In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00157-CR

KHADIJAH WRIGHT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Bowie County, Texas
Trial Court No. 18F0377-005

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

A Bowie County jury found Khadijah Wright guilty of injury to a child causing death by omission and assessed a sentence of ninety-nine years' imprisonment. *See* TEX. PENAL CODE ANN. § 22.04. On appeal, Wright argues that her trial counsel rendered ineffective assistance. We conclude that Wright has inadequately briefed two of the four grounds of alleged ineffective assistance and that the silent record does not meet Wright's burden to prove the remaining two grounds of ineffective assistance of counsel. As a result, we affirm the trial court's judgment.

"The applicant has the burden to prove ineffective assistance of counsel by a preponderance of the evidence." *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011) (quoting *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)). The right to counsel does not mean the right to errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). Thus, to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*. 466 U.S. 668, 687–88 (1984); *see also Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009).

The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. This requirement can be difficult to meet since there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Counsel "should ordinarily be afforded an opportunity to explain his actions before being" found ineffective. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). "When an appellate record is silent on why trial counsel failed to take certain actions, the appellant has 'failed to rebut the presumption that trial counsel's decision was in some way—be it conceivable or not—reasonable.'" *Clark v. State*, 592 S.W.3d

919, 930 (Tex. App.—Texarkana 2019, pet. ref'd) (quoting *Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007)). The reason is that complaints that an attorney was ineffective cannot succeed unless they are "firmly founded in the record." *Id.* (quoting *Bone v. State*, 77 S.W.3d 828, 833 n.13 (Tex. Crim. App. 2002)); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)). "We will not second-guess through hindsight the strategy of counsel at trial, nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness." *Blackmon v. State*, 80 S.W.3d 103, 108 (Tex. App.—Texarkana 2002, pet. ref'd). "If this Court 'can conceive potential reasonable trial strategies that counsel could have been pursuing,' then we cannot conclude that counsel's performance was deficient." *Turner v. State*, 528 S.W.3d 569, 577 (Tex. App.—Texarkana 2016, no pet.) (quoting *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005)).

The second *Strickland* prong, sometimes called "the prejudice prong," requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id*. Thus, to establish prejudice,

> an applicant must show "that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result was reliable." [*Strickland*, 466 U.S.] at 687 . . . . It is not sufficient for Applicant to show "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693 . . . . Rather, [he] must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

Martinez, 330 S.W.3d at 901.

A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). "Thus, we need not examine both *Strickland* prongs if one cannot be met." *Turner*, 528 S.W.3d at 577 (citing *Strickland*, 466 U.S. at 697).

Here, Wright raises several grounds of ineffective assistance, including that counsel failed to object to the admission of Wright's voluntary confession, to attend certain pretrial hearings, to make an opening statement or present witnesses during guilt/innocence, and to call mitigation witnesses, other than an expert witness at punishment. We find that (1) Wright has forfeited her first two grounds of ineffective assistance and (2) the record does not support the remaining grounds arguing ineffective assistance.

(1) Wright Has Forfeited Her First Two Grounds of Ineffective Assistance

"To avoid forfeiting a legal argument for inadequate briefing, an appellant's brief must contain 'a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.'" *Taylor v. State*, 558 S.W.3d 215, 218 (Tex. App.—Texarkana 2018, no pet.) (quoting TEX. R. APP. P. 38.1(i)) (citing *Lucio v. State*, 351 S.W.3d 878, 896–97 (Tex. Crim. App. 2011); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008); *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000)). "Because the Texas Court of Criminal Appeals has emphasized that an appellate court has no obligation to construct and compose issues, facts, and arguments for an appellant, encompassed within Rule 38.1 is the party's task of explaining or discussing why an argument has substance." *Id.* (citing *Wolfe v. State*, 509 S.W.3d 325, 343 (Tex. Crim. App. 2017); *Lucio*, 351 S.W.3d at 896–97; *Busby*, 253 S.W.3d at 673).

"To avoid forfeiture, a party must provide substantive analysis by applying the law to the facts." *Id.* (citing *Linney v. State*, 413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (Cochran, J., concurring in refusal to grant petition for discretionary review)). "A brief that fails to apply the law to the facts does not comply with Rule 38.1 and presents nothing for review." *Id.* (citing *Swearingen v. State*, 101 S.W.3d 89, 100 (Tex. Crim. App. 2003)).

In her first ground, Wright argues that counsel was ineffective because she failed to suppress or object to the admission of her voluntary confession. To meet her burden under *Strickland*, Wright must show that a challenge to the admission of her voluntary confession was warranted. Yet, Wright does not explain whether any basis for such a challenge existed. As a result, she has failed to make a clear and concise argument that counsel had reason to challenge the admission of her voluntary confession.

Also, "[a] trial counsel's failure to file a motion to suppress is not per se ineffective assistance of counsel." *Wert v. State*, 383 S.W.3d 747, 753 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986)). "Counsel is not required to engage in the filing of futile motions." *Id.* (citing *Mooney v. State*, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991)). To "prevail on an ineffective assistance claim premised on counsel's failure to file a motion to suppress, an appellant must show by a preponderance of the evidence that the motion to suppress would have been granted and that the remaining evidence would have been insufficient to support his conviction." *Id.* (citing *Jackson v. State*, 973 S.W.2d 954, 956–57 (Tex. Crim. App. 1998)). Wright fails to present any analysis of this issue.

Because conclusory statements do not lay the predicate for an ineffective-assistance claim, Wright has forfeited this ground of ineffective assistance. *See Lucio*, 351 S.W.3d at 896; *Ruiz v.*

State, 293 S.W.3d 685, 693 (Tex. App.—San Antonio 2009, pet. ref'd) (complaint waived where defendant's brief "contain[ed] no argument or authorities" to support contention that his counsel was ineffective); *Tufele v. State*, 130 S.W.3d 267, 270–71 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (ineffective-assistance-of-counsel complaint waived for inadequate briefing).

Wright also complains of her counsel's failure to appear at several pretrial hearings because "[a]bsence from such hearings deny the defendant vital assistance in their process through the criminal justice system." The argument is unsupported by citation to authority or any explanation of how failure to appear at pretrial hearings—a fact of which the jury was unaware—led to a different result in this jury trial during which counsel was present. As a result, by failing to brief the second prong of *Strickland* with respect to this ground of ineffective assistance, Wright has forfeited it. *See Bessey v. State*, 199 S.W.3d 546, 555 (Tex. App.—Texarkana 2006), *aff'd*, 239 S.W.3d 809 (Tex. Crim. App. 2007) (finding inadequate briefing where appellant made no effort to show how record demonstrated prejudice under *Strickland*'s second prong); *Peake v. State*, 133 S.W.3d 332, 334 (Tex. App.—Amarillo 2004, pet. ref'd) (overruling appellant's claim of ineffective assistance of counsel due to inadequate briefing while noting that the appellate court has "no duty to unilaterally fill the void appellant left" by his briefing).

The first two issues on appeal are overruled.

(2) The Record Does Not Support the Remaining Grounds Arguing Ineffective Assistance

The remaining issues are not supported by the record.

Wright complains that counsel reserved opening statement, did not present a single witness during the guilt/innocence phase of trial, and did not address the jury until closing argument.

Wright essentially argues that, by these omissions, counsel failed to present a defense. We find that this silent record does not support Wright's ground of ineffective assistance.

"Whether to deliver an opening statement is entirely optional." *Darkins v. State*, 430 S.W.3d 559, 570 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (citing *Calderon v. State*, 950 S.W.2d 121, 127 (Tex. App.—El Paso 1997, no pet.) ("The option for defense counsel to deliver an opening statement immediately after the State makes its opening statement is entirely discretionary.")). "Few matters during a criminal trial could be more imbued with strategic implications than the exercise of this option." *Id*. (quoting *Calderon*, 950 S.W.2d at 127). Because we will not second-guess counsel's trial strategy through hindsight, we conclude that "[c]ounsel's failure to make an opening statement was not conduct 'so outrageous that no competent attorney would have engaged in it.'" *Id*. (citing *Goodspeed*, 187 S.W.3d at 392).

Also, when challenging counsel's failure to call witnesses, "an 'applicant must show that [the witnesses] had been available to testify and that [their] testimony would have been of some benefit to the defense.'" *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007) (per curiam) (quoting *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004)). Absent such a showing, "[a] claim of ineffective assistance based on trial counsel's failure to call a witness cannot succeed." *Barnett v. State*, 344 S.W.3d 6, 14 (Tex. App.—Texarkana 2011, pet. ref'd). Because Wright has failed to make any showing that any witnesses were available to testify in her defense, she cannot meet the first *Strickland* prong. Accordingly, we overrule this ground of alleged ineffective assistance.

In her last ground of ineffective assistance, Wright argues that counsel should have called more witnesses than Alauna Curry, including siblings, co-workers, friends, her pastor, or church

members to present mitigating evidence. She also asserts that counsel should have subpoenaed her ailing mother who was on dialysis.

During punishment, defense counsel called Curry, a professor at Baylor College of Medicine who specialized in psychological trauma, post-traumatic stress disorder, and anxiety, to testify in Wright's defense. Curry assessed Wright and diagnosed her with major depressive disorder and post-traumatic stress disorder due to psychological traumas experienced by Wright since childhood. Curry testified that Wright was devastated by growing up without a father, being raped at nineteen, and suffering multiple instances of domestic violence. Curry also testified that Wright, who was twenty-four at the time of the incident, had attempted suicide twice. Curry also clarified that Wright had no prior history of arrests.

Wright's brief assumes that other witnesses could have presented mitigating evidence or corroborated Curry's testimony, but the record before this Court does not reflect that any additional mitigating evidence existed.[1] "If a reviewing court can speculate about the existence of further mitigating evidence, then it just as logically might speculate about the existence of further aggravating evidence." *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). However, "[i]neffective assistance of counsel claims are not built on retrospective speculation; they must 'be firmly founded in the record.'" *Id.* (citing *Thompson*, 9 S.W.3d at 813–14). "That record must

[1]The record also does not show that if mitigating evidence existed, trial counsel could not have reasonably determined that the potential benefit of such evidence outweighed the risk of unfavorable counter-testimony. Curry testified that Wright's "family and other sisters had a reputation for being easy to have sex with" and that her alleged rapist had sex with her family members, including her sister. During its cross-examination, the State insinuated that her family members said Wright was in a dating relationship with her alleged rapist, casting doubt on the allegation. Based on this information, even assuming that there was additional mitigating evidence to present, counsel could have concluded that it was possible that testimony from family members and others would not be favorable to Wright and could potentially unravel Curry's mitigating diagnoses of Wright's mental health.

itself affirmatively demonstrate the alleged ineffectiveness." *Id.* Because the record itself does not affirmatively demonstrate that there was mitigating evidence trial counsel failed to present, Wright has failed to satisfy the first prong of *Strickland*. *See id.* at 834. As a result, we overrule her last ground of ineffective assistance.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 1, 2020
Date Decided: July 2, 2020

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