Affirmed in Part and Reversed and Remanded in Part and Majority and Dissenting Opinions filed August 31, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00319-CR

JOSE ARMANDO DELEON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 07-02731-CRF-272

DISSENTING OPINION

I agree that appellant's defense counsel did not render ineffective assistance during the guilt/innocence phase of trial, but I differ from the majority in that I would hold that appellant also did not receive ineffective assistance of counsel during the punishment phase of trial. I therefore respectfully dissent.

I. STANDARD OF REVIEW

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the *Strickland* test, an appellant must prove that his trial counsel's representation was deficient and the deficient performance was so serious that it deprived the appellant of a fair trial. *Id*. at 687, 104 S. Ct. at 2064. To establish both prongs, the appellant must prove by a preponderance of the evidence that counsel's representation fell below the objective standard of prevailing professional norms, and there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Id*. at 690–94, 104 S. Ct. at 2066–68. This test is applied to claims arising under the Texas Constitution as well as those arising under the United States Constitution. *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986) (en banc). An appellant's failure to satisfy one prong makes it unnecessary for a court to consider the other prong. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that the attorney's actions were reasonably professional and were motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). When the record is silent as to trial counsel's strategy, we will not conclude that the appellant received ineffective assistance unless the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Usually, however, the lack of a clear record prevents the appellant from meeting the first part of the *Strickland* test because the reasonableness of counsel's choices and motivations during trial can be proven deficient only through facts that do not normally appear in the appellate record. *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). "[I]solated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination." *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994) (en banc). Moreover, "[i]t is not sufficient that the appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata*, 226 S.W.3d at 430. Rather, to establish that trial counsel's acts or omissions were outside the range of professional competent assistance, a defendant must show that counsel's errors were so serious that he was not functioning as counsel. *Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995) (en banc).

II. PROBATION OFFICER CHARLES RUSS

With regard to Charles Russ, the probation officer who testified during the punishment phase of trial, appellant contends that his trial attorney rendered ineffective assistance, first, by calling Russ as a witness at all, and second, by failing to object to Russ's testimony in specific areas. The majority agrees with both of these arguments, and finds that defense counsel's conduct undermined confidence in the jury's assessment of punishment. Thus, the majority reverses the sentence and remands for a new punishment hearing without reaching appellant's argument that defense counsel rendered ineffective assistance during the punishment phase of trial by introducing evidence that although appellant is a citizen of Mexico, he is a legal resident of the United States.

I respectfully disagree with the majority's conclusions concerning defense counsel's effectiveness in calling Russ as a witness, in failing to object to certain testimony, and in finding this conduct prejudicial to appellant. I therefore would reach

appellant's remaining arguments, but based on this record, I would conclude that neither prong of the *Strickland* test has been satisfied.

A. Calling Probation Officer as a Witness

The majority holds that, notwithstanding the presumption that defense counsel's decision to call Russ as a witness was motivated by sound trial strategy, no competent attorney would have called a probation officer as a witness during the punishment phase of trial. Thus, the majority appears to hold that a defense attorney who calls a probation officer as a witness during the punishment phase of trial delivers ineffective assistance as a matter of law. I respectfully disagree that such conduct falls below an objective standard of reasonable representation as a matter of law or on the facts presented here.

Appellant has not offered and I have not found any authority supporting the majority's conclusion that no competent attorney would call a probation officer as a witness during the punishment phase of trial. To the contrary, the Court of Criminal Appeals has expressly stated that a defendant may call a probation officer during the punishment phase of trial to help establish the defendant's suitability for community supervision. *See Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006). I further disagree with the majority's reading of *Mares v. State*, 52 S.W.3d 886 (Tex. App.—San Antonio 2001, pet. ref'd). *See ante*, at 13, 15. In holding that the defendant in that case received ineffective assistance of counsel, the *Mares* court did not base its holding on defense counsel's conduct in calling a probation officer to testify or even on counsel's failure to object to testimony that was simply adverse; rather, the *Mares* court held that where the sole objective of a punishment hearing was to obtain probation, counsel rendered ineffective assistance by failing to object to an unqualified witness's expert opinion that she would not recommend probation for a person with the defendant's criminal record. *Mares*, 52 S.W.3d at 893. The probation officer in this case was not asked if he would recommend appellant for probation, and he volunteered no such opinion; thus, *Mares* does not apply to the facts presented in this case.

Here, defense counsel relied on Russ's testimony in arguing that the surest way for the jury to protect the community was to recommend probation because a sexual offender on probation is required to successfully complete a treatment program. As defense counsel stated in the opening argument of the punishment phase, "The probation officer is going to come in. . . . He is going to tell you what probation consists of. He's going to tell you-all the conditions and the various punishments; the fact that sex offenders are required to register as a sex offender." Russ then testified that counseling was a condition of probation, and that probationers are required to submit to polygraph exams and unscheduled home visits to police their compliance with conditions imposed for the protection of the community. He further explained that it can take several years to complete counseling, and a probationer who has difficulty reading and writing will require a longer period of counseling to complete the program. Although Russ stated that parolees also are required to attend counseling, he explained that this requirement ends when the period of parole is over, even if the treatment program has not been completed. Moreover, he testified that counseling for imprisoned sex offenders may be available for some of those who volunteer for treatment, but prisoners fear that they will be harmed by other inmates if they are identified as sex offenders.

Defense counsel properly may call a probation officer to offer evidence of the conditions of probation, as was done here. *See McBean v. State*, 167 S.W.3d 334, 340 (Tex. App.—Amarillo 2004, pet. ref'd) (defense counsel did not render ineffective assistance by offering testimony of probation officer regarding conditions of probation and success of sexual offenders on probation, even though the officer further testified without objection that most successful probationers "pled guilty and took responsibility initially"). On this record, I therefore would "conclude that there were legitimate and professionally sound reasons for counsel's conduct" in calling Russ as a witness. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). Thus, I would hold that the record does not support the claim that defense counsel rendered ineffective assistance simply by calling a probation officer as a witness.

B. Failure to Object to Testimony Regarding Rehabilitation of Sexual Offenders

Appellant additionally argues that he received ineffective assistance in the punishment phase of trial because defense counsel failed to object to Russ's testimony emphatically denying that sexual offenders are "ever rehabilitated to the point where the risk is gone." According to appellant, defense counsel should have objected on the grounds that (a) the witness was not qualified to offer such testimony, (b) "the subject matter . . . was unreliable and did not assist the trier of fact,"[1] and (c) the testimony was unfairly prejudicial. The majority finds this testimony not only unfairly prejudicial, but also highly inflammatory, and concludes that even if Russ were qualified to offer such opinion testimony, defense counsel's conduct in failing to object to it fell below professional standards. In contrast, I would hold that defense counsel's decision to refrain from objecting was reasonable, even if Russ were not qualified to offer such opinion testimony or the evidence was otherwise unreliable.[2]

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[1] Based on the authorities cited, appellant appears to assume for the purpose of this "reliability" argument that Russ is an expert in the rehabilitation of sexual offenders. *See, e.g.*, *Mata v. State*, 46 S.W.3d 902, 908–09 (Tex. Crim. App. 2001) ("Evidence Rule 702 provides that an expert witness may testify as to his opinion based on scientific knowledge . . . . A trial court's responsibility under Rule 702 is to determine whether proffered scientific evidence is sufficiently reliable and relevant to assist the jury."); *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. l998) (discussing the standard for evaluating scientific evidence), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999) (en banc); *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (en banc) (addressing proof of reliability of novel scientific evidence). Because neither the majority's analysis nor my own is affected by accepting or rejecting this assumption, it is unnecessary to address this argument further.

[2] The majority concludes that there has been no showing as to whether or not Russ was qualified to offer an expert opinion on the subject. *Ante*, at 13. But if the record were silent on this matter, then under the governing standard of review, I would presume that defense counsel's failure to object was based on sound trial strategy. Absent a contrary showing in the record, I would presume that defense counsel had investigated Russ's qualifications before calling him as a witness, was satisfied with Russ's qualifications to offer an expert opinion on the rehabilitation of sex offenders, and reasonably believed that the trial court would not abuse its discretion by overruling an objection based on Russ's qualifications. *See Bone*, 77 S.W.3d at 834–35 & n.21. I do not believe the record is silent, however. Instead, I read the record as affirmatively demonstrating that Russ was not qualified to offer an expert opinion on the rehabilitation of sex offenders. I nevertheless would conclude that appellant has failed to show that his trial attorney rendered inefficient representation by failing to object to Russ's testimony.

The decision to refrain from objecting must be evaluated in light of the information available at the time. *Ex parte Carillo*, 687 S.W.2d 320, 324 (Tex. Crim. App. 1985). Defense counsel is not required to make every sustainable objection, and the concern that "overobjecting" can alienate a jury has been recognized as valid. *See Bollinger v. State*, 224 S.W.3d 768, 781 (Tex. App.—Eastland 2007, pet. ref'd) ("Counsel can be concerned that too many objections will alienate a jury or that an objection might draw unwanted attention to a particular issue."). Moreover, a trial attorney "may strategically decide to allow the other side to introduce otherwise inadmissible evidence because it simply does not hurt the client's case or, in fact, may help it." *McKinny v. State*, 76 S.W.3d 463, 473 (Tex. App.—Houston [1st Dist.] 2002, no pet.). "If a lawyer is reasonably sure certain evidence will not hurt his client's case, 'it is usually better not to object.'" *Id.* (quoting THOMAS A. MAUET, TRIAL TECHNIQUES, 248–49 (5th ed. 2000)). Finally, we must "'assume a strategic motivation if *any* can possibly be imagined.'" *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (quoting 3 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 11.10(c) (2d ed. 1999)) (emphasis added); *see also Ex parte Ellis*, 233 S.W.3d 324, 331 (Tex. Crim. App. 2007) ("Although the defensive course chosen by counsel was risky, and perhaps highly undesirable to most criminal defense attorneys, we cannot say that no reasonable trial attorney would pursue such a strategy under the facts of this case.").

In this case, however, a reasonable strategy is not only imaginable but forcefully suggested by defense counsel's closing argument. Russ had testified that one who commits a sexual offense against a child can never be rehabilitated to the point that he no longer has inappropriate sexual thoughts, but such a person can learn skills to help him refrain from inappropriate behavior. In closing argument, defense counsel turned this testimony to appellant's advantage by arguing that because appellant would continue to have inappropriate thoughts after serving any prison term that might be imposed, the only way to protect society was to ensure that appellant received sufficient treatment to acquire the skills necessary to prevent those thoughts from becoming behaviors.

[P]rison isn't going to help society. It isn't going to help Jose Deleon be a better man or a better part of our society.

The evidence you heard from Charlie Russ today was that the type of counseling available in prison is inadequate; it's first come, first served.

It doesn't help if you're trying to treat somebody who is a sex offender to do it in a place where they can't possibly be around any children. It does no good.

It is likely that most people who go to prison at some time emerge from prison. I would submit to you that a man who can't read and write and who's had trouble with English as Mr. Deleon has for 30 years being in this country, with Mr. Deleon it is going to take him more than the three or four years to work through his counseling that it would take an educated person. It is going to take him a while. But that is what will benefit society the most.

You heard Charlie Russ say when people do these things, they have deviant desires deep in their mind. They have thoughts that hopefully the rest of us don't have, and will always have them.

And Mr. Deleon is not an educated man, but there is education available. Mr. Russ can provide that. Dr. Roy Luepnitz can provide that.[3] You heard about that during Mr. Russ'[s] testimony. This type of education is necessary for people who have these type[s] of problems to make sure it doesn't happen again.

So I would argue to you that based on all of these things that I have discussed -- in addition to the fact that what is best for society in this case is to make sure there are not problems down the road -- is a strenuous probation with counseling, with the polygraph testing you have heard about. . . .

Based on these things I talked to you about today, the life Mr. Deleon has lived with the exception of this incident, the help that he needs to make sure that this doesn't become a problem in the future and that nobody else is harmed, I would argue to you that probation is the best solution in this case for you-all.

[3] Russ testified that Dr. Roy Luepnitz provided counseling to sexual offenders on probation or parole.

I disagree with the majority's conclusion that by choosing to use Russ's testimony to appellant's advantage rather than simply objecting to it, defense counsel's conduct was so outrageous that no competent attorney would have engaged in it. *See Ellis*, 233 S.W.3d at 336 (in evaluating whether counsel may have acted pursuit to a sound trial strategy, "[w]e cannot ignore the fact that counsel's tactics *could* have achieved the desired result") (emphasis added). I instead would hold that defense counsel's conduct fell within objective professional standards.

C. Failure to Object to Testimony That Appellant Became an "Illegal Alien" Upon Conviction

Appellant also contends he received ineffective assistance because defense counsel allegedly allowed Russ to testify that "if convicted, appellant would immediately become an illegal alien." According to appellant, such testimony was excludable "because the opinion was incorrect."

Appellant's argument is not supported by citation to the record[4] or to relevant authority.[5] I therefore would hold that this argument is waived. *See* TEX. R. APP. P. 38.1(i).[6]

[4] Russ instead testified, "[I]f I have anybody on my caseload that is not an American citizen, I have to contact immigration and let them know. They will come pick them up in my office and deport them back to Mexico or their homeland." He further agreed with the prosecutor that he did not supervise probationers who were removed from the country. On redirect examination, however, Russ clarified that he was referring to probationers who were in the country illegally and to visitors with expired visas. It is undisputed that appellant is a legal resident and that defense counsel repeatedly drew this fact to the jury's attention.

[5] In support of this argument, appellant cites only a statute concerning reentry of removed aliens. *See* 8 U.S.C.A. § 1326 (West 2005). Neither party contends that appellant was ever removed from this country or attempted reentry after removal. The statute therefore has no application here.

[6] *See also Villareal v. State*, No. 14-00-00948-CR, 2001 WL 1249329, at *2 (Tex. App.—Houston [14th Dist.] Oct. 18, 2001, pet. ref'd) (not designated for publication) ("[C]ounsel's argument that appellant is an illegal alien and thus likely to be deported after serving his punishment was a plausible trial strategy in trying to induce the jury to impose a shorter sentence because appellant would not thereafter pose a threat to the community.").

D. Absence of Prejudice

Because I would conclude that defense counsel's conduct fell within professional standards, I would not reach the question of prejudice. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. I nevertheless address it here to explain my disagreement with the standard of review as applied by the majority.

Under the Sixth Amendment, a criminal defendant has the right, first, to actual representation by counsel, and second, to effective assistance from such counsel. Thus, claims of ineffective assistance of counsel may be considered to be of two corresponding types: those in which counsel, in effect, does not act as the defendant's representative or is prevented from doing so, and those in which counsel represents the defendant, but fails to do so in a professionally competent manner. The Fifth Circuit has frequently referred to this as the distinction between "no defense at all" and "shoddy representation." *See, e.g.*, *Gochicoa v. Johnson*, 238 F.3d 278, 284 (5th Cir. 2000); *Jackson v. Johnson*, 150 F.3d 520, 525 (5th Cir. 1998); *Childress v. Johnson*, 103 F.3d 1221 (5th Cir. 1997). In *Strickland*, the latter are referred to as claims of "actual ineffectiveness." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. The distinction is an important one, because the type of constitutional violation alleged determines whether prejudice is presumed or must be shown.

If the first or "representation" right has been violated, then prejudice is presumed, and the defendant is entitled to have the judgment set aside. "[S]uch circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Id.* at 692, 104 S. Ct. at 2067. Violations resulting in presumed prejudice occur when (a) the defendant was actually denied the assistance of counsel at a critical stage in the proceedings,[7] (b) defense counsel "entirely failed to subject the prosecution's case to

[7] *See United States v. Cronic*, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 2047 n.25, 80 L. Ed. 2d 657 (1984).

meaningful adversarial testing" such that the defendant was constructively denied the assistance of counsel altogether,[8] or (c) the State engages in various kinds of interference with counsel's assistance.[9] *Id.* at 692, 104 S. Ct. at 2067; *Johnson v. State*, 169 S.W.3d 223, 228–29 (Tex. Crim. App. 2005). On the other hand, if the second right allegedly has been violated, i.e., if the defendant's claim is based on "actual ineffectiveness," then the defendant must "affirmatively prove prejudice" before a reviewing court will set aside the judgment. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067.[10] This is true even if multiple errors permeate the proceedings. *See Aldrich v. State*, 296 S.W.3d 225, 233–259 (Tex. App.—Fort Worth 2009, pet. ref'd) (op. on reh'g en banc).

Here, appellant alleges "actual ineffectiveness," and thus, must affirmatively prove prejudice. The majority opines that "it is difficult to assess exactly what impact the testimony had on the jury,"[11] but nevertheless holds that appellant was prejudiced by defense counsel's conduct in calling Russ as a witness and in failing to object to his testimony regarding the rehabilitation of sexual offenders. This conclusion appears to be based primarily on (a) the number of pages used to transcribe Russ's testimony relative to the overall length of the punishment-phase transcript, and (b) the jury's failure to

[8] *See Cannon v. State*, 252 S.W.3d 342, 350 (Tex. Crim. App. 2008) (op. on reh'g) (presuming prejudice where defense counsel, asserting unpreparedness, refused to participate in trial).

[9] *See, e.g., Geders v. United States*, 425 U.S. 80, 91, 96 S. Ct. 1330, 1337, 47 L. Ed. 2d 592 (1976) (holding that sequestration order that prevented defendant and attorney from conferring during a 17-hour overnight recess violated Sixth Amendment, and reversing without requiring prejudice to be shown); *Herring v. New York*, 422 U.S. 853, 863–65, 95 S. Ct. 2550, 2555–57, 45 L. Ed. 2d 593 (1975) (holding that statute permitting trial judge to deny the right to closing argument violated criminal defendant's Sixth Amendment rights, and reversing without requiring a showing of prejudice).

[10] This rule is subject to an exception. A limited presumption of prejudice applies to an "actual ineffectiveness" claim based on a conflict of interest. *See Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067; *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S. Ct. 1708, 1718–19, 64 L. Ed. 2d 333 (1980). The prejudice presumption applies to such a claim only if defense counsel's performance was adversely affected by his actual representation of conflicting interests. *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067; *Cuyler*, 446 U.S. at 349–50, 100 S. Ct. at 1718–19. No such allegations have been presented here.

[11] *Ante*, at 14.

recommend probation as appellant requested.[12] This seems to me an insufficient basis on which to conclude that appellant has made the requisite showing of prejudice, not least because this approach ignores all of the remaining evidence.

As I read the record, there was no reasonable probability that the jury would have reached a different outcome absent Russ's testimony, because unfortunately, appellant's friends and family made it abundantly clear that if appellant received probation, they would continue to allow him access to young girls. All of appellant's friends and family who testified at the punishment phase of trial expressed disbelief that appellant committed the offense, and even though a condition of probation would be that appellant avoid contact with children, two witnesses testified that they would have no problem in continuing to allow appellant to have contact with the young girls in their families. One of these witnesses lives across the street from appellant and has a three-year-old daughter. The third witness, appellant's wife, testified that appellant still maintained his innocence, and although she was sure she could promise the jury that she would not leave him alone around children ever again, she undermined that testimony by agreeing that she was equally sure that appellant had not been alone with the complainant. She also demonstrated unreliability in accounting for her husband's whereabouts.[13] Finally, it is

[12] The majority states that these "are only additional factors that support the conclusion that the testimony was in fact quite damaging" and that it determined that Russ's testimony was prejudicial based primarily on "the damaging nature of Russ's testimony." *Ante*, at 15 n.3. But "prejudice" and "damage" mean the same thing. *See* ROGET'S II: THE NEW THESAURUS 759 (Houghton Mifflin Co. ed., 3d ed. 1995); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1788 (Philip Babcock Gove ed., 3d ed. 1993). Thus, to say that the testimony was prejudicial—i.e., damaging—because the testimony was damaging—i.e., prejudicial—is circular. The majority simply presumes that the nature of the testimony was prejudicial, but as explained above, no such presumption applies to claims of "actual ineffectiveness" such as those presented here. When this presumption is removed, nothing remains of the majority's argument concerning prejudice other than the comparative length of all of Russ's testimony and the jury's refusal to recommend probation.

[13] When asked what appellant did after receiving the guilty verdict, appellant's wife initially stated that the family just sat in a room together the whole time, but when asked if appellant ran some errands, she admitted that he did go to "advise the store" of the outcome of the trial. When asked if appellant went shopping for tires, she admitted this as well and testified that appellant had changed a tire on their daughter's vehicle.

undisputed that three of appellant's grandchildren—including an infant girl—continued to live with him.

In sum, there was abundant evidence that instead of supporting his efforts to comply with the conditions of probation, appellant's friends and family would continue to allow him access to young girls. On this record, I would find no reasonable probability that the outcome of the punishment phase of trial would have been more favorable to appellant if his attorney had not called Russ as a witness.

III. NATIONAL ORIGIN

Defense counsel offered evidence during the punishment phase of trial that although appellant is a Mexican citizen, he has been a legal resident of this country since 1985 and would have become an American citizen, but he could not pass the citizenship test because he speaks only Spanish and cannot read and write. Defense counsel referred to this evidence in the opening and closing arguments of the punishment phase of trial, and appellant contends that remarks "that implicated appellant's ethnic, national, and immigration characteristics are strictly prohibited and inadmissible as irrelevant, outside the record, and prejudicial."[14]

Contrary to appellant's argument, such evidence is neither inadmissible per se nor inherently prejudicial, and none of the cases cited by appellant support such a holding.[15]

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[14] Appellant also complains of his counsel's failure to object to improper jury argument by the State. According to appellant, "The State argued that upon deportation, defendant would not be subject to probation supervision." He contends that defense counsel rendered ineffective assistance by failing to object to inflammatory and derogatory remarks to the jury about his ethnic, national, and immigration characteristics. These arguments have not been shown to have any factual basis in the record. None of the State's arguments in the punishment phase of trial contained any reference to deportation or to appellant's ethnicity, nationality, or immigration status, and appellant has cited no inflammatory or derogatory references by the prosecutor to appellant's ethnicity, nationality, or immigration status. I therefore would hold this argument to be waived. *See* TEX. R. APP. P. 38.1(i).

[15] Appellant does not contend that defense counsel improperly elicited extraneous-offense evidence, and as previously mentioned, he cites no evidence of improper jury argument. Thus, the cases he cites in support of his "national origin" argument are distinguishable. *See, e.g.*, *Ex parte Walker*, 777 S.W. 2d 427, 432 (Tex. Crim. App. 1989) (en banc) (eliciting hearsay and extraneous-offense evidence was prejudicial); *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979) (civil case finding no

Offering such evidence can form part of a valid trial strategy, and many reasons for choosing to offer such evidence can be imagined. For example, evidence that appellant became a legal resident decades ago supports defense counsel's arguments in favor of probation by showing that appellant is capable of self-policing and has voluntarily and successfully done so in the past. Appellant has a Hispanic name and the jurors saw that the trial was being translated into Spanish for the appellant. Defense counsel may have been concerned that the jurors may have thought that appellant was an illegal alien. The fact that appellant was a legal resident was a positive fact for the appellant. Counsel may also have chosen to use evidence of appellant's long legal residency to demonstrate his strong roots in the community and to undermine arguments or inferences that appellant would ignore registration requirements, violate the conditions of probation, or avoid supervision by returning to his home country. I therefore would hold that defense counsel's conduct fell within objective norms of professional representation.

CONCLUSION

Although defense counsel has had no opportunity to reply to appellant's allegations of ineffective assistance, it is possible to imagine reasonable trial strategies for the challenged conduct. Moreover, on this record, I would conclude that there is no reasonable probability that the outcome of the punishment phase of trial would have been

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reversible error where attorney argued that lawyer and doctor worked together to increase medical bills); *Tex. Employers' Ins. Ass'n v. Haywood*, 153 Tex. 242, 246, 266 S.W.2d 856, 858–59 (Tex. 1926) (workers' compensation case in which court found prejudice where attorney made a blatant plea for jury to decide case based on idea that witnesses' "color alone was . . . a badge of perjury"); *Brown v. State*, 974 S.W.2d 289, 293–94 (Tex. App.—San Antonio 1998, pet. ref'd) (op. on reh'g) (eliciting evidence of extraneous drug offenses was prejudicial); *Holiday Inn v. State*, 931 S.W. 2d 614, 626–27 (Tex. App.—Amarillo 1996, writ denied) (civil case in which evidence of alien citizenship was held to be not prejudicial); *Riascos v. State*, 792 S.W. 2d 754, 758 (Tex. App.—Houston [14th Dist] 1990, pet. ref'd) (concerning improper jury argument); *Matter of Knighton*, 685 S.W. 2d 719, 721 (Tex. App.—Amarillo 1984, no writ) (civil case in which it was held that asking a jury to decide custody of children based on wife's religion was prejudicial); *Tex. Employers' Ins. Ass'n v. Jones*, 361 S.W.2d 725, 727 (Tex. App.—Waco 1962, writ ref'd n.r.e.) (workers' compensation case in which court found harm from improper jury argument based on racial and religious prejudice); *Penate v. Berry*, 348 S.W.2d 167, 168 (Tex. App.—El Paso 1961, writ ref'd n.r.e.) (civil case in which the court held that it was incurably prejudicial for an attorney to urge the jury to decide a case based on citizenship).

different if none of the challenged conduct had occurred. The absence of a deficient performance by defense counsel and the absence of prejudice afford independent grounds for affirming the trial court's judgment; thus, for each of these reasons, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher. (CJ Hedges majority.
Publish — TEX. R. APP. P. 47.2(b).