Affirmed and Memorandum Opinion filed March 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-07-00715-CR

KARL EUGENE JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1081219

MEMORANDUM OPINION

A jury convicted Karl Eugene Jones of burglary of a building, a state-jail felony. Because appellant is a repeat offender, the jury sentenced him to twenty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant raises the following issues on appeal: (1) the trial court erred in overruling appellant's objection to one of the State's improper jury arguments; (2) the State's improper jury arguments generally so infected the trial with unfairness as to make appellant's conviction a denial of due process; (3) appellant received ineffective

assistance of counsel; and (4) the trial court abused its discretion in denying appellant's motion for new trial. We affirm.

I. BACKGROUND

At approximately 2:15 a.m. on August 20, 2006, Officer R. J. Cantu of the Houston Police Department (HPD) received a burglary alarm call and was dispatched to Owen Electric Supply, Inc. (OES). OES manufactures and sells electrical construction products. When Officer Cantu arrived at the scene, he observed appellant and another male inside the fenced-in premises. First, the men stood inside the fence and lifted spools of wire over it to the outside. Next, they went through a hole in the fence to the outside and continued lifting the spools over it. When Officer Cantu's backup arrived, the two men took off running. Appellant ran back through the hole in the fence and into OES's building, and the other man ran toward some nearby railroad tracks. Consistent with department policy, Officer Cantu summoned the HPD's canine unit to search the building.

Officer W.J. Bearden arrived with a patrol canine and noted the building's door had been forced open. She entered the building and gave three commands for anyone inside to come out. After receiving no response, she released the canine from his leash and instructed him to search the building. The canine alerted her that he had picked up a scent behind some boxes. She gave several commands for anyone behind the boxes to come out. After receiving no response, she sent the canine back behind the boxes, and he pulled appellant out.

Edward Wrobliske, a vice president at OES, was present on the scene when Officer Bearden and the canine retrieved appellant from inside the building. However, because it was dark at the scene, he was unable to later identify appellant at trial. Officers Bearden and Cantu, however, identified appellant at trial as the man pulled out of the building. Officer Cantu further testified appellant was the man he saw lifting spools of wire over the fence. Wrobliske testified approximately sixty spools of copper wire, each worth two-hundred dollars, had been removed from the building.

Appellant admitted he was at the scene during the burglary but denied stealing the wire. Instead, he offered another explanation for his presence at the crime scene. He claimed that a friend took him to the fence on the property to meet with another man concerning some landscaping equipment. He further testified he did not enter the property until Officer Bearden arrived with the canine, at which point he ran through the fence and into the building in an effort simply to escape the canine.

Appellant also claimed he was incapable of committing the burglary because he was suffering from blood clots in his leg and could not walk on his own without crutches or a cane. Nevertheless, that claim was controverted by appellant's testimony that he could apparently walk from the car to the premises and later *run* into the building, all without the assistance of crutches or a cane.

The jury convicted appellant of burglary of a building. *See* Tex. Penal Code Ann. § 30.02 (Vernon 2003). Upon finding he had two previous felony convictions, the jury enhanced his sentence to a second-degree felony and sentenced him to twenty years' confinement. *See id.* §§ 12.33(a); 12.42(a)(2) (Vernon Supp. 2009).

Appellant filed a motion for new trial, alleging he received ineffective assistance of counsel. At the hearing on the motion, his counsel did not testify, and appellant otherwise presented no evidence regarding his counsel's actions or strategy other than what appears on the face of the record. The motion for new trial was denied, and this appeal was properly perfected.

II. DISCUSSION

A. Jury Arguments

Because appellant's first two issues bear on allegedly improper jury arguments, we will address them together. A proper jury argument should fall within one of four general areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to the argument of opposing counsel, or (4) plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). The State is permitted to draw reasonable inferences from the evidence and is to be afforded wide latitude in its jury

arguments as long as counsel's argument is supported by evidence and made in good faith. *Griffin v. State*, 554 S.W.2d 688, 690 (Tex. Crim. App. 1977).

Appellant objected to five allegedly improper jury arguments by the State. The court sustained four of his objections and overruled one. In his first issue, appellant contends the four arguments to which the court sustained his objections otherwise so infected the trial with unfairness as to make his conviction a denial of due process. In his second issue, appellant contends the court erred in overruling his remaining objection to the State's argument.

1. Sustained Objections

To complain on appeal about an improper jury argument, a defendant must show he objected to the argument at trial and pursued his objection to an adverse ruling. *See Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993). A defendant pursues his objection to an adverse ruling where, after the court sustains his objection, he requests an instruction to disregard and, if necessary, moves for a mistrial. *Id.* Where he fails to do so, he has nothing to complain of on appeal because the court has already given him all the relief he requested at trial. *Id.* Here, appellant did not pursue any of the sustained objections to an adverse ruling. Therefore, he forfeits his right to raise them on appeal.[1] *See id.*

2. Overruled Objection

We review a court's overruling of an objection to an improper jury argument under a reversible-error standard. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). An argument constitutes reversible error when it violates a statute,

[1] Appellant suggests he need not preserve error if improper jury arguments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Miller v. State*, 741 S.W.2d 382, 391 (Tex. Crim. App. 1987). However, the Texas Court of Criminal Appeals has expressly rejected this contention, even as to incurable jury argument. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) ("[A] defendant's 'right' not to be subjected to incurable erroneous jury arguments is one of those rights that is forfeited by a failure to insist upon it. Therefore, we hold . . . a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal.").

injects new and harmful facts into the case, or is manifestly improper. *Id.* We review the record in its entirety to determine whether any erroneous statements were made, and if so, we determine whether they were so prejudicial as to deprive the defendant of a fair trial. *Johnson v. State*, 233 S.W.3d 109, 114 n.4 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Here, appellant claims the State mischaracterized his trial testimony during its closing argument. Specifically, appellant contends the State's argument—that he testified to having been on the property before the police arrived—is incorrect because he testified he was outside the fence until the police arrived. Appellant claims the State's argument injected new and harmful facts into the case. We disagree.

It is unclear from the evidence presented whether OES's property extended outside the fence. At a minimum, however, Officer Cantu testified that appellant was inside the fence at one point and on OES property. The jury was entitled to believe Officer Cantu's testimony and disbelieve appellant's. *See Parker v. State*, 119 S.W.3d 350, 355 (Tex. App.—Waco 2003, pet. ref'd) (citing *Goodman v. State*, 66 S.W.3d 283, 287 (Tex. Crim. App. 2001)). Therefore, the State's argument does not inject new and harmful facts into the case. *Wesbrook*, 29 S.W.3d at 115. Accordingly, we overrule appellant's first and second issues.

B. Ineffective Assistance of Counsel

In his third issue, appellant contends he received ineffective assistance of counsel. Both the federal and state constitutions guarantee an accused the right to have the reasonably effective assistance of counsel. *See* U.S. Const. Amend. VI; Tex. Const. Art. I, § 10; Tex. Code Crim. Proc. Ann. art 1.05 (Vernon 2005); *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In reviewing claims of ineffective assistance of counsel, we apply a two-pronged test. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687–88). To establish ineffective assistance of counsel, appellant must prove by a preponderance of the evidence that (1) his trial

counsel's representation was deficient in that it fell below the standard of prevailing professional norms and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Id.* (citing *Strickland*, 466 U.S. at 687–88). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

When evaluating a claim of ineffective assistance, we look to the totality of the representation and the particular circumstances of each case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We are to begin with the strong presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Salinas*, 163 S.W.3d at 740; *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). To overcome the presumption of reasonable professional assistance, an accused must show his allegation of ineffectiveness and counsel's alleged ineffectiveness are firmly founded in the record. *Thompson*, 9 S.W.3d at 814.

The record is best developed in a hearing on a motion for new trial or an application for a writ of habeas corpus. *Stults*, 23 S.W.3d at 208. Where there is no record or where the record is otherwise silent as to the reasons for counsel's conduct, an allegation of ineffective assistance can often lie beyond effective appellate review. *See id.* Of course, when no reasonable trial strategy could justify counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects counsel's strategy. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). Our review of counsel's actions, however, must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).

Here, appellant was granted a hearing on his motion for new trial. However, appellant's new-trial evidence significantly lacked testimony from counsel or any other source as to legal strategy. Nevertheless, appellant raises some seventeen sub-issues

arguing ineffective assistance, which we have grouped for disposition as follows: (1) failure to conduct a reasonable investigation; (2) failure to prepare appellant for trial; (3) characterization of appellant's conduct as "stupid" rather than criminal; (4) failure to preserve error to the State's improper jury arguments; (5) failure to request the submission of defensive issues in the jury charge; and (6) failure to explain the consequences of stipulating to previous offenses.

1. Failure to Investigate

Counsel has a duty to make either a reasonable investigation or a reasonable decision that an investigation is unnecessary. *Strickland*, 466 U.S. at 691. Appellant argues counsel failed to do either when she chose not to (1) speak with several of the State's witnesses prior to trial; (2) subpoena a medical expert and the officer who took appellant to the hospital after his arrest; and (3) subpoena or produce HPD's internal-affairs records and appellant's medical records.

Specifically, appellant argues counsel was ineffective because she failed to speak to Wrobliske, Officer Cantu, and appellant's girlfriend prior to trial. With regard to Wrobliske, appellant contends had counsel spoken with him prior to trial, she would have discovered he believed it was an "inside job." Nevertheless, at the new-trial hearing, Wrobliske denied ever making any such statement. With regard to Officer Cantu, who testified at trial, the record does not reflect what beneficial information, if any, he could have provided during an informal interview. Finally, as to appellant's girlfriend, the record reflects she had an opportunity to communicate with counsel prior to trial; during that meeting, she apparently provided counsel appellant's medical records and identified another man whom she believed to be a participant in the burglary. The record does not reflect what additional beneficial information, if any, she could have provided. Moreover, all three witnesses testified at trial.

Appellant argues counsel was ineffective for failing to subpoena the officer who took him to the hospital and a medical expert, presumably to speak to appellant's claimed

medical condition. Generally, the decision to call a particular witness to testify is a strategic one. Here, we have no evidence in the record from which we can determine counsel's strategy. She may have reasonably decided that calling these witnesses would have done more harm than good, particularly in light of appellant's testimony undermining his claim of a debilitating medical condition. *See Stults*, 23 S.W.3d at 209 n.6.

Appellant also argues counsel was ineffective for failing to subpoena or produce HPD's internal-affairs records and appellant's medical records. The record is silent as to what these records would have revealed. Appellant has not shown that counsel's representation fell below prevailing professional norms or that the result probably would have been different. *See Strickland*, 466 U.S. at 687. Therefore, we overrule appellant's complaint that counsel failed to investigate. *See id.* at 691.

2. Failure to Prepare Appellant for Trial

Appellant contends counsel failed to give him notice of plea offers, the trial setting, and proper trial appearance. The record reveals, however, that appellant was aware of the plea agreements offered by the State, and he rejected them. It also reveals that on the day of trial, appellant wished to proceed to a jury trial.

Appellant argues counsel should have advised him that his hairstyle, which he wore in 30 ponytail plaits, might offend the jury's sensibilities. Appellant cites to no authority, nor can we find any, suggesting a certain hairstyle to be improper trial appearance. Additionally, appellant concedes his hairstyle is less likely to offend a jury than, for example, appearing in jail clothing, which has even been held not to constitute ineffective representation. *See Estelle v. Williams*, 425 U.S. 501, 508–09 (1976); *Randle v. State*, 826 S.W.2d 943, 945 (Tex. Crim. App. 1992). Therefore, appellant has not shown counsel failed to prepare him for trial. *See Strickland*, 466 U.S. at 691.

3. Characterization of Appellant's Actions as "Stupid"

Appellant further criticizes his counsel for referring to appellant's actions as "stupid" during her arguments. The pertinent parts of counsel's arguments read as follows:

> [M]y client made a succession of really stupid decisions that night. He did a lot of things that he shouldn't have done but ultimately the evidence will show my client was not the person who went into that building….
>
> . . . .
>
> [H]e made a bunch of really bad decisions, stupid decisions, but not criminal decisions…
>
> . . . .
>
> [W]e talked about how you do stupid stuff. You know, you've been awakened because you're sleeping because you're taking Vicodin, and then you go and you get a call, you're really not paying attention….
>
> . . . .
>
> And I have no clue why he went out there. I wouldn't have done it, but doing stupid stuff is not criminal.

It is not unprecedented for defense counsel to note her defendant's poor judgment as a reasonable concession while nevertheless urging the jury to find him not guilty of a crime. *See, e.g.*, *Hines v. State*, 144 S.W.3d 90, 93 (Tex. App.—Fort Worth 2004, no pet.) (holding counsel's argument that the defendant made a "stupid mistake" did not render counsel ineffective).[2] We need not conclude counsel was ineffective merely

[2] Appellant further argues that by characterizing appellant's actions as stupid, counsel negated any defense of involuntary intoxication. We disagree. Such a characterization as to some acts does not automatically preclude appellant from arguing he committed other acts through involuntary intoxication. *See, e.g.*, *Mendenhall v. State*, 77 S.W.3d 815, 817–18 (Tex. Crim. App. 2002) (describing involuntary-intoxication affirmative defense arising from actor's inability, as a result of mental disease or defect, either to know his conduct was wrong or to conform his conduct to the requirements of the law he allegedly violated). However, as noted elsewhere, the defense of involuntary intoxication would have been inconsistent with the core defense theory of the case—that appellant did not commit the crime.

because other counsel may have tried the case differently. *See Ingham*, 679 S.W.2d at 509.

4. Failure to Preserve Error

Appellant argues counsel was ineffective for failing to preserve error on three of the State's allegedly improper arguments. However, because the record lacks specific evidence as to counsel's strategy, appellant has not overcome the presumption of effective assistance. *See Thompson*, 9 S.W.3d at 814. Counsel may have reasonably decided not to object to avoid drawing the jury's attention to the State's argument. We will not speculate as to counsel's strategy or conclude that she was ineffective merely because other counsel may have tried the case differently. *Ingham*, 832 S.W.2d at 509. Accordingly, appellant's argument fails.

5. Failure to Request Defensive Issues in the Jury Charge

Appellant contends counsel was ineffective because she failed to request jury instructions on the potential defenses of necessity and involuntary intoxication. However, both defenses require the defendant to admit he committed the offense before offering the defense as justification. *See Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999) (necessity); *Mendenhall v. State*, 77 S.W.3d 815, 817 (Tex. Crim. App. 2002) (involuntary intoxication). As such, the defenses were inconsistent with appellant's theory of the case—that he did not commit the crime. *See id.* Consequently, it was not unreasonable for counsel not to request their submission.

Appellant also contends counsel provided ineffective assistance by failing to request an instruction stating "mere presence is not evidence of guilt." "Mere presence," however, is not a recognized defense, although it may be argued on appeal in the context of legal insufficiency of the evidence. *See Collins v. State*, 686 S.W.2d 272, 274 (Tex. App.—Houston [14th Dist.] 1985, no pet.). Accordingly, appellant's argument that counsel was ineffective for failing to request the submission of defensive issues in the jury charge fails.

6. Failure to Discuss Sentence Enhancements and Stipulations

Appellant argues counsel was ineffective for failing to explain the consequences of pleading true or stipulating to specific previous offenses. Notably, appellant has never denied that he committed the prior offenses. Additionally, even had appellant refused to stipulate to some of his previous offenses, we cannot say there is a reasonable probability that the outcome would have been different because the State offered direct proof—the judgments—of at least two prior felonies. *See Strickland*, 466 U.S. at 687. That evidence, by itself, was sufficient to satisfy the necessary requirements to enhance appellant's punishment to a second-degree felony. *See* §§ 12.42(a)(2), 12.33(a). Therefore, appellant has not shown there is a reasonable probability the result would have been different. *See Strickland*, 466 U.S. at 687. Accordingly, appellant's argument fails.

Appellant has not met his burden as to ineffective assistance. Thus, we overrule his third issue on appeal.

C. Denial of Motion for New Trial

At the motion for new trial hearing, appellant raised various allegations of ineffective assistance of counsel, and the trial court ultimately denied appellant's motion. For reasons that are unclear, appellant argues now on appeal that the trial court erred by denying his motion with respect to one particular allegation—that counsel was ineffective for objecting to evidence of a prior burglary of the same OES building. As we understand his complaint, appellant suggests that evidence proving his innocence of the *previous* burglary might similarly disprove his participation in the *later* burglary.

We review the denial of a motion for new trial for an abuse of discretion. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *State v. Herndon*, 215 S.W.3d 901, 907–08 (Tex. Crim. App. 2007). The mere fact that a trial court may decide a matter within its discretionary authority differently than an appellate court does not mean the trial court abused its discretion. *Id.*

We review the evidence in the light most favorable to the trial court's ruling, and we presume that all reasonable findings that could have been made against the losing party were so made. *See Quinn v. State,* 958 S.W.2d 395, 402 (Tex. Crim. App. 1997). Only when no reasonable view of the record could support the trial court's ruling do we conclude the trial court abused its discretion. *Holden v. State,* 201 S.W.3d 761, 763 (Tex. Crim. App. 2006).

As the State correctly points out, essentially "[a]ppellant's argument . . . is that . . . counsel was ineffective for objecting to 'favorable evidence,' and the trial court erred in preventing him from eliciting the date, time and place of the burglary . . . ." The State argues:

> [t]he fact that appellant could not have committed a previous, unrelated burglary against the same complaining witness in no way exonerates him of the instant charge. . . . [Additionally,] the [S]tate never attempted to connect appellant to the prior burglary; therefore, there was no need for trial counsel to allow proof of an inadmissible offense into evidence, only later to refute it.

We agree. We decline to hold that counsel's objection to evidence of an entirely unrelated offense somehow constituted unsound trial strategy. *See* Tex. R. Evid. 401, 403, 404. Appellant's suggestion that he did not commit a different burglary has no bearing on whether he committed the burglary for which he was charged. *See id.* Therefore, appellant has not shown counsel was ineffective, and the trial court did not abuse its discretion in denying appellant's motion for new trial. Accordingly, we overrule appellant's fourth issue on appeal.

III. CONCLUSION

Having overruled appellant's issues on appeal, we affirm the trial court's judgment.

/s/ Kent C. Sullivan
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

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