COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LORRAINE LIZZETTE MERJIL,	§	No. 08-13-00351-CR
Appellant,	§	Appeal from
v.	§	34th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 2011D04531)

O P I N I O N

Appellant was convicted of causing injury to a child--her daughter Desiree Merjil--by failing to provide the care and protection required of a parent. The same jury acquitted Appellant of capital murder, and murder charges arising out of the death of Desiree. Appellant now contends in a single issue that her trial counsel provided ineffective assistance by failing to offer mitigating evidence at the sentencing phase of the case. For the reasons noted below, we affirm.

FACTUAL SUMMARY

Appellant was charged with capital murder, murder, and injury to a child by omission, all arising out of the death of her twenty-month old daughter, Desiree Merjil. No error is raised with regard to the guilt-innocence phase of the trial, and we need recite only the facts necessary to understand the issue before us.

Desiree Merjil presented to the Sierra Providence East Emergency Department at 4:09 a.m. on July 31, 2011. The child was unresponsive, not breathing, and had no pulse. The medical staff attempted to resuscitate Desiree, but she was declared dead at 4:40 a.m. Appellant told the medical staff that the child had thrown up about 11 p.m. and appeared ill when she was put down to sleep. When Appellant got up at 3:43 a.m. and checked on Desiree, the child was unresponsive and pale. She tried to call 911 but nobody answered, so she drove the child to the hospital. The hospital medical record notes that Appellant denied that there were any injuries to Desiree.

An autopsy performed on the child revealed the opposite. The County Medical Examiner, Dr. Juan Contin, noticed a bruise just to the right of Desiree's belly button. He discovered a liter of blood in the abdomen. The blood had come from a tear of the small bowel mesentery which is a network of blood vessels that support the small intestines. There was bruising of other internal structures of the abdomen. Parts of the intestines were necrotic and "halfway dead." In Dr. Contin's opinion, this injury came from blunt force trauma, whereby the tissue gets caught between the spine and whatever is striking the body, causing the tissue to literally explode. He ruled the death a homicide. He communicated this finding to a police detective who was present at the autopsy.

The police then interviewed Appellant and her live-in boyfriend, Jorge Ramos. The two were interviewed separately. Appellant denied that she knew anything about an injury to Desiree's abdomen, and only recalled that a bed frame had accidentally hit Desiree in the head a few days earlier.[1] In speaking with the detectives, Appellant had initially told them that Jorge was not at the house that evening. She did this to keep Jorge from getting in trouble with his

[1] Dr. Contin's report notes the healed cut to the forehead, and Desiree's pediatrician noted that he had treated that injury on July 22, 2011.

probation officer, given their records showed him living at a different address. But she eventually admitted that he was with her that evening and told the detectives that Jorge had not done anything to Desiree.

She then told the detectives that she and Jorge were at home when the baby started feeling sick and vomited. She tried to give Desiree something to eat and drink and then put the child down to sleep. She and Jorge had to leave the house to take some diapers or formula to Appellant's mother. Her statement acknowledges that they left Desiree at the house from sometime around 8 p.m. to 11 p.m. as they ran their errands.[2] When they returned, she tried to feed Desiree, but she was not hungry and they all went to bed. She awoke in the early morning hours and noticed the baby wasn't responsive. A cell phone record documents a call to 911 at 3:56 a.m.

But a different story was being told in Jorge's interview room. He also initially planned to say that he was not at the house that evening. At first he did not tell the detectives about any injuries to Desiree. When the police confronted him with the fact of the abdominal injuries, however, he told them that Appellant had sometime on the afternoon of July 30 hit Desiree with her hand, elbow, and knees, because Desiree would not go to sleep.

After giving their respective statements, the police arrested both. Appellant was indicted for capital murder, murder, and injury to a child by omission. Jorge was charged with injury to a child by omission. He later pleaded guilty to that charge, and received a sentence of ten years' deferred adjudication.

[2] Other evidence, such as the signals from their cell phone, suggests they left the house around 9:55 p.m. and returned by at least 2:05 a.m. They were living with Jorge Ramos's aunt and her family, so there were people in the house. The aunt thought they left around 9 p.m. to 9:15 p.m. and returned around 11 p.m. She was not asked to look after Desiree that night.

Much of the trial in this case focused on who struck Desiree in the abdomen: Appellant or Jorge. Appellant elicited the testimony of Jorge's cell-mate who testified that Jorge had admitted to being the one who hit the child. One of the detectives who interviewed Jorge also conceded to the jury that about 90 percent of what Jorge had told them was false. But the injury to a child by omission count permitted the jury to find Appellant guilty if Jorge Ramos had inflicted the injury, and Appellant stood by, or did not seek immediate medical attention. The jury convicted Appellant only on that count.

Appellant had elected to have the jury assess punishment. She also filed an application for probation. The State called no witnesses and introduced no evidence in the punishment phase, instead relying on the evidence admitted in the guilt innocence phase. Appellant's counsel called two witnesses in the punishment phase, Maria Merjil and Melanie Ramirez. Maria Merjil, Appellant's mother, testified that Appellant had no prior felony convictions. She explained that Appellant would have a relative to stay with if she received probation. Ms. Merjil also testified that as of the date of trial, Appellant had already been in jail some two years. Prior to her arrest in this case, Appellant was taking online courses. Appellant was twenty-one years of age at the time of her arrest. Defense counsel also offered the testimony of Melanie Ramirez, a probation officer, who testified to the various conditions that might attach to someone on probation, such as curfews, travel restrictions, parenting classes, drug and alcohol testing.

Appellant's counsel pursued at least two themes in his punishment phase closing argument. First, counsel suggested that the jury's verdict in guilt-innocence phase meant that Jorge was the one who struck Desiree, and that he had only received probation. Counsel argued it would be unjust to give Appellant a harsher sentence than the one who actually struck the

child.[3] Appellant's second theme was one developed throughout the course of the guilt innocence phase. Appellant had contended that Jorge had controlled and manipulated her, noting that she displayed characteristics consistent with battered women's syndrome. Appellant had called psychologist Dr. James Schutte in the guilt innocence phase who testified to the nature of the syndrome. He testified that Appellant demonstrated elements of the syndrome based on various records that he reviewed. These included notations that Appellant had been abused by Jorge, that she was afraid of him, that she was isolated from others by him, and that she stopped paying attention to her outward appearance. As an example, Appellant's counsel had developed from a fact witness an incident whereby Appellant attempted to leave, but that he found her and made her return to him. Appellant had also developed testimony in the guilt innocence phase from her relatives attesting to the elements of the syndrome. Additionally, counsel elicited through a family witness testimony that Appellant was a caring mother who regularly took the child to a pediatrician.

The jury could have sentenced Appellant to anywhere from five years to life, and assessed up to a $10,000 fine. If the sentence were ten years or less, the jury could have recommended probation. Instead, the jury assessed a fifteen year sentence with no fine.

A little over a month after the trial concluded, the State filed a motion requesting the trial court to sentence Appellant. Five weeks later, the trial court reconvened the parties to pronounce the sentence. At that time, Appellant's counsel urged the trial judge to depart downward from the jury's sentence. The State argued that the trial court lacked the authority to do so. The trial court responded that it might have such authority, but had done so only once in twenty-seven

[3] We note that the verdict acquitting Appellant of the capital murder and murder charges only means that the jury had a reasonable doubt as to Appellant's guilt on those charges.

years on the bench. No evidence was offered at the sentencing by either the State or Appellant. The trial judge formally pronounced the fifteen year prison term based on jury's verdict.

Appellant raises one issue for our review. In Issue One, she contends that she was denied effective assistance of counsel because her trial attorney presented no mitigating evidence at the punishment phase of the trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance of counsel, Appellant must establish by a preponderance of evidence that: (1) her attorney's performance was deficient; and that (2) her attorney's deficient performance deprived her of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Ex parte Chandler*, 182 S.W.3d 350, 353 (Tex.Crim.App. 2005). Appellant must satisfy both *Strickland* components, and the failure to show either deficient performance or prejudice will defeat an ineffectiveness claim. *Perez v. State*, 310 S.W.3d 890, 893 (Tex.Crim.App. 2010); *Rylander v. State,* 101 S.W.3d 107, 110–11 (Tex.Crim.App. 2003).

Under the first prong of the *Strickland* test, the attorney's performance must be shown to have fallen below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999). Stated otherwise, she must show her counsel's actions do not meet the objective norms for professional conduct of trial counsel. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex.Crim.App. 2002). Under the second prong, Appellant must establish that there is a reasonable probability that but for her attorney's deficient performance, the outcome of the case would have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2069; *Thompson*, 9 S.W.3d at 812. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Jackson v. State,* 973 S.W.2d 954,

956 (Tex.Crim.App. 1998).

We presume that the attorney's representation fell within the wide range of reasonable and professional assistance. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001) *citing Tong v. State*, 25 S.W.3d 707, 712 (Tex.Crim.App. 2000). Ineffective assistance claims must be firmly founded in the record to overcome this presumption. *Thompson*, 9 S.W.3d at 813. In most direct appeal cases, this task is very difficult because the record is undeveloped and cannot abundantly reflect a failing of trial counsel. *Id.* at 813-14; *see also Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex.Crim.App. 2000). When the record is silent and does not provide an explanation for the attorney's conduct, the strong presumption of reasonable assistance is not overcome. *Rylander*, 101 S.W.3d at 110-11. Accordingly, when the record does not contain evidence of the reasoning behind trial counsel's actions, the attorney's performance cannot be found to be deficient. *Rylander*, 101 S.W.3d at 110-11; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994).

Appellant frames her sole issue as whether her "rights to the effective assistance of counsel and a fair punishment were denied when her trial counsel failed to present evidence during the sentencing phase?" But as set out above, there is no doubt that her trial counsel both admitted and argued evidence in the punishment phase of the trial *before the jury*. Counsel also developed evidence useful for the punishment phase arguments during the guilt and innocence phase of the trial. As we understand Appellant's actual argument as articulated in her brief, she faults her counsel for not offering additional evidence at a post-trial hearing *before the judge* when he pronounced the sentence.

We find any number of problems with this argument. First, Appellant cites us to no rule or other authority that requires a hearing, much less an evidentiary hearing, for pronouncement

of sentence. The Code of Criminal Procedure describes the contents of a judgment of conviction, but it does not describe any kind of evidentiary hearing necessary for its entry. *See* TEX.CODE CRIM.PROC.ANN. art. 42.01 (West Supp. 2015). The trial court may order the attorneys for either side or the court clerk to prepare the judgment, or the court may do so on its own. *Id*. at art. 42.01 § 2. Victims, or relatives of victims, are accorded the right to make their views known at pronouncement of the sentence, but only after the punishment has been assessed. TEX. CODE CRIM.PROC.ANN art. 42.03 § 1(b)(West 2006). Article 42.07 also requires the trial court to ask the defendant if there is any reason not to pronounce sentence, but there are only three specified reasons which can prevent that pronouncement, none of which include additional evidence of mitigation. TEX.CODE CRIM.PROC.ANN. art. 42.07.[4] In the absence of an established right or procedure for introducing punishment phase evidence after the jury has been discharged, we can hardly find a breach of the professional standard of care for Appellant's counsel not doing so.

Second, as the State points out, there is case law indicating that the trial court does not have the authority to pronounce a sentence other than that as found by the jury. *Ex parte McIver*, 586 S.W.2d 851, 854 (Tex.Crim.App. 1979)("Courts have no power to change a jury verdict unless it is with the jury's consent and before they have dispersed."); *Smith v. State*, 479 S.W.2d 680, 681 (Tex.Crim.App. 1972)(jury's verdict assessed punishment at confinement for one year followed by probation; trial court in its sentence and judgment was not entitled to strike the probation term); *State v. Dudley*, 223 S.W.3d 717, 721 (Tex.App.--Tyler 2007, no pet.)("If a jury assesses a punishment authorized by the law, the trial court has no power to change that punishment verdict and has very little authority to do anything other than to impose that

[4] The designated reasons are that: (1) the defendant has been pardoned; (2) the defendant is incompetent to stand trial; and (3) when the defendant escapes and is recaptured, that person captured is not the actual person who was convicted. *Id*. at art. 42.07 §§ (1),(2),(3).

sentence."). Appellant cites no contrary authority in her opening brief, and she did not respond to any of these cases in a reply brief. We need not wade into that legal issue on this record, other than to note that Appellant can hardly claim her counsel failed to meet a professional standard of care if she cannot show the action she desires is even legally possible. *See Vaughn v. State*, 931 S.W.2d 564, 567 (Tex.Crim.App. 1996)(ineffective assistance claim could not be based on case law that was unsettled at the time of counsel's actions); *Ex parte Davis,* 866 S.W.2d 234, 241 (Tex.Crim.App. 1993)(counsel not ineffective for failing to object to prosecutor's argument at punishment phase of capital trial that misstated meaning of term "deliberate" prior to Court of Criminal Appeals interpreting the term).

Third, there is nothing in the record to explain her trial counsel's decision to not put on evidence at the pronouncement of the verdict (were that even permissible). Absent some explanation of the reasoning behind counsel's actions, his performance cannot be found to be deficient. *Rylander*, 101 S.W.3d at 110-11; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994). That is, Appellant must overcome the presumption that the challenged action "might be considered [a] sound trial strategy." *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). This rule seems particularly true with respect to the decision to offer evidence because the admission of one piece of evidence often opens the door to other evidence, not all of which is helpful.

Finally, Appellant offers no indication of what additional evidence might have been offered. The situation is analogous to that where a defendant claims counsel should have called some additional witness. But the failure to call a witness does not establish an ineffective assistance of counsel claim without a showing that the witness was available to testify and that the testimony would have benefitted the defendant. *Cate v. State*, 124 S.W.3d 922, 927

(Tex.App.--Amarillo 2004, pet. ref d). Accordingly, we reject Appellant's ineffective assistance claim regarding the failure to call some unknown witness who might testify to some unspecified fact. *See Ashley v. State*, No. 08-11-00231-CR, 2012 WL 5287936 at *4 (Tex.App.--El Paso Oct. 24, 2012, no pet.)(not designated for publication)(alleged failure to call family witnesses in punishment phase did not meet *Strickland test*); *Johnston v. State*, 959 S.W.2d 230, 236 (Tex.App.--Dallas 1997, no pet.)(record failed to show what additional witnesses might have been available had counsel investigated claim further).

For the same reasons, Appellant fails to prove the second part of the *Strickland* test--proof of prejudice. Because the ineffective assistance claim was never raised below, and there is no offer of proof as to what the additional evidence would have been, we are in no position to gauge how it might have affected the result, short of sheer speculation. Appellant concludes the prejudice discussion in her brief by stating: "[b]ut for counsel's failure to introduce mitigating evidence, the court might have reduced Appellant's sentence, as the court observed it could do." But "might" is the not the standard we judge prejudice by. Instead, we must be convinced of a reasonable *probability* that but for her attorney's deficient performance, the outcome of the case *would* have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2069. Appellant would need to prove that had her counsel offered some new or additional evidence at the pronouncement hearing, that the trial judge would have ruled differently. As the trial judge noted himself, however, he had only strayed from a jury's sentence once in the twenty-seven years that he has been on the bench. In that one instance, the trial judge actually brought the jury back and sought their non-binding input on how some changed circumstance may have affected them. We simply have no indication that some new or different piece of evidence would have resulted in a different result here. *See Jackson*, 973 S.W.2d at 956 (alleged failure to file motion

to suppress could not support ineffective assistance claim without showing motion would have been granted). Without knowing what additional evidence Appellant contends should have been offered, we are unconvinced that she has met her burden. For these reasons, we overrule the sole point and affirm the conviction in all respects.

February 16, 2016

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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