Opinion issued May 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00897-CR

JAMAILE BURNETT JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1532340

DISSENTING OPINION

A jury found Jamaile Burnett Johnson guilty of the offense of theft. Johnson appeals from his judgment of conviction contending that:

(1) the evidence is legally insufficient to prove he intended to commit theft;

(2) the trial court erred in excluding testimony as inadmissible hearsay; and

(3) his lawyer provided ineffective assistance at trial.

The majority correctly rejects Johnson's first issue as to the legal sufficiency of the evidence. It does not address Johnson's second issue about hearsay.

The majority reverses and remands for a new trial based on Johnson's third issue. The majority holds that Johnson's trial counsel rendered ineffective assistance by failing to secure the admission of Johnson's medical records into evidence. In her concurrence, Justice Keyes would go further and hold that Johnson's trial counsel rendered ineffective assistance by failing to assert insanity as a defense.

I am not unsympathetic to the majority's concerns. Its holding, however, is not firmly founded in the record and is contrary to the law. I respectfully dissent.

BACKGROUND

At trial, Johnson did not dispute that he took someone else's truck. His defense was that he thought the truck he took was actually his truck due to mental health issues. The jury heard substantial evidence about Johnson's mental health:

In the days leading up to the alleged theft, Johnson was in Beaumont. His truck ran out of gas there, and he locked his keys in the cab. When a local police officer encountered Johnson on the roadside, Johnson's behavior was so erratic that the officer took him to Spindletop Medical Center for a psychiatric evaluation. Johnson refused evaluation but would not leave, which resulted in his arrest for trespassing. Once Johnson was released from jail, he looked for his truck on foot and

eventually hitchhiked to Houston. Though homeless at the time, he hailed from the Houston area.

After Johnson returned to Houston, he saw his mother, and she testified that his demeanor was not normal. They had a conversation about his truck. She told him that his truck was not in Houston, but she did not "think he understood or believed that." She thought he needed help, but she was not able to get him any.

Lewis Armstead, who is like a stepfather to Johnson, testified that Johnson behaved strangely the morning of the theft. Johnson pulled up grass and rubbed it on himself. He later laid down on railroad tracks and threw rocks. Armstead called to Johnson, but Johnson did not respond. Armstead stated that Johnson's behavior that morning resembled behavior that he had displayed while growing up, which Armstead described as "schizophrenia or something." Though Johnson's behavior was concerning enough that the police were called, the police declined to take Johnson to the hospital because the officers determined that he was responsive and lucid. After the officers left, so did Johnson. Armstead testified that when Johnson later returned with the truck, Johnson behaved as if he was not in his right mind.

Johnson's own account of the theft was incredible. He testified that he thought he had found his truck in Houston even though he had left it in Beaumont. When he got into the truck its keys were in the ignition and the truck was running. Johnson was surprised to see a woman whom he did not know in the passenger's seat. He

found her attractive and asked if she wanted to go for a ride. He explained, "She's in the truck, she's in my truck. I asked her: Do you want a ride because I'm fixing to leave in my truck." After she exited the truck, Johnson drove off.

Despite this evidence of mental infirmity, the jury found Johnson guilty of theft. As the majority holds, the evidence is legally sufficient to support the verdict.

LEGAL FRAMEWORK

The Crime of Theft

Theft is a specific-intent crime. *Ex parte Smith*, 645 S.W.2d 310, 312 (Tex. Crim. App. 1983). A person commits the crime of theft "if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a). Appropriation alone is not a crime; the person must act with the required intent. *State v. Ford*, 537 S.W.3d 19, 24 (Tex. Crim. App. 2017). Intent is almost always proved by circumstantial evidence. *Edwards v. State*, 497 S.W.3d 147, 157 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Jurors may infer intent from any circumstance tending to prove its existence, such as the defendant's acts and words. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Edwards*, 497 S.W.3d at 157. While we review circumstantial evidence of intent like any other element, it is the prerogative of the jurors, as the triers of fact, to decide which inferences are most reasonable when the circumstances could support different inferences. *Thornton v. State*, 425 S.W.3d 289, 304 (Tex. Crim. App. 2014).

Mental Illness as a Defense

Insanity is an affirmative defense. TEX. PENAL CODE § 8.01(a). A defendant is not guilty if he did not know that his conduct was wrong as a result of a severe mental disease or defect. *Id.* In this context, wrong means illegal. *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008). Texas law presumes sanity; the defendant must prove insanity by a preponderance of the evidence. *Id.* at 591–92.

But evidence of mental infirmity may be relevant and admissible even if a defendant does not assert an insanity defense. When a crime requires proof of a specific intent, evidence of mental disease or defect that directly rebuts that specific intent is relevant and admissible unless excluded by an evidentiary rule. *Id.* at 594–96.

A reasonable mistake of fact that negates a defendant's criminal intent also is a defense to prosecution. TEX. PENAL CODE § 8.02(a). But a defendant cannot rely on evidence of a mental disease or defect to establish the defense of mistake of fact because the beliefs of mentally ill persons are not reasonable as a matter of law. *Mays v. State*, 318 S.W.3d 368, 382–84 (Tex. Crim. App. 2010).

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must prove two things: deficient performance and prejudice. *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). The defendant bears the burden of proving

deficient performance and prejudice by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). Unless the defendant proves both prongs, we cannot sustain a claim of ineffective assistance. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). The purpose of this two-prong test is to ascertain whether defense counsel's conduct so undermined the proper functioning of the adversarial process that it calls into question the reliability of the jury's verdict. *Villa v. State*, 417 S.W.3d 455, 463 (Tex. Crim. App. 2013).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). Judicial scrutiny of counsel's performance is highly deferential. *Mata v. State*, 226 S.W.3d 425, 428 (Tex. Crim. App. 2007). It is not enough that counsel's performance seems questionable in hindsight. *Prine*, 537 S.W.3d at 117. Nor can we infer deficient performance based on unclear portions of the record. *Mata*, 226 S.W.3d at 432. Rather, the record must affirmatively show that counsel's performance was deficient. *Prine*, 537 S.W.3d at 117. There is a strong presumption that counsel's conduct was reasonable, and the defendant must overcome this presumption to prevail on an ineffective-assistance claim. *Id.* Thus, counsel's deficient performance must be firmly founded in the record. *Id.*

If the record is underdeveloped—as it usually is on direct appeal—we can find counsel's performance deficient only if his conduct was so outrageous that no

competent lawyer would have engaged in it. *Id.* Counsel ordinarily should be afforded the opportunity to explain his conduct before we find his performance deficient. *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). It is rare that the trial record, standing alone, suffices to show deficiency. *Id.* The reasonableness of counsel's decisions often depends on facts that do not appear in the record. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). An underdeveloped trial record is a difficult hurdle to overcome: the record must show that counsel's performance fell below an objective standard of reasonableness as a matter of law and that no reasonable trial strategy could justify counsel's ostensibly deficient conduct. *Lopez*, 343 S.W.3d at 143. If the record doesn't disclose counsel's reasons for his conduct and a legitimate trial strategy is a possibility, we cannot find him deficient. *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). A finding of deficient performance cannot rest on an appellate court's speculation. *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004).

A defendant is prejudiced by his trial counsel's deficient performance if there is a reasonable probability that but for counsel's deficient performance the trial's outcome would have differed. *Nava*, 415 S.W.3d at 308. A reasonable probability is one that undermines our confidence in the trial's outcome. *Id.* We may dispose of an ineffective-assistance claim for lack of sufficient prejudice without addressing

deficient performance when a lack of prejudice is apparent. *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012).

A defendant is not entitled to errorless representation. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). We therefore must review an ineffective-assistance claim with an eye toward the totality of the representation. *Id.* A single error will seldom suffice to prove ineffective assistance. *Villa*, 417 S.W.3d at 463. A single error does so only if it is both egregious and had a seriously deleterious impact on counsel's representation as a whole. *Frangias*, 450 S.W.3d at 136.

The Limited Role of Appellate Review

An appellate court is a court of review. We review the issues raised by the parties. We generally cannot reverse a judgment on a ground that has not been raised by the parties at trial or on appeal. *Cameron v. State*, 241 S.W.3d 15, 18 (Tex. Crim. App. 2007); *State v. Bailey*, 201 S.W.3d 739, 743 (Tex. Crim. App. 2006).

ANALYSIS

The Majority Opinion is Mired in Error

Johnson contends that his trial lawyer provided ineffective assistance by failing "to offer his medical records in admissible form" because these records showed his "history of mental illness," which was key evidence supporting his "lack of intent and mistake of fact." According to Johnson, these records "would have

been compelling corroboration" of the testimony about his mental infirmity. The majority agrees. For several reasons, I cannot.

First, though Johnson filed his medical records with this court, he concedes that he did not make them part of the record. We cannot consider documents that are not in the record. *See* TEX. R. APP. P. 34.1; *Martin v. State*, 492 S.W.2d 471, 472 (Tex. Crim. App. 1973); *Welch v. State*, 908 S.W.2d 258, 261 n.1 (Tex. App.—El Paso 1995, no pet.). A claim of ineffective assistance that depends on documents that are not in the appellate record is not firmly founded in the record. Johnson's claim fails for this reason alone. *See Prine*, 537 S.W.3d at 117.

Second, the majority faults Johnson's trial counsel for not securing the admission of his medical records with a business-records affidavit. The majority envisions a trial in which the court admits these records and gives them to the jury for it to evaluate without the aid of an expert witness. Johnson's records span almost 1,100 pages. They state various medical diagnoses, often without elaboration, such as "psychotic disorder" and "antisocial personality disorder." How are jurors to know what such diagnoses entail in general let alone how they potentially impact Johnson's ability to form the specific intent required to commit theft? A jury of laymen is not in a position to interpret these medical records without the aid of a medical expert. *See Navarro v. State*, 469 S.W.3d 687, 702 n.7 (Tex. App—Houston [14th Dist.] 2015, pet. ref'd); *State Office of Risk Mngmt. v. Adkins*, 347 S.W.3d 394,

401 (Tex. App.—Dallas 2011, no pet.). The law is clear that a defendant need not prove mental disease or defect through expert testimony. *Turner v. State*, 422 S.W.3d 676, 695 n.39 (Tex. Crim. App. 2013). But if a defendant wishes to prove his mental infirmity through medical records—created by medical experts—the testimony of an expert is required to interpret them. Because the trial court would have been justified in excluding Johnson's medical records on this basis even if they were accompanied by a business-record affidavit, any failing by Johnson's trial counsel with respect to the affidavit was not deficient. *See Grantham v. State*, 116 S.W.3d 136, 147 (Tex. App.—Tyler 2003, pet. ref'd) (appellate courts do not fault trial lawyers for failing to offer inadmissible evidence).

Third, the majority concludes that no plausible trial strategy could explain Johnson's trial lawyer's failure to secure the admission of the medical records. But the need for expert testimony to facilitate their introduction is a possibility. It is possible that an expert would have had to make concessions about the records or the extent to which they support Johnson's defense of mental infirmity. It is conceivable that defense counsel opted not to press the admissibility of the records for this reason. *Cf. Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (noting possibility that counsel who failed to object to report on confrontation grounds may have decided not to do so because testimony of report's author may have been unhelpful). We do not know whether this is the case because the record does not

contain any evidence as to trial counsel's decision-making. Nor do we know whether trial counsel consulted an expert before trial. Without this evidence, we cannot say that Johnson's trial counsel was deficient. *See Garza*, 213 S.W.3d at 348.

Setting aside the possibility of unhelpful expert testimony, the medical records themselves contain information that a reasonable lawyer might have misgivings about introducing before a jury. For example, a June 2011 psychiatric evaluation that indicates Johnson has had mental health problems since 2003 also discloses significant criminal history, including convictions for indecency with a child and unlawful possession of a weapon. Other records provide details about the indecency conviction. A December 2002 record that describes Johnson as "very unpredictable and at one time violent with the staff" states that Johnson pulled a knife on a friend and threatened to kill him. Another from December 2011 refers to "gang issues" and contains an admission from Johnson that he "had multiple offenses and felonies" that were "not related to a mental illness." An October 2014 record notes that Johnson was convicted for possession of morphine. Others note drug abuse. Unlike the majority, I do not think that defense counsel was deficient by failing to ensure that such a mixed bag of information reached the jury during the guilt-innocence phase of trial. Competent defense counsel can reasonably decide that a double-edged sword is too dangerous to wield. *See Depena v. State*, 148 S.W.3d 461, 469–70 (Tex. App.—Corpus Christi 2004, no pet.) (rejecting ineffective-assistance claim when

defense lawyers testified that they did not call witness because her testimony would have been double-edged sword).

Fourth, Johnson has not made any effort to carry his burden to show deficient performance or prejudice. He does not discuss the contents of his medical records in his brief. Nor does his brief contain citations to particular pages or passages from the 1,100 or so pages of medical records that he filed with this court. Johnson thus has not presented his ineffective-assistance claim for our review. *See* TEX. R. APP. P. 38.1(i); *Hawkins v. State*, 613 S.W.2d 720, 735 (Tex. Crim. App. 1981); *Nguyen v. State*, 177 S.W.3d 659, 669 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). Undeterred by this failure, the majority has—without guidance from the parties—decided which statements from these voluminous medical records are dispositive of Johnson's ineffective-assistance claim. In doing so, the majority has abandoned its role as neutral arbiter and instead acts as Johnson's advocate. *See Brown v. State*, 122 S.W.3d 794, 797 (Tex. Crim. App. 2003) (judge's role is one of neutral arbiter between advocates tasked with arguing evidence); *Dees v. State*, 508 S.W.3d 312, 319 (Tex. App.—Fort Worth 2013, no pet.) (appellate court's review of record for error without guidance of counsel "would place the court in a position too similar to that of an advocate as opposed to a neutral arbiter"). The majority's donning of the advocate's mantle is underscored by its failure to acknowledge that Johnson's medical records contain information prejudicial to his defense.

Fifth, the majority's failure to acknowledge that Johnson's medical records contain prejudicial information also skews its analysis of prejudice. Johnson was indicted and tried for aggravated robbery with a deadly weapon. At trial, the woman who was sitting in the truck he took testified that Johnson had a screwdriver. Though Johnson did not point it directly at her, she said that he threatened her with it and that she was very scared. The jury found Johnson guilty of the lesser-included offense of theft rather than aggravated robbery with a deadly weapon. Had the jury received records documenting that Johnson had previously threatened another with a knife, it could have impacted its deliberations as to whether Johnson used the deadly weapon to take the truck by threat of violence. These medical records could have changed the outcome of the trial in more ways than one, not all of them favorable to Johnson.

Johnson introduced substantial evidence of his mental infirmity at trial without the records. Among other things, the jury heard that:

- Johnson's behavior was so erratic that a Beaumont police officer took him to a facility for a psychiatric evaluation in the days leading up to the theft;
- when Johnson returned to the Houston area, his mother thought that his demeanor was abnormal and that he needed help;
- his mother testified that he seemed to believe his truck was in Houston even though she told him that he was mistaken;
- on the morning of the theft, Johnson's behavior was again so erratic that his stepfather called the police for help; and

- Johnson's stepfather stated that Johnson's behavior resembled "schizophrenia or something," which Johnson had long had.

In addition, Johnson testified in his own defense, which gave the jury an opportunity to evaluate his mental wellbeing firsthand. *Campbell v. State*, 125 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (defendant's testimony gave jury chance to personally evaluate his mental faculties). Johnson's own account of the theft was bizarre in almost every respect. He testified that he thought his truck had been impounded in Beaumont, but he nonetheless decided that a truck he happened upon in Houston was his own. He agreed that this truck did not resemble his in certain respects, but he stated that he thought that someone had altered his truck's appearance. When he got in the truck and found it was occupied by a woman he did not know, this did not dissuade him from believing the truck was his. Despite a 45-minute police chase, Johnson did not think the police were after him.

The medical records would have corroborated the preceding evidence of mental infirmity. But unlike the evidence of mental disease or defect that was before the jury, the records also included material prejudicial to the defense. It is not possible on this record to conclude with confidence that the outcome of Johnson's trial would have been more favorable to him if these records had been admitted.

The Concurring Opinion Would Compound the Majority's Errors

Justice Keyes would hold that Johnson's lawyer also provided ineffective assistance by not pleading insanity as an affirmative defense. But Johnson has not

argued that his trial lawyer gave ineffective assistance by failing to plead insanity. This is dispositive. We cannot reverse a conviction on a ground not raised by Johnson. *Cameron*, 241 S.W.3d at 18; *Bailey*, 201 S.W.3d at 743.

Nor was Johnson required to plead insanity to raise mental infirmity as a defense. Because theft is a specific-intent crime, he was entitled to put on evidence of mental disease or defect to negate the specific intent required to commit theft. *See Ruffin*, 270 S.W.3d at 594–96. Johnson did so.

Justice Keyes argues that Johnson's medical records could have been used to show Johnson did not know right from wrong. That's debatable. Johnson's defense, however, was not that he took the truck because he did not know theft is wrong. His defense was that he took the truck because he thought it was his. Justice Keyes urges that no reasonable trial strategy could account for trial counsel's failure to plead insanity, but the record shows the opposite. An insanity defense is incompatible with the defense that Johnson asserted at trial. It is conceivable that defense counsel advised Johnson to dispute intent rather than sanity for any number of legitimate reasons. For example, the state bore the burden of proving intent, whereas Johnson would have borne the burden of proving insanity. *See Ruffin*, 270 S.W.3d 591–92. But the record is silent as to counsel's decision-making, and an ineffective-assistance claim cannot rest on silence. *See Garza*, 213 S.W.3d at 348.

Justice Keyes also assumes that Johnson's trial lawyer could have unilaterally chosen to plead insanity on Johnson's behalf. But this is far from clear and highlights the danger of appellate courts raising and deciding issues unbriefed by the parties.

The decision to plead guilty or assert innocence belongs to the defendant. *Turner v. State*, 570 S.W.3d 250, 274–75 (Tex. Crim. App. 2018). So long as the defendant is competent to stand trial, the ultimate decision to plead not guilty by reason of insanity may well be his to make. *See* TEX. DISC. R. PROF'L CONDUCT R. 1.02(a)(3), (g) (lawyer shall abide by defendant's decision as to plea to be entered in criminal case unless lawyer reasonably believes defendant is incompetent); *see also United States v. Marble*, 940 F.2d 1543, 1547–58 (D.C. Cir. 1991) (trial court must honor competent defendant's choice not to raise insanity defense). Indeed, it is possible that an attorney's decision to plead insanity without his client's assent could itself constitute ineffective-assistance of counsel. *See Dean v. Superintendent, Clinton Corr. Fac.*, 93 F.3d 58, 60–63 (2d Cir. 1996) (assuming defendant had right not to plead insanity but rejecting ineffective-assistance claim because defendant did not show counsel's entry of plea was made over defendant's objection).

As is usually true on direct appeal, our record casts little light on defense counsel's choices. We know that defense counsel and the state moved for an order requiring a psychiatric examination of Johnson to determine his competency to stand trial. The trial court ordered an exam. The results aren't in the record, but we can

infer that Johnson was found competent from the fact that he was tried. Given his unchallenged competency to stand trial and the absence of evidence as to the advice that his trial attorney gave him about whether to plead insanity, we cannot fault defense counsel for pursuing a defense other than insanity. An ineffective-assistance claim must be firmly founded in the record. The ineffective-assistance claim advocated by Justice Keyes has no basis in the record.

CONCLUSION

The majority's doubts as to Johnson's mental health are understandable. I share them. But however well-intentioned, the majority's holding is insupportable on the present record and contrary to the law. I therefore respectfully dissent.

Gordon Goodman
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

Keyes, J., concurring.

Goodman, J., dissenting.

Publish. TEX. R. APP. P. 47.2(b).