Juvenile’s deferred prosecutions for Terroristic Threat and Assault of a Public Servant admissible in adult PSI report. [Douglas-Myers v. State](16-3-4)

On May 12, 2016, the Houston Court of Appeals (1st Dist.) held that an accurate statement of appellant’s juvenile criminal and social history is relevant to the trial court’s assessment of punishment because while the inclusion of such information in the PSI report was prejudicial, it cannot be said to be unfairly prejudicial in the context of a sentencing hearing.

¶ 16-3-4. **Douglas-Myers v. State,** MEMORANDUM, No. 01-05-00610-CR, 2016 WL 2841087 [Tex.App.—Houston (1st Dist.), 5/12/2016].

**Facts:** On Tuesday, June 10, 2014, Deputy L. Fernandez was dispatched to a Burglary of a Habitation. The Deputy spoke to Tanni Wortham and McKenna Hall who reported that appellant was one of three men who had robbed them at gunpoint. They knew appellant through their roommate and provided the Deputy with appellant’s telephone number. After Wortham and Hall positively identified appellant as one of the perpetrators, appellant was charged with aggravated robbery with a deadly weapon.

Appellant pleaded guilty without a plea bargain. Before resetting the case for a sentencing hearing, the trial court asked the appellant whether he acted on his own. Appellant responded “Yes, Sir.”

The trial court requested a PSI. The PSI report detailed the charged offense, including statements from Wortham and Hall as well as a statement from appellant, appellant’s criminal and social history, and a Texas Risk Assessment System (“TRAS”) assessment. The PSI report relayed that appellant said he “did not do it” and pleaded guilty for reasons related to witness availability. The PSI report goes on to set out appellant’s ascertainable prior court record, which apart from the charged offense, noted that appellant reported that he once “received a $100 ticket for cursing in school” and that he had been charged with two juvenile offenses.

In the first of these two juvenile offenses, according to the PSI report, appellant was charged in May 2009, with the offense of Terroristic Threat and sentenced to six-month’s deferred prosecution. Appellant told the PSI investigator that he was so charged after threatening to stick his teacher with scissors and pointing scissors at the teacher. The second juvenile offense described in the PSI report occurred in December 2011, when appellant was charged for the offense of Assault of a Public Servant and sentenced to six month’s deferred prosecution. Appellant told the PSI investigator that he was so charged after he accidentally hit an Assistant Principal while involved in a fight with another student at school. Appellant further stated that he was not under the influence of alcohol or drugs at the time of either offense. Ultimately, both cases were nonsuited, suggesting appellant successfully completed both terms of deferred prosecution.

During the sentencing hearing, appellant presented no witnesses but provided letters from himself, Tevia Douglas, Gwendyln Roy, and L. Williams. The State introduced testimony from Wortham and Hall, who both asked that appellant be sentenced to a term of confinement. The trial court stated that that it reviewed the PSI report, the TRAS assessment, and the letters submitted by appellant. The trial court found appellant guilty of aggravated robbery and assessed punishment at eight years’ confinement.

**Held:** Affirmed

**Memorandum Opinion:** In his first issue, appellant argues that his trial counsel provided ineffective assistance in failing to object to the description of appellant’s juvenile offenses in the PSI report. In particular, appellant complains that the PSI report’s inclusion of appellant’s juvenile charge for assault of a public servant and of appellant being fined $100 for cursing in school were unfairly prejudicial and thus objectionable under Texas Rule of Evidence 403.

In order to show ineffective assistance based on a failure to object, appellant must show that the trial judge would have committed error in overruling the objection had it been made. Ex parte White, 160 S.W.3d 46, 53 (Tex.Crim.App.2004). A defendant’s criminal history is probative to a trial court’s assessment of punishment. See TEX.CODE CRIM. PROC. art. 37.07 § 3(a) (providing that “evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant ...”); TEX.CODE CRIM. PROC. art. 42.12 § 9(a) (providing that PSI report may include “criminal and social history” as well as “any other information relating to the defendant or the offense requested by the judge”).

Here, had defense counsel objected to the PSI report’s inclusion of appellant’s criminal history and an instance of cursing in school under Rule 403, the trial court would not have erred in overruling such an objection. Appellant has not alleged that the PSI report inaccurately represents appellant’s ascertainable criminal or social history. An accurate statement of appellant’s juvenile criminal and social history is relevant to the trial court’s assessment of punishment. See TEX.CODE CRIM. PROC. art. 37.07 § 3(a); TEX.CODE CRIM. PROC. art. 42.12 § 9(a); Montgomery v. State, 810 S.W.2d 372, 389 (Tex.Crim.App.1990) (“Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial.”). Though the inclusion of such information in the PSI report was prejudicial, it cannot be said to be unfairly prejudicial in the context of a sentencing hearing.

**Conclusion:** Thus, we conclude that trial counsel’s representation did not fall below an objective standard of reasonableness by failing to object to descriptions of appellant’s criminal and social history in the PSI report. We overrule appellant’s first issue.