[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-90,417-01

EX PARTE SYLVANUS RENE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 1257226-A IN THE 351ST DISTRICT COURT FROM HARRIS COUNTY

Per curiam.

ORDER

(Filed Feb. 24, 2021)

Applicant was convicted of sexual assault of a child and sentenced to sixty-five years' imprisonment. The Fourteenth Court of Appeals affirmed his conviction. *Rene v State*, 376 S.W.3d 302 (Tex. App.—Houston [14th Dist.] August 9, 2012) (pet. ref'd.). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

The trial court conducted a live habeas hearing in this case, and subsequently adopted Applicant's

proposed findings of fact and conclusions of law, recommending that Applicant be granted a new punishment hearing. On January 27, 2021, this Court denied relief with a written order. Because the trial court's order and recommendation was separated from the proposed findings of fact and conclusions of law in the habeas record when it was received by this Court, this Court noted in its January 27, 2021 order denying relief that the trial court had not made findings of fact and conclusions of law. In a motion suggesting reconsideration on the Court's own motion, Applicant pointed out that the trial court had indeed intended to adopt Applicant's proposed findings of fact and conclusions of law.

We now withdraw our order of January 27, 2021, and reconsider the case on our own motion. Tex. R. App. P. 79.2(d). Having considered the trial court's findings of fact, conclusions of law, and recommendation to grant relief, this Court still believes that the trial court's recommendation is not supported by the record. Based on this Court's independent review of the entire record, relief is denied.

Filed: February 24, 2021
Do not publish

App. 3

[SEAL]

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The trial court conducted a live habeas hearing in this case, and subsequently entered an order

recommending that Applicant be granted a new punishment hearing. The trial court's order does not include specific findings of fact and conclusions of law and the record does not support the trial court's recommendation to grant relief. Based on this Court's independent review of the entire record, relief is denied.

Filed: January 27, 2021
Do not publish

IN THE 351ST DISTRICT COURT
OF HARRIS COUNTY, TEXAS

EX PARTE SYLVANUS RENE	§ § § § §	CAUSE NO. 1257226-A

APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Apr. 27, 2020)

The court, having considered the application for a writ of habeas corpus, the brief, the exhibits, and the official court records and testimony from the trial and the habeas corpus proceeding, enters the following findings of fact and conclusions of law:

I.

THE TRIAL

1. Applicant was charged with sexual assault of a child on March 31, 2010.

2. James Brooks and Laine Lindsey represented applicant at trial.

3. The State presented a video depicting applicant having oral sex with the complainant, a 16-year-old female who had run away from home and was working for him as a prostitute in 2008.

4. The jury convicted applicant.

5. The State presented evidence at the punishment stage that applicant shot Keon Addison in the chest on July 24, 2005; that he participated in the kidnapping of Glenn Jackson in 2008; that he had convictions for theft, possession of marijuana, failure to stop and give information, assault (3), and unlawfully carrying a weapon; and that he was a self-admitted member of the Bloods.

6. The jury assessed applicant's punishment at 65 years in prison on February 21, 2011.

7. The Fourteenth Court of Appeals affirmed applicant's conviction on August 9, 2012. The Court of Criminal Appeals refused discretionary review on January 30, 2013. Rene v. State, 376 S.W. 3d 302 (Tex. App—Houston [14th Dist.] 2012, pet. ref'd).

II.

THE DOCTRINE OF LACHES

8. Applicant's conviction became final on appeal when the time to file a petition for a writ of certiorari in the Supreme Court expired on April 30, 2013.

9. Applicant's family hired Joel Hayter to conduct a habeas investigation in July 2013 (1 H.R.R. 165-66).

10. Hayter completed the investigation in 2014 (1 H.R.R. 172).

11. Applicant's family could not afford to hire Hayter until 2018. He filed the application in 2019 (1 H.R.R. 172-73).

12. The State did not plead laches.

13. The State did not prove at the writ hearing that applicant's delay in filing the application will cause it so much prejudice that the court should not consider the merits of the constitutional claims. Although lead counsel Brooks passed away in 2015, he responded to the allegations of deficient performance in a letter to, and a recorded conversation with, Hayter (AX 8, 9, 10, 10a, 11). Co-counsel Lindsey testified at the writ hearing regarding the allegations of deficient performance (1 H.R.R. 137-64).

14. The habeas record is adequate for the court to determine whether Brooks had sound strategic reasons for the omissions in question.

III.

FALSE TESTIMONY

A. Keon Addison Falsely Testified That Applicant Shot Him.

15. Addison testified at the punishment stage that he was walking through a crowd of 15 to 20 people at an apartment complex when applicant shot him in the chest with a black revolver in 2005 (6 R.R. 36, 38, 42-43, 49-50).

16. Addison did not describe the shooter or the gun to the deputy who questioned him at the scene and at the hospital (6 R.R. 14-16, 48, 50-51, 57-58).

17. Addison testified that he was on deferred adjudication probation for aggravated assault when he was charged with a state jail felony theft in 2008. He pled guilty and was sentenced to six years in prison for aggravated assault and six months in a state jail for theft (6 R.R. 54-55).

18. Addison testified that assistant district attorney Katherine McDaniel and her investigator met with him in prison to discuss applicant in 2009 (6 R.R. 60). Addison identified applicant as the shooter in a photospread at the prison four years after the incident (6 R.R. 51-52, 60-61).

19. Addison told Hayter in a recorded interview on January 2, 2014, that he did not see applicant with a gun and did not see who shot him; he assumed that applicant did because they previously had issues, and applicant was in the crowd (AX 16, 17).

20. Addison testified at the writ hearing that he did not see applicant with a gun and did not see applicant shoot him but "probably believed" and "felt like" he did (1 H.R.R. 36, 41, 45-46, 47, 49).

21. Addison testified at the writ hearing that applicant was the first person he saw when he turned around after he was shot (1 H.R.R. 41, 46). In view of the fact that he was shot in the chest, applicant could

not have been the shooter, as applicant was behind him when he turned around.

22. Addison testified at the writ hearing that, when he met with McDaniel in prison, she said that she was out to get applicant and that she would write a letter to the parole board on his behalf if he testified (1 H.R.R. 37).

23. The court finds that the State presented Addison's false testimony that applicant shot him.

24. Applicant is entitled to a new trial on punishment even if McDaniel did not know at the time of trial that Addison's testimony was false. See Ex parte Chabot, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

B. Keon Addison Falsely Testified That He Is Not A Gang Member.

25. McDaniel elicited on direct examination that Addison is not in a gang (6 R.R. 38).

26. Addison denied on cross-examination that he is a Crip (6 R.R. 64).

27. McDaniel had an offense report reflecting that Addison kept calling deputy Paul Croas "cuz" at the scene, which is a street term for "cousin" that the Crips use, and that he told Croas that he is a Crip (AX 2 at 6). It also reflects that Addison's girlfriend, Katrina Lee, told Croas that applicant and Addison had fought two or three weeks before over "gang stuff" involving rival gang members crossing out each other's

graffiti (AX 2 at 6). Finally, it reflects that Keemar Houlder, a Blood, told another deputy at the scene that Addison is a Crip (AX 2 at 8).

28. McDaniel testified at the writ hearing that she elicited that Addison is not a gang member because he was not documented in any law enforcement database (1 H.R.R. 72-73, 76). She could not explain why she asked Addison about gang membership without eliciting that he told deputy Croas that he is a Crip, asserting, "Just because something is in an offense report does not make it so" (1 H.R.R. 78-79, 85).

29. Deputy Croas testified at the writ hearing that Addison used Crip gang terminology at the scene and told him that he is a Crip and that the shooting was over "stupid gang stuff" and "graffiti going back and forth" (1 H.R.R. 53-54).

30. The court finds that McDaniel elicited Addison's false testimony that he is not a gang member and failed to correct his false testimony that he is not a Crip.

C. Keon Addison Falsely Testified That He Was Not Seeking A Parole Letter.

31. Addison denied on cross-examination that he was cooperating with the State and testifying to obtain a parole letter (6 R.R. 61-62).

32. Addison sent a letter to McDaniel one month after the trial asking whether she would send the "support" letter on his behalf (AX 7). McDaniel testified at

the writ hearing that she understood him to be asking for a parole letter (1 H.R.R. 93).

33. McDaniel sent an email on December 12, 2013, to Scott Durfee, General Counsel to the Harris County District Attorney, that she told Addison that she would consider providing information to the Parole Board regarding his testimony, including whether she found him truthful or untruthful (AX 19; 1 H.R.R. 100-02). She mentioned that she informed Lindsey that she would consider writing a letter to the Parole Board regarding Addison's cooperation "at the conclusion of the trial" (1 H.R.R. 102).

34. McDaniel sent an email to Durfee on January 3, 2014, that she sent a letter to the Parole Board that Addison cooperated with law enforcement and testified at the trial (1 H.R.R. 110-11).

35. Before applicant filed the habeas corpus application, McDaniel's position was that, before the trial she told Addison that she would consider writing a parole letter and informed Lindsey, and that she wrote the letter after the trial (AX 19; 1 H.R.R. 101-02).

36. After applicant filed the application alleging that McDaniel failed to correct Addison's false testimony that he was not seeking a parole letter, she changed her position and claimed that Addison did not mention parole until he sent the letter after the trial, that she never told him that she would write a parole letter, and that she did not write a letter (1 H.R.R. 69, 94). This testimony is not credible.

37. Lindsey testified at the writ hearing that, had McDaniel told him before the trial that she would write a parole letter if Addison testified truthfully, he would have informed Brooks and ensured that Brooks impeached Addison's testimony denying that he was seeking a parole letter (1 H.R.R. 146-50). This testimony is credible.

38. The court finds that McDaniel and Addison discussed a parole letter before he testified; that McDaniel did not inform Brooks or Lindsey; that Addison wrote a letter to McDaniel one month after the trial asking whether she had sent the "support" letter; and that McDaniel informed Durfee before the application was filed that she told Addison that she would consider writing a parole letter stating whether he testified truthfully or untruthfully and that she wrote the letter (1 H.R.R. 38-39, 105-06).

39. The court finds that McDaniel failed to correct Addison's false testimony that he was not seeking a parole letter.

D. Materiality

40. Addison's false testimony that applicant shot him was material because it was the most compelling evidence presented at the punishment stage that applicant would be dangerous in the future. Had Addison testified that he saw applicant in the crowd, that he did not see applicant with a gun, and that he did not see who shot him, the trial court should have excluded his testimony.

41. Addison's false testimony that he is not a Crip was material because McDaniel argued during summation that he is not a gang member even though she had an offense report reflecting that he is (6 R.R. 159; AX 2 at 6, 8). Had the jury heard deputy Croas' testimony that Addison said that he is a Crip, it would have understood that Addison had a motive to identify applicant, a Blood, as the shooter.

42. Addison's false testimony that he was not seeking a parole letter was material because, had the jury known that he really was, it would have understood that he had motive to identify applicant four years later.

43. The court concludes that there is a reasonable probability that, had Addison's testimony been excluded, or had the jury heard that he lied that he saw applicant shoot him, that he is not a Crip, and that he was not seeking a parole letter, it probably would have assessed less than 65 years in prison.

IV.

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT STAGE

44. Lindsey testified at the writ hearing that there was no sound strategic reason for Brooks not to call deputy Croas to impeach Addison's testimony that he is not a Crip (1 H.R.R. 144-45).

45. The court finds that Brooks performed deficiently in failing to call deputy Croas to impeach Addison.

46. Lindsey testified at the writ hearing that there was no sound strategic reason for Brooks not to impeach Glenn Jackson's testimony that applicant and another man forced him into the trunk of a car at gunpoint in 2008 with information in the offense report that Jackson changed his story several times and appeared to be withholding information (1 H.R.R. 152-56; AX 13 at 4).

47. The court finds that Brooks performed deficiently in failing to impeach Jackson with his prior inconsistent statements.

48. Prosecutor Allison Baimbridge argued without objection that the jury's job was to do justice for the complainant, her family, the other victims who testified, and "all the other victims that might still be out there that we can't find yet, but that you know are there" (6 R.R. 130). There was no evidence of any other victims.

49. Lindsey testified at the writ hearing that this argument was outside the record, and Brooks should have objected (1 H.R.R. 156-57).

50. McDaniel argued without objection that, after applicant was released from prison in 2008, "he's having sex with minors" (6 R.R. 154). There was no evidence that applicant had sex with any minor other than the complainant.

51. Lindsey testified at the writ hearing that this argument was outside the record, and Brooks should have objected (1 H.R.R. 158).

52. McDaniel argued outside the record her opinion that applicant was "the worst gangster in Texas, maybe in the country" (6 R.R. 151). There was no evidence of this.

53. Lindsey testified at the writ hearing that this argument was outside the record and an improper opinion, and Brooks should have objected (1 H.R.R 158-59).

54. The court finds that Brooks performed deficiently in failing to impeach Addison and Jackson with their prior inconsistent statements and failing to object to the prosecutors' improper arguments outside the record.

55. The court concludes that there is a reasonable probability that, but for Brooks' errors, the jury would have assessed less than 65 years in prison.

V.

CUMULATIVE PREJUDICE

56. The cumulative prejudice resulting from the State's use of and failure to correct false testimony and the deficient performance of defense counsel requires a new trial. See Chamberlain v State, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999).

IN THE 351ST DISTRICT COURT
OF HARRIS COUNTY, TEXAS

EX PARTE SYLVANUS RENE	§ § § § §	CAUSE NO. 1257226-A

RECOMMENDATION AND ORDER

(Filed Apr. 27, 2020)

The court recommends a new trial on punishment.

The District Clerk is ordered to prepare a transcript of all papers in this cause and send it to the Court of Criminal Appeals as provided by article 11.07 of the Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

a. the indictment and judgment;

b. the application for a writ of habeas corpus;

c. the brief;

d. the exhibits;

e. the State's answer;

f. the appellate record in cause number 1257226;

g. the Reporter's Record of the habeas corpus evidentiary hearing;

h. the applicant's proposed findings of fact and conclusions of law;

i. the State's proposed findings of fact and conclusions of law;

j. the court's findings of fact and conclusions of law; and

k. any objections filed by either party to the court's findings of fact and conclusions of law.

The District Clerk shall send a copy of this order to applicant, his counsel, and counsel for the State.

SIGNED and ENTERED on _____, 2020.

Signed: George Powell
4/28/2020

George Powell
Judge Presiding

FILE COPY

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

1/30/2013 **COA No. 14-11-00150-CR**
Tr. Ct. No. 1257226
RENE, SYLVANUS **PD-1160-12**

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

SYLVANUS RENE
HUGHES UNIT – TDC # 1721683
RT. 2, BOX 4400
GATESVILLE, TX 76597

376 S.W.3d 302
Court of Appeals of Texas,
Houston (14th Dist.).

Sylvanus RENE, Appellant,
v.
The STATE of Texas, Appellee.

No. 14-11-00150 – CR.
|
Aug. 9, 2012.
|
Discretionary Review Refused Jan. 30, 2013.

Attorneys and Law Firms

Angela Lee Cameron, Houston, for Appellant.

Bridget Holloway, Houston, for Appellee.

Panel consists of Justices FROST, BROWN, and CHRISTOPHER

OPINION

TRACY CHRISTOPHER, Justice.

Appellant Sylvanus Rene challenges his conviction for sexual assault of a child under the age of seventeen, arguing that the trial court abused its discretion in admitting, over his objections, printouts of photographs from a social-networking website. Because we conclude that any error in the admission of this evidence was harmless, we affirm.

I. Factual and Procedural Background

In February 2008, when complainant P.B. was 16 years old, classmate Cedric Robinson a/k/a "Turk" told her to call a particular telephone number if she wanted to make some money. P.B. did so, and spoke with a man named Dante who arranged to pick her up when she returned home from school. Dante drove her to an apartment where she was introduced to appellant, who uses the name "Lo." Appellant asked P.B. her age and whether she knew how to dance. P.B. told appellant she was 16, and appellant stated that he would have to get P.B. a fake identification card. He asked P.B. to perform oral sex on him so he could evaluate her skill, and she did so. Appellant then called Dante into the room and the complainant performed oral sex on him as well. P.B. stated that after this, appellant required her to live in an apartment that appellant shared with his girlfriend. While living there, P.B. worked as a prostitute and a topless dancer, and appellant kept all of the money that she earned. He told her the prices she was to charge for sex with others, and had sex with her himself four or five times.

After living with appellant for several weeks, the complainant returned home and spoke with her mother and a police officer about what had been occurring. The officer accompanied P.B. back to appellant's apartment to retrieve her things. P.B. told the officer that she wanted to take a video camera that contained footage of her. The videotape, which was shown to the jury at appellant's trial, showed the complainant performing oral sex on appellant. The jury found

appellant guilty of sexual assault of a child under the age of seventeen.

During the punishment phase of trial, Harris County Deputy Investigator Dennis Wolfford testified that in May 2008, he was investigating a homicide in which Joshua Lamb, the perpetrator, was driven to the scene of the homicide by appellant. Wolfford went to a townhouse at the Hunterwood Apartments to question appellant as a possible witness. Appellant was the only male at the townhouse, where officers seized two shotguns. Appellant told the officers about one of the guns, which was found in the closet of a bedroom that contained only men's clothing. The gun was loaded and had a shell in the chamber. Appellant was arrested for unlawful possession of a firearm, and pled guilty to that offense.

Wolfford subsequently searched social-networking websites for a profile of appellant and discovered a MySpace profile identified as belonging to "137's Don Lo." Wolfford testified that the number 137 in this profile refers to "137 Mob," a subset of the gang known as the Bloods. He printed out copies of a number of photographs from the MySpace profile, and the State offered them as evidence. Some of the photos show appellant displaying his tattoos or making gang signs with his hands. In several photos, appellant is shown with a pistol and a large amount of cash, and one photo depicts appellant and Joshua Lamb holding pistols. In this photograph, appellant is wearing a T-shirt depicting a sign modeled on the highway marker for

Interstate-10, but with the words "Eastside 10" on it, and the number "137" below the sign.

Appellant objected to the admission of the printouts on the grounds that (1) the proper predicate had not been laid, (2) there was no evidence that the appellant created the profile or posted the material, (3) there was no evidence to show that the photographs had not been altered, (4) there was no evidence that the photographs were taken after his conviction,[1] and (5) any relevance was substantially outweighed by the danger of unfair prejudice. The trial court overruled the objections.

After introducing the printouts, the State offered additional evidence about appellant's tattoos, gang membership, and gun use. A deputy sheriff authenticated photographs that he had taken of appellant's tattoos in June 2009, and these photos were admitted into evidence. Deputy Michael Squyers, a member of the Gang Suppression Unit of the Harris County Sheriff's Office, testified about indicators of gang membership, and referred both to these photographs and to the photographs printed out from the MySpace profile.

Squyers stated that he identifies gang members for inclusion in the "Gang Tracker Database" based on referrals, interviews, tattoos, and websites. He stated

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[1] Presumably, defense counsel was referring to appellant's prior felony conviction, such that photographs of appellant with a firearm would appear to be evidence of the extraneous offense of being a felon in possession of a firearm. This objection is not reurged on appeal.

that appellant is in the database. Squyers testified that "the Bloods" is the name of a street gang with many subsets such as the "59 Bounty Hunter Bloods" and that members use certain symbols. When he was shown printouts from the MySpace website, Squyers identified one of appellant's hand signs as a symbol for the Bloods and another as a sign for "east" or "east side."

Most of Squyers's testimony concerned appellant's tattoos as shown in the photographs taken by a law-enforcement officer. Among appellant's tattoos, Squyers identified images of a hand making the gang sign for the Bloods and another hand making the sign for "Crip killer." Squyers stated that "the Crips" is the name of a rival gang. Appellant also has a tattoo of the word *damu*, which Squyers identified as the Swahili word for "blood." Moreover, "Bounty Hunter" is tattooed across appellant's chest, and Squyers interpreted the words as a reference to the "59 Bounty Hunter Bloods." In addition to these, appellant has tattoos of pit bulls, of a row of five five-pointed stars, and of a man wearing a five-pointed crown. According to Squyers, tattoos of pitbulls are common among members of the Bloods, and the number five is significant to them. Moreover, when asked how he knew appellant's rank in the gang, Squyers testified that appellant "stated he was a five-star general." Squyers explained that this is the highest rank underneath the gang's president. Appellant also has tattoos of the Houston skyline; of the "shield" emblem of Interstate 10; and of the street signs at the intersection of Uvalde and Woodforest, which is located

on the east side of Houston. Finally, he has tattoos of the faces of two small children, a boy and a girl.

The jury also heard testimony during the punishment phase about some of appellant's extraneous offenses. Keon Addison testified that in July 2005, appellant shot him in the chest. The shooting occurred at an apartment complex named "The Oaks of Woodforest," located on Uvalde on the east side of Houston. Glenn Jackson testified that in April 2008, "Turk" robbed him at gunpoint, and then Turk and appellant punched Jackson before Turk forced him at gunpoint into the trunk of a car driven by appellant. Jackson escaped by releasing the trunk from the inside and jumping from the moving car.

Ultimately, the jury assessed punishment at sixty-five years' confinement and a fine of $10,000.[2] Although appellant does not challenge his conviction, he contends that his sentence was based on reversible error. In a single issue, appellant argues that the trial court abused its discretion when, during the punishment phase of trial, it admitted printouts of photographs from the MySpace website over appellant's objections.

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[2] Appellant had pleaded true to a prior felony conviction for assault, and stipulated to prior convictions for theft, possession of marijuana, assault, unlawfully carrying a weapon, and two counts each of failure to identify oneself to a police officer and assault of a family member.

II. Standard Of Review

We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse-of-discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex.Crim.App.2010), *cert. denied*, 131 S.Ct. 2966, 180 L.Ed.2d 253 (2011). We will not conclude that the trial court abused its discretion unless its decision lay outside the zone of reasonable disagreement. *Id.* Moreover, we must disregard nonconstitutional errors that do not affect the appellant's substantial rights. *See* Tex.R.App. P. 44.2(b). We will conclude that the erroneous admission of evidence did not affect the appellant's substantial rights if, after examining the record as a whole, we have "'fair assurance that the error did not influence the jury, or had but a slight effect.'" *Motilla v. State*, 78 S.W.3d 352, 355 (Tex.Crim.App.2002) (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex.Crim.App.2001)). In evaluating whether the jury was adversely affected by evidence that was erroneously admitted, we consider everything in the record, including the other evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error, the way in which the erroneously admitted evidence might be considered in connection with other evidence in the case, the jury's instructions, the theories of the defense and the prosecution, the arguments of counsel, and the extent to which the State emphasized the error. *Id.*

III. Analysis

The Court of Criminal Appeals recently addressed authentication of computer printouts of the contents of social-networking websites such as MySpace. In *Tienda v. State*, Ronnie Tien da, Jr., a/k/a "Smiley Face," was convicted of murdering David Valadez in a shootout on an interstate highway in Dallas. 358 S.W.3d 633, 634-36 (Tex.Crim.App.2012). The State offered evidence associated with three MySpace personal profiles, including account information and printouts of profile pages on which photographs, comments, and instant messages were posted. *Id.* at 634-35. Tienda objected that the State "had not laid the proper predicate to prove that the profiles were in fact what the State purported them to be, namely, declarations that the appellant himself had posted on his personal MySpace pages." *Id.* at 635. The Court of Criminal Appeals held that there was "ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them." *Id.* at 645. The circumstantial evidence included the following: (1) the MySpace user identified himself using a name that was the same as, or a derivative of, the defendant's legal name or nickname;[3] (2) the user's stated email address included or was derived from the defendant's legal name or nickname;[4] (3) the user's stated location was the same city

[3] *Id.* at 642-43.

[4] *Id.* at 642.

in which the charged offense took place;[5] (4) the user's stated gender was the same as that of the defendant;[6] (5) the user's stated age on a given date was the same as the defendant's age on that date;[7] (6) the user referred to the complainant or the offense;[8] (7) the user referred to a person as a "snitch," and a person of the same name later testified against the defendant at trial;[9] (8) the user referred to the conditions of defendant's release;[10] (9) the user's stated birthday was the same as the defendant's birthday;[11] (10) photos posted

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[5] In *Tienda*, the profile user identified his location as Dallas or "D Town." *Id.* at 642. The court identified Dallas only as the city in which Valadez was murdered; the city in which Tienda resided is not stated in the opinion. *See id.* at 634. The court also mentioned that in two of the three accounts, the user's stated zip code was 75212, *id.* at 642, but the court did not identify a connection between this zip code and any person or event in the case.

[6] *Id.* at 643, 644.

[7] *Id.* at 643 nn. 39 & 41, 644 n. 44.

[8] On one of the profile pages, the user had posted the message "RIP David Valadez," accompanied by a link to a song. Valadez's sister testified that the song was one that had been played at Valadez's funeral. *Id.* at 643.

[9] *Id.* at 645 & n. 49.

[10] On October 24, 2007, Tienda "was released on a pretrial bond with an ankle monitor," and on September 21, 2008, the MySpace user posted messages complaining that "I ALREADY BEEN ON DIS MONITOR A YEAR NOW" and "STILL ON A MONITOR SO I AINT BEEN NO WHERE IN A BOUT A YEAR NOW. . . ." *Id.* at 644-45 & n. 46. A photo posted on another of the MySpace profiles showed Tienda wearing an ankle monitor. *Id.* at 644 n. 46.

[11] On September 21, 2008, the user sent a message to another user that "MY B DAY WAS O THA 12TH U FO GOT BOUT ME,"

on the profiles appeared to be self-portraits of Tienda;[12] and (11) the profile page and one of defendant's tattoos appear to refer to the same local gang.[13]

Here, there is less circumstantial evidence than was present in *Tienda*. There is no evidence concerning the profile user's stated email address, gender, age, date of birth, or location. There also is no evidence that the profile contained references to the complainant, to the charged offense, to any witnesses who testified at trial, or to the conditions of appellant's release pending trial. None of the photographs appears to be a self-portrait.

There is, however, some circumstantial evidence that is similar to the evidence described in *Tienda*. Wolfford testified that he discovered this MySpace profile when he searched social-networking websites for appellant's name; thus, there is some evidence that the person who created the profile identified himself by appellant's name or nickname. Headings at the top of some of the pages printed from the profile indicate that it belongs to "137's Don Lo," and although there is no evidence that appellant used the nickname "Don" or "Don Lo," several witnesses testified that appellant uses the nickname "Lo." Appellant appears in nearly

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and court records showed that Tienda's birthday is on September 12th. *Id.* at 645 & n. 47.

[12] *Id.* at 643 n. 40, 644 n. 43.

[13] A statement on one of the profile pages was signed "NS XVIII ST," and witnesses testified that (a) this refers to a gang known as "Northside 18th Street," and (b) the number "18" is tattooed on the back of Tienda's head. *Id.* at 644 n. 42.

every photograph posted on this profile,[14] and in many of the photographs, appellant is shown displaying some of his distinctive tattoos. The tattoos shown in the printouts from the MySpace profile match those shown in the photographs of appellant that were taken and authenticated by law-enforcement personnel. In some of the MySpace photos, appellant is making gang signs with his hands, including a sign for the Bloods and a sign typically made for "east" or "east side"; appellant has tattoos of similar symbols and handsigns on his body. In one of the MySpace photos, appellant is displaying the tattoos on his forearms; the tattoo on one arm shows the face of a small boy, and the tattoo on the other arm shows the face of a little girl. The caption to this photo is "THE HEIR TO MY THRONE." In the same MySpace photo album are a number of pictures of a little boy and a little girl, and during the punishment phase of trial, appellant's aunt authenticated recent photographs of appellant's son and daughter. Based on a comparison of the photographs, a reasonable jury could have concluded that the tattoos on appellant's arms and the photographs of a small boy and girl on the MySpace profile depict appellant's two children.

Even assuming, without deciding, that the circumstantial evidence here was insufficient to permit a jury to conclude that the MySpace profile was created or maintained by appellant or that the photographs are

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[14] Most of the photos in which he does not appear are photographs of two children, discussed *infra*, and of a collection of sneakers.

accurate representations of the scenes depicted, we nevertheless would conclude that any error was harmless in light of the admission, without objection, of similar evidence. *See Estrada v. State*, 313 S.W.3d 274, 302 n. 29 (Tex.Crim.App.2010), *cert. denied*, 131 S.Ct. 905,178 L.Ed.2d 760 (2011) (stating that improper admission of evidence was harmless "in light of the proper admission into evidence of very similar" evidence). The MySpace printouts were admitted to "show and indicate gang affiliation and gang signs," and although there were no other photographs admitted of appellant making gang signs with his hands, the photographs that were taken by a deputy sheriff were admitted without objection, and show that appellant has tattoos of such hand signs and of many other emblems of gang membership. The evidence of appellant's gang membership was overwhelming; in closing argument, even appellant's counsel stated, "Mr. Rene is in a gang. He's pretty high up." The MySpace printouts also show appellant with a pistol, and it is not possible to tell whether the gun in the photo was loaded or even whether it was real. In contrast, when officers went to the townhouse where appellant was staying to question him about a homicide, the guns they seized were indisputably real, and one of them was loaded with a shell in the chamber. As with the photographs of appellant's tattoos, the guns were admitted into evidence without objection, and just as appellant's counsel stated in closing argument that appellant is a member of a gang, so too appellant's counsel stated in closing argument that appellant pled guilty to possessing the firearm.

In sum, everything shown by the MySpace photos was also shown by other, stronger evidence that was admitted without objection. On this record, we conclude that the evidence obtained from the MySpace profile could have had no more than the slightest effect on the jury's assessment of punishment. We accordingly overrule the sole issue presented for our review.

IV. Conclusion

Because we conclude that any error in admitting printouts of photos from the My Space profile was harmless, we affirm the trial court's judgment.

[SEAL] **CASE NO. 1257226**
INCIDENT NO./TRN: 916526651XA002

The State of Texas	§	**IN THE 351ST DISTRICT**
	§	
v.	§	**COURT**
	§	
RENE, SYLVANUS	§	**HARRIS COUNTY, TEXAS**
	§	
STATE ID NO.: TX06875859	§	

JUDGMENT OF CONVICTION BY JURY

(Filed Feb. 21, 2011)

Judge Presiding: **HON. MARK KENT ELLIS**	Date Judgement Entered: **2/21/2011**
Attorney for State: **L. DEANGELO**	Attorney for Defendant: **J. BROOKS**
Offense for which Defendant Convicted: **SEX ASSLT CHILD 14-17**	
Charging Instrument **INDICTMENT**	Statute for Offense: **N/A**
Date of Offense: **3/2/2008**	
Degree of Offense: **2ND DEGREE FELONY**	Plea to Offense: **NOT GUILTY**
Verdict of Jury: **GUILTY**	Findings on Deadly Weapon: **N/A**
Plea to 1st Enhancement Paragraph: **TRUE**	Plea to 2nd Enhancement/ Habitual Paragraph: **N/A**

Findings on 1st Enhancement Paragraph: **TRUE**	Findings on 2nd Enhancement/ Habitual Paragraph: **N/A**

Punished Assessed by: ~~**JURY**~~ JURY [/s/ AF]	Date Sentence Imposed: **2/21/2011**	Date Sentence to Commence: **2/21/2011**

Punishment and Place of Confinement:	**65 YEARS INSTITUTIONAL DIVISION, TDCJ**

THIS SENTENCE SHALL RUN CONCURRENTLY

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR **N/A**

Fine:	Court Costs:	Restitution	Restitution Payable to:
$10,000	$500.00	$ **N/A**	☐ VICTIM (see below) ☐ AGENCY/AGENT (see below)

Sex Offender Registration Requirements apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was **younger than seventeen years**.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:	From 3/31/2010 to 2/21/2011	From to
	From to	From to
	From to	From to

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

328 DAYS NOTES: **TOWARD FINE AND COSTS**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Harris County, Texas**. The State appeared by her District Attorney.

Counsel/Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.
☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and swore. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and **ORDERED** it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

☒ [/s/ AF] **Jury.** Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.

☒ **Court.** Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

☐ **No Election.** Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this county to take, safely convey, and deliver Defendant to the **Director, Institutional Division, TDCJ**. The Court **Orders** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the **Harris County District Clerk's office**. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to commence. Defendant shall be confined in the **Harris County Jail** for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the **Harris County District Clerk's office**. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY**. The Court **ORDERS** Defendant to proceed immediately to the **Office of the Harris County**. Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☒ The Court **ORDERS** Defendant's sentence **EXECUTED**.

☐ The Court **ORDERS** Defendant's sentence of confinement **SUSPENDED**. The Court **ORDERS** Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following
special findings or orders apply:

Age-Based Sex Offense.

☐ **Indecency with a Child. TEX. PENAL CODE § 22.011.**

☑ **Sexual Assault. TEX. PENAL CODE § 22.11.**

☐ **Aggravated Sexual Assault. TEX. PENAL CODE § 22.021.**

☐ **Sexual Performance of a Child. TEX. PENAL CODE § 43.25.**

The Court FINDS that at the time of the offense, Defendant was younger than nineteen (19) years of age and the victim was at least thirteen (13) years of age. The Court FURTHER FINDS that the conviction is based solely on the ages of Defendant and the victim or intended victim at the time of the offense. TEX. CODE CRIM. PROC., art. 42.017.

Sex offender registry for remainder of life.

Signed and entered on February 21, 2011

X Mark Kent Ellis
MARK KENT ELLIS
JUDGE PRESIDING

Notice of Appeal Filed: 2/21/2011

Mandate Received: March 17, 2013
Type of Mandate: Affirmed

After Mandate Received, Sentence to Begin Date is: 2/21/11

Jail Credit To remain the same.

[/s/ [Illegible] /s/ [Illegible] #1443
EN04: 999 LLBT: $10,500 LLBU: /s/ [Illegible]
EN18: /s/ [Illegible]]