Affirmed and Memorandum Opinion filed February 1, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00973-CR

NICOLE ESTELLE GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 0794510

MEMORANDUM OPINION

Appellant Nicole Estelle Green was convicted of murder and sentenced to thirty years' confinement. In three issues, she challenges the sufficiency of the evidence to support her conviction and contends that she received ineffective assistance of counsel. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 3, 1998, the decedent and Anthony Wong were leaving a Houston night club when they encountered appellant and her sister, Tiffany Boyd. The decedent and Wong knew Boyd because Boyd had arranged to rent an apartment on Wong's

behalf; Wong and the decedent each lived in the apartment at one point. Wong testified that Boyd tripped him, and then Boyd and appellant followed him, the decedent, and another friend out of the club. Wong stated that appellant approached the decedent and told him that she knew where he lived and she was going to kill him. Wong testified that the decedent was offended by appellant's remarks and wanted to confront her in the parking lot. The decedent and appellant argued. Someone said the police were coming and the parties left the first club. Boyd's version of events differs. She testified that Wong and the decedent pushed her as she tried to enter the club and then five or six men with weapons surrounded her. She stated that she notified a police officer outside, and he advised her to leave. Eventually, the parties went to a second club.

At the second club, the decedent and Boyd began fighting in the parking lot. Wong testified that Boyd was the aggressor and that the decedent was trying to defend himself. Wong started running towards them and felt something hit his leg. As he was falling, Wong looked behind him and saw appellant standing on the running board of a vehicle firing a gun. He testified that appellant pointed the gun at him and at the decedent while she was shooting. Wong stated that after he was shot a second time, he saw appellant and Boyd get into the vehicle and drive off.

Boyd's and appellant's accounts at trial differed from Wong's description. Boyd testified that the decedent put a gun in her face, she pushed him backwards, and he shot her in the hand. Boyd stated that she fell to the ground and crawled to the passenger's side of the vehicle she arrived in. While she was doing so, she heard gunshots. She testified that neither she nor her sister had a weapon. Appellant testified that the decedent rushed up to her sister and the two began arguing. She then stated that the decedent and Wong, who appellant said was carrying a weapon, rushed up to her, she heard a gunshot, everyone started screaming, and a man handed her a gun. Appellant admitted to shooting Wong; she stated, however, that the decedent was already "going down" when she shot at Wong.

Several witnesses at the scene also testified. Lanaydria Chevis, the decedent's wife, was in the parking lot to pick up her husband from the club when the events took place. Chevis testified that she heard the decedent and a woman "fussing and cussing" at each other. When Chevis exited her vehicle and walked behind the truck she was parked next to, she saw appellant "get on the side of the car and take a gun and shoot [the decedent] dead and he fell." Chevis got in her vehicle and attempted to pursue appellant's vehicle before returning to the scene. Shanquelyn Druilhet, a friend of Chevis's, witnessed the decedent and Boyd fighting. She testified that appellant climbed on the ledge of a vehicle, pointed a gun at the decedent, and began firing.

E.W. Walker, a Houston police officer, stopped by the second club to see a friend after work. He witnessed a female exit a vehicle and start yelling at two men. Walker stated that the female yelled out to the males and one of the males turned around and said something back to her. The female then shot the male who had responded to her. The other male turned around and said something to her, and the female shot him. Walker pursued the vehicle before returning to the scene. Angelo Rayson was also at the club that night. He heard five people arguing. He looked up after hearing gunshots and saw appellant standing over a vehicle pointing a weapon at Wong. He testified that a male was pointing a weapon at the decedent. Clarence Ford was working at the second club. He heard an argument between a male and female. He then heard two gunshots. Ford observed a female speed off in a vehicle.

Several Houston Police Department employees and a medical examiner testified. Appellant challenges the testimony of three of those individuals: (1) Officer Eric Mehl; (2) Darrell Stein; and (3) Dr. Stephen Wilson. Officer Mehl generated a photo array including appellant's photo. Chevis and Druilhet identified appellant in the photo array. Officer Mehl also testified that he ruled out E.W. Walker as a potential fact witness because Walker told him he did not see the shooting occur or the suspects involved and Walker thought the gunshots were coming from a nearby apartment complex.

Stein, a firearms examiner, stated that he was able to determine that the casings were all fired from the same gun and the two bullets were fired from the same gun. The evidence indicated that all were fired from a .45 auto firearm. However, Stein could not say conclusively that all of the ballistics evidence that he evaluated was fired from the same firearm because he did not have the firearm.

Dr. Wilson testified that the decedent's injury was a gunshot wound to the chest. Dr. Wilson performed a toxicology test as part of the autopsy. The decedent tested positive for alcohol at a "fairly high level." No gunshot residue test was performed to determine whether the decedent's hands had been near a firearm when it was fired.

Appellant was apprehended in 2007 in Atlanta, Georgia. She was charged by indictment with murder. A jury found her guilty and assessed punishment at thirty years' confinement.

II. ANALYSIS

A. Sufficiency of the Evidence

In her first two issues, appellant argues that the evidence is legally and factually insufficient to support her conviction. While this appeal was pending, the Court of Criminal Appeals held that only the legal sufficiency standard should be used to evaluate the sufficiency of the evidence in a criminal case. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion); *id.* at 926 (Cochran, J., concurring). Accordingly, we review the sufficiency of the evidence in this case under a rigorous and proper application of the *Jackson v. Virginia*[1] legal sufficiency standard. *Brooks*, 323 S.W.3d at 906.

[1] 443 U.S. 307, 319 (1979).

In a legal sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether a rational fact-finder could have found the defendant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Williams v. State*, 270 S.W.3d 140, 142 (Tex. Crim. App. 2008). We must give deference to "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 319). Thus, we defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 899.

As it applies to this case, a person commits the offense of murder if she "intentionally or knowingly causes the death of an individual" or "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code Ann. § 19.02(b)(1)-(2) (West 2003). When the charge authorizes the jury to convict on more than one theory, as it did in this case, we uphold the guilty verdict if the evidence is sufficient on any one of the theories. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). The jury charge also included an instruction and application paragraph on the law of transferred intent, tracking section 6.04(b)(2) of the Texas Penal Code. *See* Tex. Penal Code Ann § 6.04(b)(2) (West 2003) ("A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different person . . . was injured, harmed, or otherwise affected.").

Appellant contends that the evidence is insufficient to support her conviction because (1) Druilhet testified that she heard five shots, not two, stated on cross-examination that she did not see who shot the decedent, and stated that there was a man near the passenger's side of appellant's car who drew a weapon after appellant started shooting; (2) Walker testified that he heard four shots and stated that he did not see weapons on the decedent or Wong; (3) Officer Mehl discredited the testimony of Walker;

(4) Stein testified that he could not determine whether all of the firearm evidence was fired from the same gun; (5) Dr. Wilson testified that the decedent was intoxicated and Dr. Wilson did not perform a gunshot residue test; (6) Boyd testified that the decedent and Wong had guns, the decedent put a gun in her face, and as she pushed him backwards the decedent shot her in the hand; (7) Wong had a motive to be untruthful; and (8) appellant testified that she heard a gunshot, someone gave her a gun, she shot it to protect herself and her sister, and the only person she shot was Wong.

The testimony of a single eyewitness can be legally sufficient to support a conviction. *See Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971). Here, Wong testified that appellant pointed a gun at him and the decedent while she was shooting and he was "sure she shot both of us." Chevis testified that she saw appellant "get on the side of the car and take a gun and shoot [the decedent] dead and he fell." Druilhet testified that appellant climbed on the ledge of a vehicle, pointed a gun at the decedent, and began firing. Chevis and Druilhet identified appellant from a photo array. While there may have been conflicting evidence, we defer to the fact-finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 899. In addition, this court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *See id*. at 911-12. Viewing all of the evidence in the light most favorable to the verdict, a rational fact-finder could have found appellant guilty of murder beyond a reasonable doubt.

Therefore, we overrule appellant's first and second issues.

B. Ineffective Assistance of Counsel

In her third issue, appellant contends that she received ineffective assistance of counsel because her trial counsel failed to (1) make an opening statement after the State; (2) object to witness characterization of appellant as "the shooter"; (3) submit medical proof of a witness' having been shot; and (4) poll the jury.

We apply a two-prong test in reviewing claims of ineffective assistance of counsel. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To prove ineffective assistance, an appellant must show by a preponderance of the evidence that (1) her counsel's performance was deficient because it fell below the standard of prevailing professional norms, and (2) there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

When determining the validity of an ineffective-assistance-of-counsel claim, there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We also indulge a strong presumption that counsel's actions were motivated by sound trial strategy, and we will not conclude that the action was deficient unless it was so outrageous that no competent attorney would have engaged in such conduct. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). However, when no reasonable trial strategy could justify trial 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 trial counsel's subjective reasons for acting as he did. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. In the majority of cases, the record on direct appeal is simply undeveloped and cannot adequately reflect the alleged failings of trial counsel. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (per curiam). This is particularly true when the alleged deficiencies are matters of omission and not of commission revealed in the record. *Id.* A proper record is best developed in a habeas corpus proceeding or in a motion for new trial hearing. *Jensen v. State*, 66 S.W.3d 528, 542 (Tex. App.—Houston

[14th Dist.] 2002, pet. ref'd). Although appellant filed a motion for new trial, she did not raise ineffective assistance of counsel in the motion. The motion was overruled by operation of law. *See* Tex. R. App. P. 21.8.

Opening Statement: Appellant contends that her trial counsel was ineffective because he should have given his opening statement immediately following the State's opening statement. Because an opening statement provides the State with a preview of the defense's strategy, trial counsel may have made the tactical decision not to make an opening statement until later. *See Standerford v. State*, 928 S.W.2d 688, 697 (Tex. App.—Fort Worth 1996, no pet.) (holding no ineffective assistance of counsel when trial counsel did not make an opening statement at all); *see also Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003) (stating that not making opening statement during punishment phase, among other alleged errors, alone is not sufficient to show ineffective assistance in face of silent record).

No objection to characterization: Appellant contends that her trial counsel was ineffective because he failed to object to Wong's labeling of appellant as "the shooter" and Boyd as "the shooter's sister." She argues that this error was compounded by the State when the prosecutor, during questioning of the witness, referred to appellant and Boyd using those labels. Wong testified that appellant was the person who shot him prior to referring to her as "the shooter." He stated that he had difficulty remembering appellant's and Boyd's names, so he referred to them, without objection, as "the shooter" and "the shooter's sister" to avoid ambiguity in his testimony. He then identified appellant in court as the person "who shot and killed my friend and shot me twice." After the identification, the prosecutor stated that he would refer to appellant as "the shooter" and her sister as "the shooter's sister."

In the absence of evidence of trial counsel's reasons for not objecting to the use of the terms "shooter" and "shooter's sister," we do not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have

engaged in it." *See Garcia*, 57 S.W.3d at 440. Even if appellant demonstrates deficient assistance, she must also affirmatively prove prejudice. *See Thompson*, 9 S.W.3d at 812. Appellant claims the reference was prejudicial because the jury would "feel immediately that the appellant was the person firing the gun during the incident." However, Wong, prior to labeling appellant as "the shooter," had testified that appellant was the person who shot him. In addition, several other witnesses testified that appellant was the person doing the shooting during the incident.

No medical proof: Appellant contends that her trial counsel was ineffective because he should have submitted medical proof of Boyd's hand wound to support Boyd's testimony that the decedent shot her. Boyd testified that she sought medical attention at the hospital where she worked, but she did not know whether hospital personnel created a medical record of her visit. Counsel's failure to present certain evidence is irrelevant absent a showing that such evidence was available and that appellant would have benefitted from the evidence. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983).

Polling the jury: Appellant contends her trial counsel was ineffective because he did not poll the jury. While the Code of Criminal Procedure allows the jury to be polled, there is no requirement that trial counsel do so. *See* Tex. Code Crim. Proc. Ann. art. 37.05 (West 2006).

The record does not affirmatively demonstrate ineffectiveness, particularly given the strong presumption that counsel was motivated by sound trial strategy. *See Garcia*, 57 S.W.3d at 440. Accordingly, appellant has failed to meet her burden of proving ineffectiveness by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 813. We overrule appellant's third issue.

III. CONCLUSION

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

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justice McCally and Senior Justice Mirabal.[*]
Do Not Publish — TEX. R. APP. P. 47.2(b).

[*] Senior Justice Margaret Garner Mirabal sitting by assignment