Opinion issued July 14, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00929-CR

HILARIO BOTELLO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 290th District Court
Bexar County, Texas[1]
Trial Court Case No. 2018CR4644

MEMORANDUM OPINION

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Fourth District of Texas. TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

A jury convicted appellant, Hilario Botello, of possession of a controlled substance, heroin, in an amount between four and 200 grams. After appellant pleaded true to two habitual offender enhancement allegations, the trial court assessed punishment at 25 years' confinement. In two issues on appeal, appellant contends that (1) the trial court erred by denying his motion to suppress because his wife did not have actual or apparent authority to consent to a search, and (2) he received ineffective assistance of counsel at trial.

We affirm.

Background

On January 20, 2018, Lisa Botello called the police to report an "Assault in Progress" at the back residence at 1237 Brighton Avenue. Officers with the San Antonio Police Department were dispatched to the scene and the 911 operator, Xavier Rodriguez, stayed on the line with Lisa until officers arrived. Rodriguez believed Lisa was in the "process of experiencing a traumatic event" and that there was "an immediate threat of danger." Lisa identified her attacker as appellant, who could be heard assaulting her over the phone. During the 911 call, Rodriguez was generating an incident detail report, which continuously updates the dispatcher and officers responding to the scene with as much information as possible.

Officer D. Davis of the San Antonio Police Department arrived on the scene and saw Lisa walking down driveway; she appeared to have a swollen, broken nose.

At the same time, Officer Davis also observed appellant, who was wearing red shorts, retreat inside the back house and close the door. Officer Davis spoke with Lisa, whom he described as being distraught, and she told him that she had just been assaulted by appellant. Lisa informed Officer Davis that she was appellant's wife, that they lived in the back residence at 1237 Brighton Avenue and had just moved in, and that she had just returned home from her parents' house to find her husband naked in bed with two females. Lisa stated that appellant, along with the other females, began assaulting her. Lisa also told Officer Davis that she saw drinks on the table inside the residence and believed that appellant had been drinking. At that point, Officer Davis believed he had probable cause to arrest appellant for committing an offense involving family violence.

Officer Davis then contacted his supervisor to confer with him about the situation and ask advice on how to proceed. Officer Davis also knocked on the door of the residence to request that appellant come outside and talk to him. Appellant, who had locked the door and barricaded himself inside the residence, made the excuse that he was taking a shower and would be out in "just a minute," but did not come out. After several attempts to talk with appellant, Officer Davis reached the conclusion, based on his training and experience, that appellant was not going to come outside. Officer Davis also told Lisa's parents, who had arrived on scene to assist their daughter, that it was not safe for them to be there because appellant was

inside, had locked the door, and it was possible he could run outside with a gun. Officer Davis further told Lisa and her parents that he was going to move his car to block the driveway "just in case [appellant] jumps out."

Officer Davis then requested consent to search from Lisa. Lisa provided both verbal as well as written consent for Officer Davis to enter the residence. Officer Davis asked if Lisa had a key to the residence, to which Lisa stated that she had left her keys behind inside the residence and had been unable to retrieve them before leaving. Thereafter, Officer Davis forced entry into the home and arrested appellant for family violence assault.

Before he was placed in the patrol car, Officer Davis conducted a search-incident-to-arrest of appellant's person to identify and seize any weapons or contraband as well as for officer-safety reasons. Officer Davis found a brown substance in a plastic bag in the left pocket of appellant's shorts. The substance was later confirmed to be heroin with a net weight of 24.592 grams. Appellant was charged with possession of a controlled substance (heroin) in an amount between 4 and 200 grams.

Before trial, appellant moved to suppress "all evidence seized [on January 20, 2018] as a result of the arrest of Defendant and search of Defendant's person, home, papers, effects, vehicle, real property, and outbuildings situated thereon". The trial court held a hearing on the motion to suppress, at which the State presented the

testimony of Officer Davis. Appellant argued that the officers had no authority to enter the residence and, therefore, the contraband seized following appellant's arrest should be suppressed. At the conclusion of the hearing, the trial court denied the motion to suppress, but did not issue findings of fact. The case proceeded to trial on July 3, 2018, during which the State presented the testimony of the 911 operator Xavier Rodriguez, Officer Davis, and Mary Hess, forensic scientist at the Bexar County Crime Lab. Appellant was convicted of possession of a controlled substance and the trial court sentenced him to 25 years' confinement.

This appeal followed.

Motion to Suppress

In his first issue, appellant argues that the trial court erred in overruling his motion to suppress the drug evidence because his estranged wife, Lisa Botello, did not have sufficient actual or apparent authority to give consent to police to search his home and person.

A. Standard of review

In reviewing a trial court's ruling on a motion to suppress, appellate courts must view all of the evidence in the light most favorable to the trial court's ruling. *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008). When the trial court does not make explicit findings of fact, the appellate court infers the necessary factual findings that support the trial court's ruling if the record evidence (viewed in

the light most favorable to the ruling) supports these implied fact findings. *Id.* Thus, we afford almost total deference to a trial judge's determination of the historical facts that the record supports, especially when his implicit factfinding is based on an evaluation of credibility and demeanor. *Id.* "If the trial judge's decision is correct on any theory of law applicable to the case, the decision will be sustained." *State v. Ross*, 32 S.W.3d 853, 855-56 (Tex. Crim. App. 2000) (en banc).

B. Applicable law

There is a strong preference for police to administer searches and seizures pursuant to a warrant. *See Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). Pursuant to the Fourth Amendment, warrantless searches and seizures inside a residence are presumptively unreasonable, subject to a "few specifically defined and well-established exceptions." *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). These "well-established exceptions" include voluntary consent to search, exigent circumstances, and searches incident to arrest. *See Gutierrez*, 221 S.W.3d at 685; *see also* TEX. CODE CRIM. PROC. art. 14.05 (officer making arrest without warrant may enter residence to make such arrest if he receives consent or there are exigent circumstances).

C. Analysis

Appellant argues that the facts do not support a finding that Lisa Botello had sufficient "joint access to or control over 1237 Brighton Avenue to render Officer

Davis' forcible entry and search of that residence reasonable based solely on the purported consent offered by [appellant's] estranged spouse." However, because we find that Officer Davis had probable cause to arrest appellant without a warrant for family violence and exigent circumstances existed allowing Officer Davis to enter appellant's residence without a warrant, we do not reach the issue of whether Lisa had actual or apparent authority to consent to a search. *See Ross*, 32 S.W.3d at 855-56 ("If the trial judge's decision is correct on any theory of law applicable to the case, the decision will be sustained.").

The State argues that Officer Davis had probable cause to arrest appellant under article 14.03(a)(4) of the Texas Code of Criminal Procedure. Appellant does not respond to this argument. Article 14.03(a)(4) allows an officer to arrest without a warrant "persons who the peace officer has probable cause to believe have committed an offense of family violence." TEX. CODE CRIM. PROC. art. 14.03(a)(4). Family violence includes acts committed by one member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, or assault. TEX. CODE CRIM. PROC. art. 5.02; TEX. FAM. CODE § 71.004(1). Probable cause for a warrantless arrest exists "if, at the moment the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a reasonably prudent man in believing that the person arrested had

committed or was committing an offense." *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). Probable cause must be based on specific, articulable facts rather than the officer's mere opinion. *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005). We use the "totality of the circumstances" test to determine whether probable cause existed for a warrantless search. *Id.*

Here, the totality of the circumstances supported a reasonable belief that appellant had committed an act of family violence. At the motion to suppress hearing, Officer Davis testified that on January 20, 2018, he responded to a report of family violence at the Brighton Avenue residence, and the nature of the call was an assault in progress. When he arrived, he saw Lisa walking down the driveway and appellant going into the house. Officer Davis further testified that Lisa's nose was swollen and appeared to be broken. He testified that, upon his arrival, Lisa informed Officer Davis that she was appellant's wife and that she lived with him at the Brighton Avenue residence but had stayed at her parents' house the night before. Officer Davis testified that she told him she had entered the residence to find appellant naked in bed with two other women, and that is when she was assaulted by appellant and the two other women. Office Davis further testified that appellant was heard on the 911 call beating Lisa, and that Lisa identified appellant on the 911 call by name and birthdate.

This evidence presented at the motion to suppress hearing supports a reasonable belief that appellant had committed an offense involving family violence and, therefore, Officer Davis had authority to make a warrantless arrest under Texas Code of Criminal Procedure article 14.03(a)(4).

However, probable cause is not all that was required. To lawfully enter the residence to make a warrantless arrest, Officer Davis needed both probable cause to arrest plus either consent or exigent circumstances. *See* TEX. CODE CRIM. PROC. art. 14.05 ("[A]n officer making an arrest without a warrant may not enter a residence to make an arrest unless: (1) a person who resides in the residence consents to the entry; or (2) exigent circumstances require that the officer making the arrest enter without the consent of a resident or without a warrant."). The State focuses on the consent element of article 14.05 but, as we stated above, we do not reach the issue of consent because we find there were exigent circumstances requiring Officer Davis to enter the residence without a warrant.

"Situations creating exigent circumstances usually include factors pointing to some danger to the officer or victims, an increased likelihood of apprehending a suspect, or the possible destruction of evidence." *McNairy v. State*, 835 S.W.2d 101, 107 (Tex. Crim. App. 1991). Exigent circumstances justifying a warrantless entry include (1) a risk of danger to the police or the victim; (2) an increased likelihood of apprehending a suspect; (3) possible destruction of evidence or contraband; (4) hot

or continuous pursuit; and (5) rendering aid or assistance to persons who the officer reasonably believes are in need of assistance. *See Gutierrez*, 221 S.W.3d at 685; *Randolph v. State*, 152 S.W.3d 764, 771 (Tex. App.—Dallas 2004, no pet.); *Beaver v. State*, 106 S.W.3d 243, 247 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

The record reflects that Lisa told Officer Davis appellant had hit her and that she believed he had been drinking. Her nose was swollen and appeared to be broken. Further, Officer Davis testified that appellant could be heard beating Lisa on the 911 call. Additionally, when Officer Davis arrived on scene, he saw Lisa walking down the driveway at the same time appellant was going back inside the residence and shutting the door. Officer Davis was also concerned for his and others' safety on scene as evidenced by his statements to Lisa's parents it was not safe for them to be there because appellant had barricaded himself inside the residence and it was possible he could run out with a gun.

Exigent circumstances exist when there is some danger to the officer or victim. Based on the information known to Officer Davis at the time and under the circumstances, he had reason to believe that appellant (1) had been drinking and was possibly intoxicated; (2) had struck his wife repeatedly; (3) had barricaded himself inside the residence after police arrived; and (4) posed a continuing physical threat to his wife. Further, after seeing that appellant had followed Lisa outside and returned to the house only after police arrived, it was reasonable for Officer Davis

to believe that appellant might become angry at his wife for calling the police and physically attack his wife again after police left the scene.

We conclude that sufficient exigent circumstances existed to warrant Officer Davis' warrantless intrusion into appellant's residence to arrest him for family violence. *See, e.g.*, *Randolph*, 152 S.W.3d at 772-73 (holding sufficient exigent circumstances existed warranting officer's warrantless intrusion into residence because officer had reason to believe appellant was intoxicated, had struck his pregnant wife, had returned to house shortly after assault, and officer had reason to believe appellant might become angry at wife for calling police and attack her again). Officer Davis' actions eliminated the risk of danger to the victim, as well as officers and other persons on scene. Accordingly, the trial court did not err in denying appellant's motion to suppress.

We overrule appellant's first issue.

Ineffective Assistance

In his second issue, appellant argues that his counsel rendered ineffective assistance by failing to: (1) object when Officer Davis refreshed his recollection with a report he did not write; (2) subpoena Lisa's parole officer to confirm that she was not living with appellant; (3) object when the trial court lodged a hearsay objection on behalf of the State; and (4) object to faulty redactions in State's Exhibit 9. We address each of these arguments in turn.

A. Standard of review

The United States Constitution and the Texas Constitution guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). To prevail on his claim of ineffective assistance of counsel, an appellant must prove (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064.

Under the first prong of *Strickland*, in reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance and were motivated by sound trial strategy. 466 U.S. at 688-89, 104 S. Ct. at 2065. To defeat this presumption, any allegation of ineffectiveness must be firmly grounded in the record so that the record affirmatively shows the alleged ineffectiveness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). Generally, counsel should be given an opportunity to explain his actions before being found ineffective. *Id.* In most cases, direct appeal is

an inadequate vehicle for raising an ineffective assistance claim because the record is undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003). In the face of a silent record, we cannot know trial counsel's strategy, so we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Under the second prong of *Strickland*, in reviewing whether there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068. The appellant has the burden to establish both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). The appellant's "failure to satisfy one prong of the Strickland test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

B. Failure to object when the State refreshed Offer Davis's recollection with a report he did not author

Appellant first argues that his counsel was ineffective because counsel failed to object when the State allowed Officer Davis to refresh his recollection with the incident detail report written by 911 operator Xavier Rodriguez. Appellant contends

that this was error because "[a]n officer should only refresh his recollection from his own report, and not the work-product authored by another agent of the State." In response, the State argues that there is no requirement in the Texas Rules of Evidence that a witness have authored a document to later use it to refresh his recollection when testifying at trial.

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). Rule 612 provides that a witness may have his present recollection refreshed by reviewing writing for that purpose. TEX. R. EVID. 612. This rule does not require the witness testifying to have prepared the document being used to refresh his recollection. *See Johnson v. State*, 478 S.W.2d 952, 953 (Tex. Crim. App. 1972) ("[I]t is not necessary that the memorandum have been made by the witness so long as it refreshes his memory."); *Callahan v. State*, 937 S.W.2d 553, 559 (Tex. App.—Texarkana 1996, no pet.) ("The rule does not require that the witness have prepared the writings."). As the writings are not being offered into evidence, no predicate of admissibility need be met. *Callahan*, 937 S.W.2d at 559. Instead, "[i]f the witness is enabled to speak of the facts from his own refreshed recollection, it is generally held that the memorandum used to refresh a present memory may be made by one other than the witness, the established rule being that

it is not the memorandum that is the evidence, but the recollection of the witness." *Armstrong v. State*, 476 S.W.2d 703, 704 (Tex. Crim. App. 1972).

The record is silent as to why appellant's counsel did not object when Officer Davis refreshed his recollection with the incident report. Although appellant filed a motion for new trial, he did not include these ineffective-assistance arguments in his motion. When the record is silent on counsel's reasoning or strategy, we will not speculate to find trial counsel ineffective on appeal. *See Henderson v. State*, 29 S.W.3d 616, 624 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). Instead, we will only find deficient performance if the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392.

We conclude that counsel's conduct of failing to object was not "so outrageous that no competent attorney would have engaged in it" because, as the State points out, there is no requirement that the witness prepare the writings used to refresh his recollection. Here, appellant is correct that, as Officer Davis was testifying, the State showed him two documents, one of which was the incident report prepared by Rodriguez, to refresh his recollection. However, because the law does not prohibit a witness's recollection from being refreshed by a document prepared by someone other than that witness, the trial court would not have committed error in overruling an objection, even if counsel had made one. *See Armstrong*, 476 S.W.2d at 704; *see, e.g.*, *Paez v. State*, 995 S.W.2d 163, 174 (Tex.

App.—San Antonio 1999, pet. ref'd) ("It is not impermissible for a witness to use a document written by another person to refresh his memory."). Therefore, counsel was not ineffective for failing to object. *Parra*, 420 S.W.3d at 824–25 (holding that because trial court would not have committed error in overruling objection, counsel was not ineffective for failing to assert such objection).

We overrule appellant's first argument on ineffective assistance.

C. Failure to subpoena Lisa Botello's parole officer to confirm her address

Appellant next argues that his counsel was ineffective by failing to call Lisa's parole officer as a witness to confirm that Lisa was not living with appellant at the time of his arrest. The State responds that the record is replete with evidence that Lisa lived with appellant and, therefore, there is nothing in the record demonstrating that counsel should have investigated further into Lisa's address.

As with the first ineffective-assistance argument, the record is silent as to counsel's reasons for failing to call Lisa's parole officer to testify. We will not speculate as to his reasons behind this decision. Moreover, in order to succeed on his ineffective-assistance claim based on the failure to present testimony from Lisa's parole officer, appellant needed to show that the parole officer was available to testify and that his testimony would have been of some benefit to appellant's defense. *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007) ("When challenging an attorney's failure to call a particular witness, an [appellant] must

show that the witness had been available to testify and that his testimony would have been of some benefit to the defense.").

Although he claims that the parole officer knew where Lisa was living (i.e., with her mother), appellant has pointed to no evidence in the record to show that the parole officer was available to testify or that his testimony would have been beneficial to the defense. Appellant made no formal proffer of the parole officer's anticipated testimony nor did he provide any explanation as to what the parole officer would have testified to, if he had been called. Instead, all we have is counsel's argument on appeal that the parole officer knew Lisa was living with her mother at the time of appellant's arrest, and not with appellant like she claimed. Appellant has failed to demonstrate that the parole officer was available or that his testimony would have been favorable. Therefore, he has failed to establish that his counsel was ineffective for failing to call the parole officer. *Ramirez*, 280 S.W.3d at 853.

We overrule appellant's second argument on ineffective assistance.

D. Failure to object when the trial court lodged an objection in favor of the State

Appellant next argues that his counsel was ineffective for failing to object when the trial court lodged a hearsay objection on the State's behalf during the following colloquy related to Defense Exhibit 1 and Lisa's purported residence:

> COUNSEL: Again I'm showing you Defense Exhibit Number 1. And do you know whose writing is on this form?

OFFICER DAVIS: Yes. It's Lisa Botello's.

COUNSEL: So can we assume that the address that's at the top of this page on the form filled out, Defense Exhibit Number 1, by Ms. Botello, is a correct address?

OFFICER DAVIS: Yes.

COUNSEL: Okay. And what address is it at the top of page?

OFFICER DAVIS: 4307 -- I can't say that word.

COUNSEL: But it's not Brighton?

OFFICER DAVIS: That's correct.

COUNSEL: So she did not claim to -- the address of where the offense allegedly occurred, she wrote down another address?

OFFICER DAVIS: She stated she just moved in with her husband to that back house.

COUNSEL: Okay. That's all I was going to offer, Judge.

THE COURT: Okay. And the State's objection? Well, he doesn't know whether or not -- okay. Go ahead. What's your objection?

STATE: Just renewed to speculation.

THE COURT: Well, it's also hearsay.

STATE: Hearsay.

THE COURT: So, that's sustained.

All right. Bring the jury back in, please.

3RR45-46.

Appellant argues that it was error for the trial court to lodge an objection on behalf of the State, and therefore rendering his counsel ineffective for failing to object, because it undermined the court's appearance of being fair and impartial. A

trial judge shall maintain an attitude of impartiality throughout the trial. *Ex parte Scott*, 541 S.W.3d 104, 125 (Tex. Crim. App. 2017). The Texas Code of Criminal Procedure states that judges shall not "make any remark calculated to convey to the jury his opinion of the case." TEX. CODE CRIM. PROC. art. 38.05. However, a trial judge can make comments regarding whether testimony can be allowed. *Strong v. State*, 138 S.W.3d 546, 553 (Tex. App.—Corpus Christi 2004, no pet.). The primary concern is whether the jury would be unfairly influenced by additional comments from the bench. *Id.*

Here, the comment from the judge that the offered testimony was hearsay was made outside the presence of the jury. Therefore, the concern about unfairly influencing the jury or undermining the court's appearance of impartiality is moot. *Strong*, 138 S.W.3d at 553 (finding that because comments were made outside jury's presence, concern regarding court's appearance of lack of impartiality was moot). Further, a review of the record demonstrates that the trial court had previously ruled that Defense Ex. 1 contained hearsay and would not be admitted. Therefore, the court having sustained the State's objection based on hearsay, counsel may have believed it was unlikely the judge would have sustained a defense objection that she commented on the weight of the evidence. Either way, the record is silent as to counsel's reasons for failing to object and we cannot say that counsel's conduct was so outrageous that no competent attorney would have engaged in it. *See Scott*, 541

S.W.3d at 126 (holding trial counsel was not deficient for failing to object to trial court's comment on the weight of evidence when there were possible reasons for failure to object and record was otherwise silent as to counsel's reasoning).

We overrule appellant's third argument on ineffective assistance.

E. Failure to object to redactions in State's Exhibit 9

Appellant next argues that his counsel was ineffective for failing to object to portions of State's Exhibit 9 that he claims were more prejudicial than probative but that were not redacted. In particular, appellant argues that his trial counsel should have objected to the inclusion of the following portions of the State's Exhibit 9:

> OFFICER DAVIS: "Do you want to press charges against this dude?"
>
> LISA BOTELLO: "Yes." State's Ex. 9, Part 1 [4:33].
>
> OFFICER DAVIS: "I got the victim here with me . . . . She's got visible injuries. Possibly a broken nose." State's Ex. 9, Part 1 [10:46-11:58].
>
> OFFICER DAVIS: "You also have to have photos done, taken of your injuries." State's Ex. 9, Part 2 [5:51-6:10].
>
> OFFICER DAVIS: "This is a domestic violence sheet[.]" State's Ex. 9, Part 2 [7:46-8:35].
>
> APPELLANT: "I was shitting." State's Ex. 9, Part 2 [12:21-12:37].

But, as the State points out, these same facts were established by other evidence previously admitted without objection and about which appellant does not complain. For example, Rodriguez testified that when he took the 911 call from Lisa, he thought she was "in a very serious situation to where [he] felt like there was an

immediate threat of danger." He further testified that he notified officers that this was a "family violence" event. Officer Davis also testified that Lisa had told him she had just been assaulted, that her nose appeared swollen and broken, and that appellant was ultimately arrested for family violence assault. The failure to object to such cumulative evidence is harmless and does not support a claim of ineffective assistance. *See Marlow v. State*, 886 S.W.2d 314, 318 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (holding that appellant failed to show prejudice from counsel's failure to object to hearsay evidence because evidence was cumulative and, therefore, its admission was harmless); *McEuen v. State*, No. 14-08-00947-CR, 2009 WL 2476540, at *3-4 (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet.) (mem. op., not designated for publication) (rejecting appellant's ineffective assistance claim based on counsel's failure to object because facts had already been established by other admitted evidence about which appellant did not complain). Therefore, we cannot say counsel's failure to object was so outrageous that no competent attorney would have engaged in it. *Goodspeed*, 187 S.W.3d at 392.

We overrule appellant's fourth argument on ineffective assistance.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).