Opinion issued July 14, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00031-CR

DAVID ALLEN VASQUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 22nd District Court
Hays County, Texas[1]
Trial Court Case No. CR-16-0943

MEMORANDUM OPINION

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 18–9006 (Tex. Jan. 9, 2018); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Third District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

A jury found appellant, David Allen Vasquez, guilty of the felony offense of sexual assault.[2] After he pleaded true to the allegation in an enhancement paragraph that he had been previously convicted of another felony offense of sexual assault, the trial court, as statutorily required, assessed his punishment at confinement for life.[3] In his sole issue, appellant contends that his trial counsel provided him with ineffective assistance of counsel.

We affirm.

Background

The complainant testified that in November 2015, she was a senior at Texas State University. She lived in Hays County, Texas at the Aspen Heights apartment complex in a four-bedroom unit with two roommates, Christina Burrow and Veronica Mueller. The complainant and Burrow were close friends.

About 4:00 p.m. on Thursday, November 5, 2015, the complainant, Burrow, and appellant went to a local bar and restaurant. At the time, Burrow and appellant had been in a dating relationship for several months, and the complainant frequently hung out with them. The complainant liked appellant and approved of his relationship with Burrow.

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2 *See* TEX. PENAL CODE ANN. § 22.011(a), (f).

3 *See id.* § 12.42(b), (c)(2)(A)(i), (B)(ii).

At the local bar and restaurant, the complainant, Burrow, and appellant each drank two or three "dollar-size" frozen margaritas, which were "[a] little on the weak side." After a while, they left the bar and restaurant and went to the complainant and Burrow's apartment to "chill and hang out." Another friend, Jared Kirk, joined them at about 8:30 p.m. The third roommate, Mueller, was out of town and not at the apartment that night.

According to the complainant, the group of four friends watched music videos and played cards; they were "just kind of hanging out." Kirk had brought a case of beer to the apartment, and he shared some with the complainant. Appellant drank from a bottle of whiskey, and Burrow drank white wine. The four also smoked marijuana. Nevertheless, the complainant explained that she "didn't feel overly stoned or overly high or anything like that," and "[t]ipsy, yes, but [she] knew [her] limit" and "wasn't drunk, like, plastered, stuff like that."

Burrow was the first to leave the group to go to bed. She headed into her bedroom off the living room, followed by appellant. The complainant "thought [she] heard what sounded almost like some kind of sex or something" coming from the room, then appellant walked out and rejoined the complainant and Kirk in the living room. The three of them continued "drinking and smoking and just watching music videos." The complainant did not "remember going to sleep," but she stretched out on the sofa and fell asleep in the living room. It was not unusual for her to fall asleep

on the sofa. She did not remember what time Kirk left, only that he did so before she fell asleep.

The complainant woke up during the night to find appellant on top of her with his fingers inside her vagina. He had pushed down the waistband of her sweatpants to fit his hand inside and had straddled her with his knees. The complainant noticed that appellant was looking at her at the same time he was "trying to get his penis out." She said, "Stop. Please stop," a "couple of times." When she saw his "erect penis," she "gathered all of the strength in [her] body—to push him off of [her] before things escalated." Once she pushed him off, they both sat on the sofa facing the television for a few seconds, then appellant said, "Thank you for stopping me," and he "walked back into [Burrow]'s [bed]room."

After appellant left the living room, the complainant texted "[h]elp" to Miles Stewart, her co-worker at Pluckers Wing Bar restaurant, who lived in another building in the same apartment complex. She told Stewart that she was upset because appellant "had made a pass at [her]." She stayed at Stewart's apartment for an hour or two, hugging a pillow and crying. Then, she went back to her apartment and into her bedroom, locking the door behind her.

On Friday morning, she saw appellant and Burrow when she left for work, and they both said good morning to her and hello. The complainant returned from

work around noon that day. She spent the rest of the day with Burrow watching movies on television.

When asked why she did not immediately report the sexual assault to law enforcement, the complainant explained, "At the time, I didn't know what to do." Burrow and appellant had become more serious in their relationship, and "[Burrow's] parents were in town to meet [appellant] . . . . And[,] it was this whole huge weekend that [Burrow] had talked about. They went to the Texas State [University] football game on Saturday. Her mom and dad were both in town. I—I didn't know how to, like, react to it. And[,] at the time, [Burrow] was my best friend, so I didn't know—you know, she had been talking about this."

On Saturday, the complainant went to the gym in her apartment complex to work out, but after several minutes, she "broke down." She went to her car, called her mother, and told her about the sexual assault. Her mother encouraged her to confide in Mueller, who had returned from out of town. The complainant went inside her apartment and told Mueller about the sexual assault. Later that day, the complainant went to Austin, Texas to attend a University of Texas football game with another friend to "get [her] mind off of things." On the way to Austin, she told her friend about the sexual assault, explaining that she "might not be [her]self and th[at] [was] why."

On Saturday night, the complainant sent appellant a direct message using Facebook Messenger.[4] The trial court admitted into evidence a copy of the exchange between the complainant and appellant on Facebook Messenger.

[The complainant]:	Why the hell did you do that to me on Thursday . . . . I need answers.
[Appellant]:	What're you talking about?
[The complainant]:	You don't remember what you did to me on Thursday night?
[Appellant]:	No! Last thing I remember I was smoking with you and [Kirk.]
[The complainant]:	You sexually assaulted me.
[Appellant]:	What did I do?!? Huh?
	Wait what?!?
[The complainant]:	Yeah.
[Appellant]:	I had sex with you?
[The complainant]:	No. You were fingering me and I was telling you to stop and you wouldn't and you whipped it out and I pushed you off of me and then you said "I'm sorry. Thank you for making me stop."
	[Y]ou don't recall any of that?
[Appellant]:	What the fuck?!? No . . . .
[The complainant]:	Why would I lie about this?
[Appellant]:	I don't remember any of that. I would never want to do any of that to you. That would ruin [Burrow] and [me]!

[4] "Facebook Messenger is a mobile tool that allows users to instantly send chat messages to friends on Facebook." *See Edwards v. State*, 497 S.W.3d 147, 155 n.8 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (internal quotations omitted).

> Can I call you in a little bit and forgive [sic] out what the hell happen[ed]?

The next day, Sunday, the complainant reported the sexual assault to law enforcement.

Stewart testified that in November 2015, he was a co-worker of the complainant's at Pluckers Wing Bar restaurant and he had known her for about two years. On November 6, 2016, at about 3:15 a.m., he received a text message from the complainant. She then came over to his apartment. It was the first time that she had been to his apartment, and she was upset. The complainant cried the entire time that she was there. Stewart did not ask her many questions; they just watched television in his living room. She stayed for an hour or so and then left.

The complainant's mother testified that in November 2015, she received a telephone call from the complainant. The complainant "was crying and very upset." The complainant's mother asked her specific questions about what had happened, and the complainant told her mother "the situation" and answered her questions. Because the complainant's mother lived about an hour away, she told the complainant "to talk to [Mueller] and to have her get her arms around her." And she was "pretty sure" she encouraged the complainant to report the sexual assault to law enforcement.

Mueller testified that she arrived back at the apartment on the morning of Saturday, November 7, 2015, and the complainant went to the gym at the apartment

complex. A short while later, Mueller "went out to smoke on the balcony [of the apartment], and [she] saw [the complainant] come from the gym to her car." She saw the complainant sitting in her car and talking on her cellular telephone. She could see, "looking down right at her," that the complainant was "clearly distressed. And when she came up [to the apartment], she was crying." The two were alone in the apartment at the time, and Mueller asked the complainant, "What happened?" The complainant told her about the sexual assault.

Mueller also explained that at some point, the complainant and Mueller talked to Burrow about what appellant had done to the complainant. Burrow appeared "very confused and upset." Soon after the disclosure, the interactions between Burrow and the complainant became tense. In Mueller's opinion, the situation ruined the friendship between Burrow and the complainant.

Burrow testified that she met appellant when they worked at restaurants next door to each other. At the time of the sexual assault, she had been dating him for about six months. She and the complainant were close friends and roommates. According to Burrow, on Thursday, November 5, 2015, appellant, who lived in Round Rock, stayed overnight with her at the apartment she shared with the complainant and Mueller. On that night, Burrow, the complainant, appellant, and Kirk were all at the apartment hanging out in the living room, drinking, and smoking. Burrow became intoxicated and went to her bedroom to sleep, but the complainant,

appellant, and Kirk stayed up in the living room after she left. At some point, she woke up briefly when appellant joined her in bed.

The following Monday, Burrow found out about the sexual assault from Mueller and the complainant, and the complainant told Burrow what had happened between her and appellant. The complainant was distraught and crying. Burrow noted that she had read some direct messages on Facebook Messenger between the complainant and appellant on appellant's cellular phone. She briefly discussed the matter with appellant, who denied that he had sexually assaulted the complainant.

Kirk testified that he met the complainant in 2013, when they were co-workers at Pluckers Wing Bar restaurant. By November 2015, they had become "pretty close friends" who "liked to hang out outside of work a lot," "at least two or three times a week." Kirk also knew Burrow, and he had met appellant a couple of months before November 2015 through Burrow. According to Kirk, he, the complainant, and Burrow had hung out with appellant "[a] few times, a handful of times, but not a lot."

On Thursday, November 5, 2015, he brought beer over to the complainant and Burrow's apartment. He arrived at the apartment at the same time as Burrow and appellant. Kirk, the complainant, Burrow, and appellant then spent "the majority of [the] time" that evening "drinking alcohol, smoking weed, watching . . . music videos" on television, and playing cards. Burrow, appellant, and Kirk also took

amphetamines; the complainant did not. At some point, Burrow left the living room and went to her bedroom to go to sleep. Appellant went to Burrow's bedroom for a little while and then returned to the living room to hang out with Kirk and the complainant. When Kirk left the apartment at about 1:30 a.m., the complainant "was laying down on the couch, and [appellant] was sitting to the left of her," by her feet.

Kirk further testified that a "day or two" later, the complainant told him about the sexual assault. She was "crying, sobbing, [and] kind of shaking a little bit" when she told him. Later, Kirk spoke with a law enforcement officer and gave a witness statement about the events of that night.

Standard of Review

The Sixth Amendment to the United States Constitution guarantees the right to the reasonably effective assistance of counsel in criminal prosecutions. U.S. CONST. amend. VI; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also* TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05; *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (test for ineffective assistance of counsel same under both federal and state constitutions). To prove a claim of ineffective assistance of counsel, appellant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466

U.S. 668, 687–88, 694 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). 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). And "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).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. 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 falls within the range of reasonable professional assistance or trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006). To rebut that presumption, a claim of ineffective assistance must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. *See Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (internal quotations omitted).

The trial record alone is rarely sufficient to show ineffective assistance. *Williams v. State*, 526 S.W.3d 581, 583 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *see also Mata v.*

State, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007) (noting "presumption that trial counsel's performance was reasonably based in sound trial strategy"). Thus, because the reasonableness of trial counsel's decision often involves facts that do not appear in the appellate record, the Texas Court of Criminal Appeals has stated that trial counsel should ordinarily be given an opportunity to explain his actions before a court reviews the record and determines that counsel was ineffective. *See Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Where, as here, trial counsel is not given an opportunity to explain his actions, "the appellate court should not find deficient performance unless the challenged conduct was so outrageous that no competent attorney would have engaged in it." *Menefield*, 363 S.W.3d at 593 (internal quotations omitted); *accord Williams*, 526 S.W.3d at 583.

Ineffective Assistance of Counsel

In his sole issue, appellant argues that his trial counsel did not provide him with effective assistance of counsel because counsel (1) did not file any pretrial motions except for a motion in limine; (2) misused two peremptory strikes on jury panel members whom the trial court had already struck for cause; (3) did not object to the testimony of five witnesses who impermissibly bolstered the complainant's outcry testimony; and (4) did not object to certain portions of the State's closing argument.

Appellant first asserts that his trial counsel provided him ineffective assistance of counsel by not filing any pretrial motions except for a motion in limine. The failure to file pretrial motions generally does not amount to ineffective assistance of counsel because trial counsel may decide not to file pretrial motions as part of his trial strategy. *Mares v. State*, 52 S.W.3d 886, 891 (Tex. App.—San Antonio 2001, pet. ref'd) (decision not to pursue pretrial motions "is not categorically deemed ineffective assistance of counsel"); *Wills v. State*, 867 S.W.2d 852, 857 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *see also Houston v. State*, No. 03-04-00620-CR, 2006 WL 2504922, at *3 (Tex. App.—Austin Aug. 31, 2006, no pet.) (mem. op., not designated for publication).

Here, the record does not contain any evidence of appellant's trial counsel's strategy, and we must presume that counsel's performance was effective. *See Lopez*, 343 S.W.3d at 143; *see also Goodspeed*, 187 S.W.3d at 392 (in cases where record silent as to trial counsel's reasoning, appellate court should find ineffective assistance only if challenged conduct so outrageous that no competent attorney would have engaged in it); *Smith v. State*, 84 S.W.3d 36, 42 (Tex. App.—Texarkana 2002, no pet.) ("Without evidence of the strategy and methods involved concerning counsel's actions at trial, the court will presume sound trial strategy."). Thus, we hold that appellant has not established that trial counsel's performance fell below an objective standard of reasonableness because he did not file any pretrial motions

other than a motion in limine.[5] *See Miranda v. State*, 993 S.W.2d 323, 327–28 (Tex. App.—Austin 1999, no pet.) (defendant did not overcome strong presumption trial court's strategy reasonable where nothing in record revealed trial court's strategy with regard to his decision not to file pretrial motions).

Appellant next asserts that his trial counsel provided him with ineffective assistance of counsel during voir dire by wasting two of his peremptory strikes on jury panel members whom the trial court had already struck for cause. According to appellant, this resulted in certain jurors being seated on the jury that knew individuals who had experienced a sexual assault. For instance, one juror that may have been seated under these circumstances disclosed that her great-aunt had been "raped and murdered" twenty years before. That juror also stated that it would not affect her verdict.

Here, again, the record does not contain any evidence of appellant's trial counsel's strategy in utilizing his peremptory strikes, and we must presume that

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[5] Appellant, in his briefing, also does not explain how the pretrial motions that he believes should have been filed have merit, nor has he shown how obtaining a ruling on such motions would have changed the outcome of this case. "[U]nless . . . appellant shows that a pretrial motion had merit and that a ruling on the pretrial motion would have changed the outcome of the case," he cannot establish both prongs of the *Strickland* test. *Ex parte Hollowell*, No. 03-11-00240-CR, 2012 WL 1959309, at *3 (Tex. App.—Austin June 1, 2012, pet. ref'd) (mem. op., not designated for publication); *see also Keller v. State*, 125 S.W.3d 600, 608 (Tex. App.—Houston [1st Dist.] 2003) ("To establish ineffective assistance of counsel for failure to file a motion with the court, a defendant must demonstrate that he would have succeeded on the motion."), *pet. dism'd, improvidently granted*, 146 S.W.3d 677 (Tex. Crim. App. 2004).

counsel's performance was effective. *See Lopez*, 343 S.W.3d at 143; *see also Goodspeed*, 187 S.W.3d at 392; *Smith*, 84 S.W.3d at 42. Further, the Texas Court of Criminal Appeals has rejected two similar ineffective-assistance-of-counsel claims based on inadequate records. In *Murphy v. State*, the defendant's trial counsel used peremptory strikes against two jury panel members who counsel erroneously believed had been unsuccessfully challenged for cause. 112 S.W.3d 592, 600–01 (Tex. Crim. App. 2003). The Court of Criminal Appeals declared that, "[d]espite [trial] counsel's mistaken belief about the challenges for cause, he may have ultimately utilized peremptory strikes against [those jury panel members] for any number of legitimate reasons," leaving "at least the possibility" that his use of those peremptory strikes "was reasonable trial strategy." *Id*. (internal quotation omitted). Thus, the court deferred to the trial counsel's decision, concluding that counsel's performance was not deficient. *Id.* In *Goodspeed*, the defendant's trial counsel did not ask any questions of the jury panel during voir dire and exercised two of his ten peremptory strikes on prospective jurors who had already been excused by the trial court. 187 S.W.3d at 393–94. The Court of Criminal Appeals observed that trial counsel had not been given the opportunity to respond to the ineffective-assistance-of-counsel claim, and thus, it could not conclude that his performance was deficient. *Id.* at 394 (also noting, even if trial counsel's use of peremptory strikes constituted deficient performance, defendant still required to

show "that they harmed him" which he had not done). Following *Goodspeed* and *Murphy*, we hold that appellant has not established that his trial counsel's performance fell below an objective standard of reasonableness because he used his peremptory strikes on two jury panel members whom the trial court had already struck for cause.

Appellant also asserts that his trial counsel provided him with ineffective assistance of counsel because he did not object to certain testimony from five witnesses that appellant believes the State used to improperly bolster the complainant's credibility. The complained-of testimony comes from Stewart, the complainant's mother, Mueller, Burrow, and Kirk.

"To show ineffective assistance of counsel for the failure to object during trial, [appellant] must show that the trial [court] would have committed error in overruling the objection." *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004). A trial counsel's decision not to object to admissible evidence does not constitute ineffective assistance. *Oliva v. State*, 942 S.W.2d 727, 732 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd).

"Bolstering" refers to any evidence offered for the sole purpose of convincing the fact finder that a particular witness or other source of evidence is credible, "without substantively contributing to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would

be without the evidence." *Cohn v. State*, 849 S.W.2d 817, 819–20 (Tex. Crim. App. 1993) (internal quotations omitted). Bolstering does not include evidence that corroborates the accuracy of another witness's testimony or that "enhances inferences to be drawn from another source of evidence, in the sense that it has an incrementally further tendency to establish a fact of consequence." *Id.* at 820 (emphasis omitted).

Here, because of both the State's careful questioning of the witnesses and appellant's trial counsel's sustained objections, the testimony from Stewart, the complainant's mother, Mueller, Burrow, and Kirk about their interactions with the complainant in the days following the sexual assault centered on the complainant's demeanor and their own statements to her and not what the complainant told them. None of the complained-of testimony went directly to the complainant's truthfulness or was proffered for the sole purpose of convincing the jury of the complainant's credibility. Appellant has not met his burden to show that, had his trial counsel objected, the trial court would have erred in overruling his objection to the challenged testimony. Thus, we hold that appellant has not established that his trial counsel's performance fell below an objective standard of reasonableness because he did not object to the complained-of testimony from Stewart, the complainant's mother, Mueller, Burrow, and Kirk.

Finally, appellant asserts that his trial counsel provided him with ineffective assistance of counsel because he did not object to certain portions of the State's closing argument.

Proper jury argument generally falls within one of four areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to an argument of opposing counsel, and (4) plea for law enforcement. *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019). Proper jury argument is not objectionable, and trial counsel cannot be ineffective for not objecting to it. *Weinn v. State*, 281 S.W.3d 633, 640–41 (Tex. App.—Amarillo 2009), *aff'd on other grounds*, 326 S.W.3d 189 (Tex. Crim. App. 2010); *see also Smith v. State*, Nos. 01-05-01095-CR, 01-05-01096-CR, 2007 WL 79475, at *12 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, pet. ref'd) (mem. op., not designated for publication) (argument constituted "summation of the evidence and reasonable deductions from the evidence" and counsel's not objecting not ineffective assistance).

Appellant asserts that trial counsel should have objected to the portion of the State's closing argument where it referenced the testimony of witnesses—Stewart, the complainant's mother, Mueller, Burrow, and Kirk—who interacted with the complainant in the days following the sexual assault, stressing to the jury that the testimony of each witness "corroborates" the complainant's testimony. According to appellant, this argument by the State constitutes improper bolstering, but when

read in context, the State's argument is not about the veracity of the complainant's description of the sexual assault. Rather, it is a summation of the evidence, highlighting the consistency in the descriptions of the complainant's behavior and apparent emotional state based on a reasonable deduction from the evidence. The State, in its argument to the jury, may opine on a witness's credibility or the truth of a witness's testimony if the opinion is based on reasonable deductions from the evidence and does not constitute unsworn testimony. *Thomas v. State*, 445 S.W.3d 201, 211 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). Because the complained-of portion of the State's argument did not constitute improper jury argument, we cannot conclude that appellant's trial counsel's performance was deficient. Thus, we hold that appellant has not established that his trial counsel's performance fell below an objective standard of reasonableness because he did not object to the complained-of portion of the State's closing argument.

Appellant also asserts that his trial counsel should have objected to the portion of the State's closing argument stating:

> As a prosecutor, my role is to do what I believe is just and fair. It's not always to seek a conviction. Sometimes it's to dismiss a case, sometimes it's to decline a case, and sometimes it's to pursue that case. A lot of times it's to pursue that case.

But this statement, contrary to appellant's assertion, does not opine on whether the State believed that the complainant was telling the truth; it rebutted appellant's trial counsel's argument that the State was only concerned with obtaining a conviction

even without evidence to support the conviction. Because the complained-of portion of the State's argument did not constitute improper jury argument, we cannot conclude that appellant's trial counsel's performance was deficient. Thus, we hold that appellant has not established that his trial counsel's performance fell below an objective standard of reasonableness because he did not object to the complained-of portion of the State's closing argument.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Kelly, Landau, and Countiss.

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