benz. [3 RR 74].

It took the officers less than five minutes to locate the vehicle that matched the description and license plate. [3 RR 42, 74-75]. A high-risk stop was conducted and Mr. Olguin exited the vehicle with his hands up. [3 RR 42]. Mr. Olguin informed the officers his girlfriend was in her house - however, the police offense report included no mention of her. [3 RR 86, 88]. The vehicle was searched and a loaded AR pistol was found. [3 RR 44-45, 59, 62]. A cell phone was also discovered as well as some marijuana. [3 RR 46, 64-65]. When asked about the cell phone, Mr. Olguin told the officer he had found it at the construction site. [3 RR 51]. Officer Rheinhold testified he had to ask Mr. Olguin several times about the gun before he admitted to having one. [3 RR 80]. Mr. Olguin denied pointing the gun at the complainant. [3 RR 92-93].

Officer Rheinhold said the complainant never told him that the gun had been pointed at him. [3 RR 94].

State calls probation officer to the stand

Vermeil Haynes, a probation officer for Harris County, "interviewed" Mr. Olguin for the court. [3 RR 125-26]. He did a TRAS interview for the court. [3 RR 126]. (<https://cscd.harriscountytexas.gov/Programs/Centralized-Assessment-Center>). Haynes explained that the interview is to discover "mental issues, any drug use admitted in court; also, criminal histories, we look up." [3 RR 128]. He also explained that before the meeting he reviews if they have already been on probation and drug tests, possibly. [3 RR 128-29]. Haynes reviewed the offense report before meeting with Mr. Olguin. [3 RR 129-30]. He explained that anything told to him by Mr. Olguin was not confidential. [3 RR 131]. Haynes stated that he was not with the defendant when he committed the offense, so he asks questions about what happened. [3 RR 130].

Mr. Olguin was interviewed and was informed that nothing said was confidential. [3 RR 130-31]. He was told the discussion would be turned over to the prosecution and the court. [3 RR 131-32]. Mr. Olguin was given "a chance to explain his version of the offense and he chose to do so." [3 RR 133]. Mr. Olguin denied pointing his gun at anyone. [3 RR 133]. Mr. Olguin also told him that his girlfriend had stolen the phone. [3 RR 134].

Verdict

After argument of counsel, the jury convicted Mr. Olguin of aggravated robbery as charged in the indictment. [4 RR 24]. After the presentation of punishment evidence, the jury sentenced Mr. Olguin to six years in prison. [6 RR 4].

SUMMARY OF THE ARGUMENT

In the State's case-in-chief, they proffered the testimony of the court liaison officer who had interviewed Mr. Olguin for a risk assessment. This witness explained all the things he looked for when assessing defendants.

There was no objection to his testimony. There was no attempt to limit his testimony. There was no cross-examination of this witness. In sum, an officer of the trial court testified against Mr. Olguin. This testimony harmed Mr. Olguin and deprived him of ineffective assistance of counsel.

ARGUMENT

Issue One: The accused maintains the presumption of innocence throughout the trial and the right to a fair trial. The State proffered the testimony of the court liaison officer who had conducted the risk assessment of Mr. Olguin and who also provided numerous examples of negative behavior that the interview contained. There was no objection by the defense. Did Mr. Olguin receive ineffective assistance of counsel by his attorney not objecting to the prejudicial testimony by the probation officer?

Error waived by no objection

Absent an objection, a defendant waives error unless it is fundamental—that is, the error creates such egregious harm that a defendant has not had a fair and impartial trial. *Cudjo v. State*, 345 S.W.3d 177, 188 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). The defense failed to object or file any sort of limiting instruction to the testimony of the court liaison officer.

The problem with the TRAS probation officer

Vermeil Haynes began his testimony explaining he was a probation officer. Any juror knows that a “probation officer” deals with people who are on probation. His testimony would allow the jury to hear about all the negative things that could be imputed to Mr. Olguin.

“Probation officer”	3 RR 125	Probation officers deal with people who have pleaded guilty to committing a crime.
“adult probation”	3 RR 126	Mr. Olguin is an adult
“agree to a TRAS interview”	3 RR 126	While TRAS does not overtly say this is a “risk assessment” - there may well be people who are aware of what this is - and that people who plead guilty get this assessment.
They gather information about “any mental issues, any drug use admitted in court; also criminal histories, we look up.”	3 RR 128	The jury could reasonably assume that Mr. Olguin met with this probation officer because of those issues.
“If they’ve already been on probation before ... there are drug tests.”	3 RR 129	This implies that Mr. Olguin may have another conviction and a drug problem.
Looks at jail records for “prescribed psychotropic medications.”	3 RR 129	A juror might reasonably believe Mr. Olguin was interviewed because of these issue and may suffer from a severe mental illness.
Agrees that the offense report is a “fair summary of what happened.”	3 RR 129	Offense reports are questionably “fair” and further are not admissible in court. <i>See Fischer v. State</i> , 207 S.W.3d 846, 860 (Tex. App.—Houston [14th Dist.] 2006), <i>aff’d</i> , 252 S.W.3d 375 (Tex. Crim. App. 2008) <i>citing State v. Leonard</i> , 104 Ohio St.3d 54, 2004–Ohio–6235, 818 N.E.2d 229, 258 (Ohio 2004) (“The police reports are inadmissible hearsay and should not have been submitted to the jury.”)
Nothing Mr. Olguin said was confidential.	3 RR 131	A juror could wonder about why Mr. Olguin had no right to remain silent. He might presume this interview was done for a plea bargain.
Mr. Olguin said his gun was in the car and he denied pointing it at anyone.	3 RR 133	This evidence <i>might</i> have been admissible on rebuttal. Yet, the State offered it in its case-in-chief.

Mr. Olguin stated his girlfriend took the phone.	3 RR 134	Again, this was not even yet a statement against party interest - because Mr. Olguin had not yet testified.
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Destruction of the presumption of innocence

Mr. Haynes testimony was problematic because it included references to criminal history, prior probations, drug tests, mental health issues, and psychotropic drugs. There may well have been a juror who knew what the risk assessment was. It is highly unlikely that any juror could not have believed that all those references were about Mr. Olguin.

“All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.” Tex. Code Crim. Pro. Ann. art. 38.03.

Under the Due Process Clause of the Fourteenth Amendment, an accused in state court has the right to the “presumption of innocence”—the right to be free from criminal conviction unless the State can prove guilt beyond a reasonable doubt by probative evidence adduced at trial. *Miles v. State*, 204 S.W.3d 822, 825 (Tex. Crim. App. 2006) (citing *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12, 485–86 (1978)); *Madrid v. State*, 595 S.W.2d 106, 110 (Tex. Crim. App. 1979); *Jessop v. State*, 368 S.W.3d 653, 673 (Tex. App.—Austin 2012, no pet.).

The testimony of the probation officer took away the presumption of innocence. This testimony deprived Mr. Olguin of the right to a fair trial. It brought in negative connotations that harmed Mr. Olguin. While Mr. Olguin was charged with this offense - all the references to other issues and criminality made Mr. Olguin seem more dangerous and refuted the presumption of innocence.

The defense lawyer's failure to object harmed Mr. Olguin's right to a fair trial

“To show ineffective assistance of counsel for the failure to object during trial, the applicant must show that the trial judge would have committed error in overruling the objection.” *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004). No plausible strategic reason exists to forgo the objection. If counsel had objected to this testimony or the damaging portions, there is a reasonable probability that the outcome of the proceeding would have been different.

The two-step analysis set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986), is the standard for appellate review of counsel's effectiveness during trial. First, Mr. Olguin must show that counsel's performance was so deficient as not to function as the “counsel” guaranteed by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *see Strickland*, 466 U.S. at 687; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The constitutional right to counsel does not guarantee errorless counsel, therefore, the effectiveness of counsel must be determined by the entire

representation. The second *Strickland* prong requires Mr. Olguin to establish “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 687. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The issue is whether he received a fair hearing resulting in a verdict worthy of confidence. *cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Factors that mitigate an individual defendant’s moral culpability “ste[m] from the diverse frailties of humankind.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)(plurality opinion of Stewart, Powell, and Stevens, JJ.). The Supreme Court further noted that:

This Court has previously recognized that “(f)or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.

Woodson, 428 U.S. at 304. Mr. Olguin is a unique individual and there is no fair assurance that Mr. Olguin’s unique and diverse frailties would not have warranted a different verdict or a less harsh sentence had the defense objected to or at least cross-examined Mr. Haynes regarding what actually applied to Mr. Olguin.

The trial court would have sustained an objection to many of the areas Mr. Haynes’s discussed.

“In order to succeed with an ineffective-assistance-of-counsel claim based on counsel's failure to object, one “must show that the trial judge would have committed error in overruling such objection.” *Ex parte Parra*, 420 S.W.3d 821, 824–25 (Tex. Crim. App. 2013).

Mental illness: Mental-illness testimony may be relevant for mitigation purposes during the punishment phase, but expert testimony that does not directly rebut the culpable mental state usually may be excluded at the guilt stage. *Mays v. State*, 318 S.W.3d 368, 381 (Tex. Crim. App. 2010). The trial court would likely have sustained any objection about mental illness or possible psychotropic drugs that Haynes testified about.

Probation: There is no evidence that Mr. Olguin was on a probation. But that thought was put into the mind of the jurors by Mr. Haynes.²

Drug use: The discussion of drug use could have put fear into the jury that Mr. Olguin was some sort of addict. There was no cross-examination regarding this fact - but the evidence was still out there from Mr. Haynes.

Extraneous offenses: Much of what was discussed including drug use and drug tests could be considered extraneous offenses. It deprived Mr. Olguin of due process to allow the jury to hear so many negative things that were not rebutted.

Presumption of innocence: As discussed *supra*, all this testimony regarding the risk assessment and things that Mr. Haynes looked for deprived Mr. Olguin of the presumption of innocence.

² Additionally, the record is silent regarding whether Mr. Olguin was forced to testify because of this inadmissible evidence. . The defendant will testify to rebut the improperly admitted evidence by meet[ing], destroy[ing], or explain[ing] it away. *Thomas v. State*, 572 S.W.2d 507, 512 (Tex. Crim. App. 1976). A reactionary choice to testify does not cure the error-the evidence remains erroneously admitted. *Id.*

Many of these references could be considered prior bad acts. Under rule of evidence 404(b), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. TEX.R. EVID. 404(b). To constitute an extraneous offense under rule 404, the evidence must show a crime or bad act, and that the defendant was connected to *it*. See *Lockhart v. State*, 847 S.W.2d 568, 573 (Tex. Crim. App.1992)(en banc). All of these bad facts were imputed to Mr. Olguin because of the description Mr. Haynes gave of the TRAS interview.

Mr. Olguin was prejudiced by the repeated issues discussed by Mr. Haynes

The complainant did not see Mr. Olguin take the cell phone. [3 RR 107, 120]. The complainant stated that Mr. Olguin held a gun to his side, pointing downwards - he never waved it at the complainant or pointed it in his direction. [3 RR 104-05]. These two concessions undermine the State's case. But when you add in the testimony of Mr. Haynes, that could well have been what pushed the jury to conviction or forced Mr. Olguin to have to testify.

It is axiomatic that ineffective assistance of counsel claims are not built on retrospective speculation; they must "be firmly founded in the record." *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). But the record shows not one objection to the testimony of Mr. Haynes. Nor does it show any cross-examination to explain what applied to Mr. Olguin.

Mr. Haynes was likely viewed with special favor

A “court liaison officer” carries the imprimatur of the court “Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved.” *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003).

A court officer can be viewed in the same light.

Mr Haynes stands in the place of the court. It is as if the trial court itself presented extraneous evidence against Mr. Olguin. The defense attorney failed to object. The defense attorney failed to mitigate the damage through cross-examination. The defense attorney’s inaction prejudiced Mr. Olguin. He received ineffective assistance of counsel and was prejudiced by the errors.

PRAYER

Mr. Olguin prays that this Court reverse and remand for a new trial.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/ Jani Maselli Wood

JANI MASELLI WOOD
Assistant Public Defender
Harris County Texas
State Bar Texas Number 00791195
1310 Prairie St., 4th Floor
Houston Texas 77002
Jani.Maselli@pdo.hctx.net
(713) 274-6700
(713) 437-4322

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. Proc. 9.5, this certifies that on January 2, 2025, a copy of the foregoing was emailed to counsel for the state (through texfile.com) at the following address:

Jessica Caird
Assistant District Attorney
1201 Franklin Street, 6th Floor
Houston, TX 77002
caird_jessica@dao.hctx.net

/s/ Jani Maselli Wood

JANI MASELLI WOOD

CERTIFICATE OF COMPLIANCE

Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of TEX. R. APP. PROC. 9.4(e)(i).

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/s/ Jani J Maselli Wood

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Ashley Davila on behalf of Jani Maselli

Bar No. 00791195

Ashley.Davila@pdo.hctx.net

Envelope ID: 95780354

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jani Maselli Wood	791195	jani.maselli@pdo.hctx.net	1/2/2025 10:28:56 AM	SENT
Jessica Caird	24000608	caird_jessica@dao.hctx.net	1/2/2025 10:28:56 AM	SENT