TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00732-CR

Robert Lee Sabins, Appellant

v.

The State of Texas, Appellee

FROM THE 207TH DISTRICT COURT OF COMAL COUNTY
NO. CR2016-851, THE HONORABLE GARY L. STEEL, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Robert Lee Sabins was indicted for multiple child sexual abuse offenses—five counts of sexual assault of a child, *see* Tex. Penal Code § 22.011(a)(2), and one count of indecency with a child by sexual contact, *see id.* § 21.11(a)(1)—for engaging in sexual activities with his cousin's fifteen-year-old daughter, K.H. In an open plea to the court, appellant pled guilty to all six counts. The trial court found appellant guilty and, after hearing punishment evidence, sentenced appellant to confinement in the Texas Department of Criminal Justice for twenty years for each of the sexual assaults and ten years for the indecency with a child, *see id.* §§ 12.33, 21.11(d), 22.011(f), and ordered some of the sentences to be served consecutively, *see id.* § 3.03(b)(2)(A). On appeal, appellant argues that the trial court erred in "not allowing" his oral motion for new counsel and complains that his trial counsel rendered ineffective assistance. We affirm the trial court's judgments of conviction.

BACKGROUND

Appellant was indicted in November of 2016. He received appointed counsel the following month pursuant to the county's "client choice program," which allows an indigent defendant to select an attorney from a list of approved attorneys by listing, in order of preference, the names of three attorneys. The attorney appointed to represent appellant was the attorney that appellant listed as his first choice.[1]

The case proceeded to trial. On the day of jury selection, after the venire panel had been qualified, appointed counsel informed the trial court that appellant was being uncooperative, stating that appellant would "have to be dragged out" of the holding cell because "[h]e doesn't want to come out." Appellant was brought before the court. The judge explained to appellant that the case was set for jury trial. He admonished appellant about appropriate courtroom behavior, advised him about the consequences of inappropriate behavior, and encouraged him to cooperate with his attorneys. The judge expressed his opinion that, because of the prior "eight jury [trial] settings" in this case, appellant's appointed attorneys—chosen by appellant—were "ready to go to trial." The judge also explained that, based on his prior experience with these attorneys in his courtroom, he knew that they were qualified to represent appellant.

The judge then informed appellant:

> So what I'm going to do is I'm going to send you back and I'm going to send your attorneys back and I want you to talk to them about two or three things. Number one is I understand there's a plea offer including just open with no deferred adjudication and going in front of me.

[1] The record reflects that, although not formally appointed, a lawyer from appointed counsel's law firm assisted in the representation of appellant.

> If you want a jury trial, then you need to decide whether you want the jury to determine punishment or whether you want me to determine punishment.[2] You need to decide whether you're going to sign an application for probation.
>
> If you don't sign that, you don't get — you don't even — nobody considers it. The jury doesn't consider it and I don't consider it. You need to sign that. And you need to assist them in whatever way you can so they can prepare for the case.
>
> Do you understand me?

Appellant said that he understood.

He then sought permission to address the court. The judge reminded appellant that he had a Fifth Amendment right to remain silent but granted him permission to speak. Appellant complained that he had "been in jail for a long time," had not "been to this courthouse in over a year," and had not "been in this courtroom . . . to speak [his] opinion or state [his] case." He said that he had repeatedly asked his counsel to remove himself from his case and had "even wrote [sic] the district clerk up here to help [him] with this."[3] He told the court that he had not seen any discovery and was "kind of walking blind."

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[2] At a later point during the exchange, appellant's counsel informed the court that an election for the jury to assess punishment had been filed. The record reflects that the election was filed one week before the trial setting.

[3] The record reflects that the clerk's office received a letter from appellant—addressed to the district clerk—in which he complained that he did not believe that his court-appointed attorney had filed a motion to remove himself as appellant's attorney (despite several requests by appellant for him to do so) or "done anything else" that appellant had requested him to do. He expressed that his attorney "ma[de] him nervous" and that he had "zero confidence" in counsel's ability to represent him. Handwritten notations on the letter reflect that "no action [was] taken" on the letter and that it was "not presented to [the] court."

The record also reflects that appointed counsel filed a motion to withdraw, but no ruling on the motion appears in the record.

The trial judge commented on appellant's prior refusal to cooperate with his attorneys: "My understanding is they've tried to talk to you four times in the last week or so and you've chosen not to talk to them so that's on you." Appellant responded, complaining that

> they just keep repeating the same things they said a year ago and that's not — that's not — I'm asking for them to be proactive, to make the contacts I asked them to make, to do the things that I asked them to do and to keep me informed and communicate and that is not happening, Your Honor.

He also described an incident when counsel visited him in jail that "did not make [him] feel very comfortable as him representing me" and expressed that he did "not feel comfortable with this situation."

The trial judge indicated that he understood appellant's complaints but explained that "it's too late for that" and that the case was "going to trial." He informed appellant that the court would give his attorneys "as long as they need" to confer with appellant "to go over whatever [they] need to go over." He then directed appellant's counsel to "go talk to [appellant] and get ready for trial." After giving that directive, the court recessed the proceeding.

When the proceeding resumed, appellant was out of the courtroom, but one of his attorneys was present. The court asked if the parties were ready for voir dire. Appellant's counsel informed the court that his partner was still conferring with appellant and that "[i]t sounds like he may accept an offer of an open plea." The judge explained that if appellant accepted "the offer of an open plea," he planned to proceed that day, rather than resetting the case for a later punishment hearing. A discussion regarding scheduling of witnesses then ensued off the record. The court then brought in the venire panel, with the jurors seated in order, to allow the parties to assess whether they wanted a jury shuffle. After that, the court excused the venire panel for lunch and recessed the proceeding.

The judge advised the parties when to return following the lunch break, and, at that point, appellant's appointed counsel, who had been conferring with appellant outside the courtroom, advised the court and the State that appellant "wants to plead guilty and go to [the court] for punishment . . . and plead open." The court recessed the proceeding to allow appellant to complete the plea paperwork.

When the proceeding resumed for the plea, the trial court reviewed the completed plea paperwork with appellant, beginning with the trial court's certification of appellant's right to appeal. The judge informed appellant that he was marking the option on the certification form that indicated, "This is a plea bargain case, but the trial court has given permission to appeal. The defendant has the right to appeal punishment only."[4] He confirmed with appellant that he knew that the document represented to the court that he understood that he "will not have the right to appeal the guilt/innocence in [his] case, but if anything goes awry in the punishment phase [he was] reserving the right to appeal that."

The court then reviewed a document entitled *Admonishments, Voluntary Statements, Waivers, Stipulations, Judicial Confession and Plea Bargain Agreement* with appellant. In that document, appellant judicially confessed to the charged crimes and waived various rights, including his right to appeal. In reviewing the document with appellant, the trial court explained appellant's constitutional rights to him:

> THE COURT: And you understand that you have a constitutional right to a trial by jury?

[4] The trial court's certification in the record has checked the option indicating that "this criminal case is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal." A handwritten notation stating "punishment only" with the judge's initials appears next to it.

[APPELLANT]: Yes, sir, I do.

THE COURT: As a matter of fact, we've got a panel coming in at 12:30 ready to go. And you understand that?

[APPELLANT]: Correct.

THE COURT: And you understand that you have a constitutional right to confront the witnesses against you?

[APPELLANT]: Yes, sir.

THE COURT: Are you willing to waive both of those constitutional rights for the purpose of entering into this —

[APPELLANT]: I am —

THE COURT: — negotiated plea agreement?

[APPELLANT]: I am, Your Honor.

After appellant affirmed his waivers, the judge remarked, "The plea agreement will speak for itself, but it is an open plea with no agreed recommendation; no deferred adjudication; and you are not probation eligible from the Court." In reviewing the punishment range with appellant, the court verified with counsel that the sentences were "stackable" and, after a brief explanation, confirmed with appellant that he understood that the punishment range was "as short as two years and as long as 120 years."

The following exchange then occurred with appellant:

THE COURT: Do you know I'm not obligated to follow this agreement?

[APPELLANT]: I agree. Yes, sir, I do.

THE COURT: If I do follow this agreement, do you understand you will have waived any and all rights to appeal regarding the guilt/innocence of this phase —

[APPELLANT]: Yes, sir.

THE COURT: — or of the trial?

[APPELLANT]: Yes, sir.

Next, the court questioned appointed counsel about appellant's competency and confirmed that appellant "clearly underst[ood] how this open plea work[ed]" and that appellant was advised about the possibility of consecutive sentences. The court then accepted appellant's plea:

THE COURT: Then, [appellant], based upon this negotiated plea agreement, how do you plead as to Counts I, II, III, IV, V and VI in Cause No. 16-851?

[APPELLANT]: Guilty, Your Honor.

THE COURT: Are you pleading guilty because you are guilty and for no other reason?

[APPELLANT]: To an extent, yes, sir, I am.

THE COURT: Do you have any problem with "to an extent"?

[PROSECUTOR]: Judge, I think it needs to be clear on the record.

THE COURT: Are you pleading guilty to Counts I through VI because you are guilty and for no other reason?

[APPELLANT]: Yes, sir.

The State offered exhibits in support of the guilty plea—which included a sealed exhibit containing the police and lab reports—that were admitted without objection. The court found appellant guilty of all the charged offenses and recessed the proceeding until the punishment hearing the following day.

During the punishment hearing, K.H. described appellant's sexual abuse of her when she was fifteen and discussed how it impacted her.[5] K.H.'s younger brother testified about K.H.'s disclosure of the sexual abuse to him. In addition, K.H.'s mother testified about how she learned about the sexual abuse, how she confronted appellant with that discovery (and his response), how her daughter's behavior changed as a result of the abuse, and how the entire family had been impacted by the abuse. Appellant presented the testimony of a psychologist who conducted a sex-offender evaluation and risk assessment of appellant. He testified that his evaluation indicated that appellant was at a low risk to sexually re-offend.

In closing argument, appellant's counsel sought sentences on "the lower end," citing as mitigation appellant's background and the circumstances of appellant's life at the time of the offenses. The State asked for eighteen-year sentences on the five counts of sexual assault of a child and a ten-year sentence on the indecency count and asked the court to stack all of the sentences. The trial court sentenced appellant to twenty years' imprisonment for each of the sexual-assault offenses and ten years' imprisonment for the indecency offense. In response to the State's request to cumulate the sentences, the trial court ordered two of the sexual-assault sentences and the indecency sentence to run consecutively—for a total of fifty years—with the remaining sexual-assault sentences to run concurrently.

Appellant filed a motion for new trial, which was overruled by operation of law. *See* Tex. R. App. P. 28.1(c). This appeal followed.

[5] The record reflects that appellant was thirty-five years old at the time of the alleged offenses.

DISCUSSION

Appellant raises two points of error on appeal. In his first point of error, he asserts that the trial court erred in "not entertaining" his oral motion for new counsel. In his second point of error, appellant claims that his trial attorney rendered ineffective assistance during both the guilt-innocence and punishment phases of trial.

As a preliminary issue, we first address the State's contention that we lack jurisdiction to consider appellant's complaints not related to the punishment hearing because appellant waived his right to appeal and the trial court granted permission for appellant to appeal only punishment-related matters.

Waiver of Right to Appeal

Generally speaking, a criminal defendant has a statutory right to appeal. *See* Tex. Code Crim. Proc. art. 44.02; *see also* Tex. R. App. P. 25.2(a)(2). However, a defendant in a non-capital case may waive any rights secured to him by law. Tex. Code Crim. Proc. art. 1.14(a). Thus, the right to appeal may be waived, and such a waiver is valid if made voluntarily, knowingly, and intelligently. *Carson v. State*, 559 S.W.3d 489, 492–93 (Tex. Crim. App. 2018); *Ex parte Delaney*, 207 S.W.3d 794, 796-97 (Tex. Crim. App. 2006). A valid waiver will prevent the defendant from appealing any issue unless the trial court consents to the appeal. *Carson*, 559 S.W.3d at 493 (citing *Monreal v. State*, 99 S.W.3d 615, 617 (Tex. Crim. App. 2003)); *Ex parte Broadway*, 301 S.W.3d 694, 697 (Tex. Crim. App. 2009).

"[A] defendant may knowingly and intelligently waive his appeal as part of a plea when consideration is given by the State, even when sentencing is not agreed upon." *Carson*, 559 S.W.3d at 494 (citing *Broadway*, 301 S.W.3d at 699); *see Jones v. State*, 488 S.W.3d 801,

805 (Tex. Crim. App. 2016) (explaining that presentence waivers of right of appeal have been upheld when record showed defendant received consideration for waiver pursuant to plea agreement). Plea-bargain agreements are not limited to those arising under Texas Rule of Appellate Procedure 25.2, which defines "a plea bargain case" as "a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant." Tex. R. App. P. 25.2(a)(2). The Court of Criminal Appeals has recognized that a plea-bargain agreement can be "a more global plea agreement based on consideration other than an agreed punishment recommendation." *Jones*, 488 S.W.3d at 808; *see Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003) (observing that, in addition to charge-bargaining and sentence-bargaining, "[t]here can be other kinds of plea bargains that include other considerations").

Under the Code of Criminal Procedure, a defendant may not unilaterally waive the right to a jury trial—the State (and the court) must consent to the waiver. *Broadway*, 301 S.W.3d at 698; *see* Tex. Code Crim. Proc. art. 1.13(a). In view of that, the State's agreement to forgo a jury trial (by consenting to the defendant's waiver of jury trial) may constitute consideration that can support a plea agreement. *See, e.g.*, *Carson*, 559 S.W.3d at 496 (concluding that appellant "negotiated a bargain of a different sort" because appellant's waiver of right to appeal was made in exchange for consideration given by State in form of its waiver of its right to jury trial and, thus, appellant's waiver was voluntary, knowing, and intelligent); *Broadway*, 301 S.W.3d at 697–98 (recognizing that, although plea agreement did not constitute traditional plea-bargain agreement, "a bargain of a different sort" existed because "the State's waiver of its right to a jury trial was consideration given in exchange for the defendant's waiver of his right to an appeal"). However, "[c]onsent to proceed to a bench trial, thus waiving the

right to a jury trial, by itself is not sufficient to qualify as consideration for defendant's waiver of his right to appeal." *Carson*, 559 S.W.3d at 494. "Rather, the record must show that the State gave up its right to a jury in exchange for the defendant's waiver of his appeal." *Id.*; *see Washington v. State*, 363 S.W.3d 589, 590, nn.2–3 (Tex. Crim. App. 2012) (per curiam) (noting that record must confirm that State gave consideration for defendant's waiver of appeal).

To determine the validity of a waiver of a right to appeal and the terms of any agreement between appellant and the State, we consider the written plea documents and the formal record in light of general contract law principles. *Jones*, 488 S.W.3d at 805; *Ex parte De Leon*, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013).

In this case, although the trial judge did not expressly reference the terms of the plea agreement on the record during the plea proceeding, he communicated his understanding of a "plea offer including . . . going in front of [the court]" and referred to the "negotiated plea agreement" twice when accepting appellant's plea. The record reflects that, on the day of jury selection, after appellant had previously elected to have the jury assess his punishment, the State extended its plea offer for appellant to plead guilty open to the court—as the venire panel was waiting and the parties were preparing for voir dire. Appellant represented to the court and the State that he was accepting that plea offer and pleading open to the court. In the plea paperwork, appellant stated, "This plea is made pursuant to a plea bargain," and affirmed that he understood his right to appeal but, "having entered into a plea agreement with the State and as part of that agreement," waived that right to appeal.

We conclude that the exchanges during the plea proceeding combined with the documents in the record are adequate to show that the State's waiver of a jury trial was given as consideration for appellant's waiver of his right of appeal as part of a negotiated plea agreement.

See Jones, 488 S.W.3d at 807; *Broadway*, 301 S.W.3d at 699; *see, e.g.*, *Lopez v. State*, 595 S.W.3d 897, 901 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd) (concluding that language in plea paperwork demonstrated that State's waiver of jury trial was part of negotiated plea bargain and, therefore, appellant's waiver of right to appeal was valid). Appellant's waiver of his right to appeal was voluntary, knowing, and intelligent. Because the trial court accepted the plea-bargain agreement, the waiver of the right of appeal was binding on appellant. *See Jones*, 488 S.W.3d at 807.

Accordingly, appellant needed the trial court's consent to appeal. *See Carson*, 559 S.W.3d at 493; *Monreal*, 99 S.W.3d at 617. Here, both the record of the plea proceeding and the trial court's certification of appellant's right to appeal reflect that the trial court granted appellant permission to appeal "punishment only." The trial court did not give consent for appellant to appeal any non-punishment issues. We agree with the State that appellant's right to appeal is limited to claims relating to the punishment phase of trial. For that reason, we address only the second part of appellant's second point of error in which he claims that he received ineffective assistance of counsel during the punishment phase of trial.

Ineffective Assistance of Counsel

During the punishment hearing, appellant's counsel called as an expert witness Stephen Thorne, a psychologist who conducted a sex-offender evaluation and risk assessment of appellant. In the second part of his second point of error, appellant contends that his trial counsel rendered ineffective assistance by calling Dr. Thorne as a witness. Citing to portions of the State's cross-examination, he argues that "the defense witness became a witness for the State."

To establish ineffective assistance of counsel, an appellant must demonstrate by a preponderance of the evidence both deficient performance by counsel and prejudice suffered by the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). The appellant must first demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88; *Ex parte Scott*, 541 S.W.3d 104, 115 (Tex. Crim. App. 2017). The appellant must then show the existence of a reasonable probability—one sufficient to undermine confidence in the outcome—that the result of the proceeding would have been different absent counsel's deficient performance. *Strickland*, 466 U.S. at 694; *Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700; *see Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010).

Appellate review of counsel's representation is highly deferential; we must "indulge in a strong presumption that counsel's conduct was *not* deficient." *Nava v. State*, 415 S.W.3d 289, 307–08 (Tex. Crim. App. 2013); *see Strickland*, 466 U.S. at 689. 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. *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012); *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Rarely will the trial record by itself be sufficient to demonstrate an ineffective-assistance claim. *Nava*, 415 S.W.3d at 308; *see Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017) (observing that record on direct appeal "is generally insufficient to show that counsel's performance was deficient"). If trial counsel has not been afforded the opportunity to explain the reasons for his conduct, we will not find him to be deficient unless the

challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308 (quoting *Menefield*, 363 S.W.3d at 593); *Goodspeed*, 187 S.W.3d at 392.

The crux of Dr. Thorne's testimony on direct examination was that, based on the results of the sex-offender evaluation and risk assessment that he conducted on appellant, he believed that appellant presented a low risk of sexually re-offending. Further, through the psychologist's testimony, trial counsel elicited mitigating evidence concerning appellant's background, including childhood exposure to alcoholism and family violence as well as significant life experiences that occurred just before he committed the instant offenses.[6] Counsel also established that, given the dynamics behind appellant's sexual deviancy, he could benefit from sex-offender treatment.

As expected, on cross-examination the State's attorney attempted to undermine Dr. Thorne's opinion about appellant's low recidivism risk. The prosecutor questioned Dr. Thorne about weaknesses of the test that he administered to appellant. The doctor conceded that no assessment tool is perfect for predicting recidivism and acknowledged the limitations of the test that he administered to appellant. The prosecutor also questioned Dr. Thorne about various factors affecting the basis of his opinion, including extraneous bad acts by appellant (a 2004 evading arrest and a jail report indicating that appellant had been moved at the request of other inmates) about which the doctor was apparently unaware. However, through questioning on re-direct, appellant's counsel minimized the significance of these bad acts by establishing the

[6] Evidence in the record indicates that appellant's mother died several years before the instant offenses occurred and that appellant's father had been investigated as a suspect in her death before he died shortly before these offenses. The evidence further reflects that appellant's sexual activity with K.H. began when the family gathered for his father's memorial service.

negligible effect that these types of non-violent non-sexual acts would have on the risk assessment that Dr. Thorne had conducted.

While appellant laments that counsel's decision to call Dr. Thorne as a witness allowed additional bad acts to be presented against him[7] and "provided a platform for presenting [appellant] as a predator," overall, the record reflects nothing more than the typical rigorous cross-examination of an expert witness. It does not demonstrate, as appellant contends, that Dr. Thorne "became a witness for the State."

Moreover, the decision to call a witness is generally a matter of trial strategy. *Carter v. State*, 506 S.W.3d 529, 541 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *Joseph v. State*, 367 S.W.3d 741, 744 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (same). Trial counsel's decision here to call Dr. Thorne as a witness was "a strategic choice that involved weighing the risks and benefits of his testimony." *See Prine*, 537 S.W.3d at 118; *see also Prine v. State*, 494 S.W.3d 909, 930 (Tex. App.—Houston [14th Dist.] 2016) (Frost, C.J., dissenting) ("The decision to call a witness to testify is fraught with risks. . . . Sometimes a witness's testimony is something of a mixed bag but key parts are necessary to achieve a particular goal, even though the witness also might give damaging testimony."), *rev'd*, 537 S.W.3d 113 (Tex. Crim. App. 2017). The Court of Criminal Appeals has recognized that "[e]valuating such risks and benefits 'is exactly the type of strategic decision that ordinarily requires courts to evaluate an attorney's explanations before concluding counsel was ineffective.'" *Prine*, 537 S.W.3d at 118 (quoting *Prine*, 494 S.W.3d at 930 (Frost, C.J., dissenting)).

[7] The record reflects that at the time of his plea, appellant had additional child sexual abuse charges pending against him in other jurisdictions for further sexual activities he engaged in with K.H. at various family properties. Trial counsel discussed these extraneous acts with Dr. Thorne during direct examination.

In this case, although appellant filed a motion for new trial, a claim of ineffective assistance of counsel was not raised. Thus, the record is silent as to the reasons underlying trial counsel's decision to call Dr. Thorne as a witness and, therefore, is silent as to whether there were strategic reasons for counsel's decision or what the particular trial strategies were. However, the record does reflect that Dr. Thorne's testimony provided favorable evidence about appellant's low risk of sexually re-offending as well as mitigating evidence on appellant's behalf. Trial counsel may have reasonably concluded that such evidence was beneficial to his client and worth the risk of a potentially damaging cross-examination. Absent record evidence regarding counsel's strategy or reasoning, we will presume he exercised reasonable professional judgment. *See Hill v. State*, 303 S.W.3d 863, 879 (Tex. App.—Fort Worth 2009, pet. ref'd); *Poole v. State*, 974 S.W.2d 892, 902 (Tex. App.—Austin 1998, pet. ref'd); *see also Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

The bottom line is that trial counsel "faced a dilemma in the punishment phase of this case" when deciding whether to call Dr. Thorne as an expert witness, and "[t]he facets of that dilemma are not fully revealed by the record before us." *See Prine*, 537 S.W.3d at 118. Because the record before this Court is not sufficiently developed to allow us to evaluate trial counsel's decision to call Dr. Thorne as a witness, appellant has failed to rebut the strong presumption of reasonable assistance. *See id.* at 117 (noting that to demonstrate deficient performance defendant must overcome strong presumption that counsel's conduct fell within wide range of reasonable professional assistance and that conduct constituted sound trial strategy).

"In the face of an undeveloped record, counsel should be found ineffective only if his conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id.*

(quoting *Goodspeed*, 187 S.W.3d at 392). The record before us does not support a conclusion that trial counsel's decision to put Dr. Thorne on the stand was so outrageous that no other attorney would have done the same. *See id.* at 118; *see also Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012) ("The mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel."). We conclude that, on this record, appellant has failed to demonstrate deficient performance on the part of his trial counsel. Thus, he has failed to establish ineffective assistance of counsel.[8] We overrule appellant's second point of error as it relates to ineffective assistance during the punishment phase of trial.

CONCLUSION

Having concluded that appellant's appeal is limited by his valid waiver of his right to appeal and the trial court's permission to appeal only punishment-related matters and further concluding that appellant failed to establish that his trial counsel rendered ineffective assistance during the punishment phase of trial, we affirm the trial court's judgments of conviction.

[8] Because appellant failed to meet his burden on the first prong of *Strickland* concerning deficient performance, we do not consider the requirements of the second prejudice prong. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

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Melissa Goodwin, Justice

Before Justices Goodwin, Kelly, and Smith

Affirmed

Filed: June 25, 2020

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