**In The**

***Court of Appeals***

***Ninth District of Texas at Beaumont***

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**NO. 09-18-00402-CR**

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**SAMUEL BURKES WILLIAMS IV, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 435th District Court**
**Montgomery County, Texas**
**Trial Cause No. 17-11-13301-CR**

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**MEMORANDUM OPINION**

A jury convicted appellant Samuel Burkes Williams IV of assault of a family member by strangulation and assessed punishment at twenty years of confinement. In his sole appellate issue, Williams argues that trial counsel provided ineffective assistance. We affirm the trial court's judgment.

PERTINENT BACKGROUND

L.W. testified that Williams is her husband. According to L.W., on the day in

question, Williams was angry, upset, and agitated, and she "could tell it was going to be a bad day that day." L.W. explained that she and Williams had a "big argument[]" about her desire for him to remove his eight pit bulls from their home, and Williams told her that neither he nor the dogs were going anywhere and that he owned the house and paid the bills. L.W. testified that she became angry and released one of the dogs through the back door, but instead of going after the dog, Williams "came after" her. L.W. explained that she sat on the bed, and Williams "came charging through the house[]" and both she and Williams were cursing.

According to L.W., Williams grabbed her ponytail and threw her across the bed, and she landed on her back on the floor. L.W. testified that Williams got on top of her, straddled her, used his legs to prevent her from moving her arms, put both his hands around her neck, and began to choke her. L.W. explained that while Williams was shaking her head and had his hands on her neck, she had shortness of breath. According to L.W., Williams eventually stopped choking her, and he pulled out a knife and threatened her life. L.W. explained that Williams eventually ran away, and she called 911. The police photographed L.W. that night, and the photographs were admitted into evidence. L.W. testified that she had previously filed reports against Williams for assaulting her but recanted.

Forensic nurse examiner Tiffani Dusang testified that it is "actually not very common to find external injury on the neck with strangulation . . . due to the high compress[i]bility of the neck." According to Dusang, the abrasions and bruises shown in the photographs of L.W.'s neck and chest are "consistent with impression marks[]" and could have been caused by manual strangulation. Dusang testified that based upon her review of the photographs and the offense report, she was "strongly convinced" that L.W.'s breath or blood circulation was impeded due to pressure on her neck.

After Dusang's testimony, the trial judge asked defense counsel to inquire with Williams about Williams's decision to testify. Williams stated that he wanted to testify despite counsel's advice that he not do so, and Williams said, "We came here with nothing, [defense counsel]. I think everybody heard us. We came here with nothing. I wasn't ready for trial, ma'am."

Williams testified that on the day in question, L.W. had a "tracking device" on him. Williams explained that he picked up an individual named David and they were going to the mall together. According to Williams, while he and David were driving, L.W. called, and Williams put L.W. on speakerphone so David could hear the conversation because L.W. was "tripping." According to Williams, David was not at trial to testify because trial counsel did not subpoena anyone. Williams

testified that L.W. told him she was going to turn the dogs loose, and he told L.W. that if she did so, he intended to pack his things when he got home. Williams explained that when he got home, L.W. had packed all of his clothes, and L.W. began punching him. According to Williams, he called his mother and told her L.W. was "beating on" him again. Williams testified that he told L.W. not to stab his tires because he was trying to leave, but L.W. assaulted him beside his car, and he went to the home of his neighbor, an individual known as "Pit Bull[,]" until the police arrived. Williams explained that he does not know Pit Bull's real name, and defense counsel "never sent an investigator to his house." Williams testified that him "having a baby by [L.W.'s] sister-in-law[] is the reason L.W. charged him with assault. Williams testified that he did not choke L.W.

After the jury convicted Williams, he filed a motion for new trial, in which he asserted, *inter alia*, that trial counsel had provided ineffective assistance. Attached to Williams's motion for new trial were written statements from several witnesses. The record does not reflect that the motion for new trial was presented to the trial court, and no signed order on the motion appears in the record, so it appears that the motion was overruled by operation of law.

## ANALYSIS OF ISSUE ONE

In issue one, Williams argues that trial counsel provided ineffective assistance because he did not properly investigate and failed to subpoena and present witnesses who would have corroborated Williams's defense.[1] To establish ineffective assistance of counsel, a defendant must satisfy the following test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). The record on direct appeal normally will not be sufficient to show that counsel's representation was so deficient and lacking in

[1]Williams does not complain of the trial judge's failure to hold a hearing on his motion for new trial or the trial court's overruling of his motion for new trial by operation of law.

tactical or strategic decisionmaking to overcome the presumption that counsel's conduct was reasonable and professional. *Id*. The defendant must prove, by a preponderance of the evidence, that there is no plausible professional reason for counsel's specific act or omission. *Id*. at 836.

"Absent a showing that potential defense witnesses were available, and that their testimony would benefit the defense, counsel's failure to call witnesses is of no moment." *Wilkerson v. State*, 726 S.W.2d 542, 551 (Tex. Crim. App. 1986). Without evidence to the contrary, we must presume that counsel decided not to call potential witnesses in the exercise of his reasonable professional judgment. *Wade v. State*, 164 S.W.3d 788, 796 (Tex. App.—Houston [14th Dist.] 2005, no pet.). To establish that counsel was ineffective due to failure to investigate, "an appellant must state with specificity what such investigation would have revealed, what specific evidence would have been discovered, and how the evidence would have altered the outcome of the trial." *Flowers v. State*, 133 S.W.3d 853, 858-59 (Tex. App.—Beaumont 2004, no pet.).

Williams has not developed a record in the trial court explaining trial counsel's conduct. *See Bone*, 77 S.W.3d at 834; *Wilkerson*, 726 S.W.2d at 551. In the absence of a record that affirmatively demonstrates counsel's alleged ineffectiveness, we cannot find that trial counsel provided ineffective assistance. *See*

*Thompson*, 9 S.W.3d at 813. In addition, Williams has not demonstrated that the potential defense witnesses were available and that their testimony would have benefited the defense, and we must presume that counsel exercised reasonable professional judgment in not calling the witnesses. *See Wilkerson*, 726 S.W.2d at 551; *Wade*, 164 S.W.3d at 796. Furthermore, Williams has not shown that testimony from the potential witnesses would have altered the outcome of the trial. *See Flowers*, 133 S.W.3d at 858-59. For all these reasons, we overrule issue one and affirm the trial court's judgment.

AFFIERMED.

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STEVE McKEITHEN
Chief Justice

Submitted on February 18, 2020
Opinion Delivered May 13, 2020
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.