In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00289-CR

SHERRY LETRICIA REEVES BOWEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law
Polk County, Texas
Trial Cause No. 2015-0114

MEMORANDUM OPINION

Sherry Letricia Reeves Bowen appeals her misdemeanor conviction for possession of marijuana. *See* Tex. Health & Safety Code Ann. § 481.121(a), (b)(1) (West 2010) (categorizing possession of marijuana weighing two ounces or less as a class B misdemeanor). In seven appellate issues, Bowen argues that (1) the trial court abused its discretion by admitting evidence of her prior arrests during the

guilt-innocence phase of her trial; (2) Bowen suffered egregious harm when the prosecutor, without objection, cross-examined Bowen's fiancé regarding the failure of Bowen's attorney to inform the prosecutor prior to the trial that Bowen's fiancé would testify that the marijuana the State claimed was in Bowen's possession belonged to him; (3) Bowen suffered egregious harm when the prosecutor, without objection, asked one of the officers what conclusion he would draw from the fact that a person had avoided being convicted following multiple arrests; (4) the evidence was insufficient to support the jury's verdict; (5) the trial court erred by failing to obtain a presentence investigation report before sentencing Bowen to jail; (6) the trial court failed, during the sentencing hearing, to have Bowen evaluated to determine if she was competent to stand trial; and (7) Bowen received ineffective assistance of counsel in the guilt-innocence and punishment phases of her trial when her attorney failed to raise various errors that she claims occurred during her trial.

To the extent Bowen's issues address alleged errors in the guilt-innocence phase of her trial, we overrule issues one through four and issue seven. We further conclude that the trial court's failure to obtain a presentence report before sentencing Bowen was error and that the error was harmful. Consequently, we affirm Bowen's conviction for possession, but we reverse Bowen's sentence and

remand her case to the trial court for another punishment hearing. Tex. Code Crim. Proc. Ann. art. 44.29(b) (West Supp. 2016).

Background

In 2015, the State charged Bowen with possessing marijuana weighing two ounces or less. *See* Tex. Health & Safety Code Ann. § 481.121(a), (b)(1). The testimony in the trial shows that in June 2014, the police recovered marijuana in a car owned by Bowen's mother, which Bowen had driven to work the day the alleged offense occurred. During Bowen's trial, two of the police officers involved in the investigation that led to Bowen's arrest testified for the State. After the State rested, Bowen and her fiancé, Robert Dhaese, testified in Bowen's defense. Following the guilt-innocence phase of Bowen's case, the jury found Bowen guilty of possession. *Id.*

Bowen elected to have the trial court assess punishment, and approximately one week after the jury found her guilty, the trial court conducted a punishment hearing. During the punishment phase of Bowen's trial, the State presented two witnesses, a police officer employed by the Polk County Sheriff's Office, who confiscated "[a] couple of small black objects commonly known as 'roaches' or tips of marijuana cigarettes" from Bowen when she entered the courthouse before her sentencing hearing began, and a patrol officer employed by the City of

Livingston, who performed a field test on the items taken from Bowen when she entered the courthouse to attend her punishment hearing. According to the testimony of the officer who worked for the sheriff's office, Bowen was arrested for possession; but, because he had not yet submitted a report about Bowen's arrest to the district attorney, Bowen had not yet been formally charged with an offense. The officer employed by the City of Livingston testified the contraband taken from Bowen showed that the substance Bowen attempted to bring into the courthouse contained marijuana.

After the State rested, Bowen's attorney advised the trial court that he did not believe that "Bowen [was] in a condition to testify at this time." At that point, the judge asked Bowen's attorney whether Bowen was ill or whether her condition was voluntary. Bowen's attorney advised the court that he did not know, but that "based on my observations and my conversations with her, I don't believe that she is totally competent and clear in her thinking at this time. I don't think she has the ability to comprehend what she's going to be doing or saying." When the trial court asked whether Bowen's attorney had any knowledge about whether Bowen was ill, her attorney indicated that he had "no knowledge of what's causing it." The record does not reflect that the trial court, the prosecutor, or Bowen's attorney asked Bowen any questions to create a record to show whether Bowen had the

ability to consult with her attorney or to demonstrate whether she had both a rational and factual understanding about the consequences that were related to the impending hearing. *See* Tex. Code Crim. Proc. Ann. art. 46B.003 (West 2006).

During the hearing, Bowen's attorney did not call any witnesses to testify on Bowen's behalf. In final argument, Bowen's attorney argued that the fact Bowen appeared in the state she was in on the day of her punishment hearing "sheds some light on the problem here, that this lady may need some help as far as treatment is concerned." He then argued that since Bowen had never previously been convicted of possession, and given that it was apparent she had a problem, Bowen should be given a sentence requiring that she receive treatment, as a "jail time sentence in her case would [not] be appropriate." In final argument, the prosecutor recommended that Bowen be sentenced to ninety days in jail. At the conclusion of the hearing, the trial court assessed a 120-day sentence. *See* Tex. Penal Code Ann. § 12.22 (West 2011).

Insufficient Evidence

For convenience, we begin our analysis with Bowen's fourth issue, in which she argues that the evidence is insufficient to support the jury's finding of guilt. According to Bowen, the evidence admitted during her trial was not sufficient to support the jury's conclusion that she possessed the marijuana. She argues the

evidence did not show that she owned or operated the car. She also argued the evidence linking her to the marijuana showed the marijuana belonged to her fiancé and that she was unaware the marijuana was there.

We review the sufficiency of the evidence to support a conviction under the standards established by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under the *Jackson* standards, we view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences from the evidence, whether any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (citing *Jackson*, 443 U.S. at 318-19). "The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses." *Id*. In this role, the jury may choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). Further, the jury is permitted to draw multiple reasonable inferences from facts as long as each inference that the jury makes is supported by the evidence presented during trial. *Temple*, 390 S.W.3d at 360. If the record before the jury supports conflicting inferences, we presume the jury resolved any conflicts in favor of the verdict that the jury reached, and we

defer to the jury's determination when the jury made its determination on conflicting inferences. *Id*.

When acting as the trier of fact, the jury acts as the exclusive judge of the weight and credibility of witnesses; therefore, the jury is given deference in the review of the jury's findings regarding the manner in which the jury chose to resolve the conflicts that existed in the evidence. *See Jackson*, 443 U.S. at 319. When possible, the court reviewing the evidence presumes that the jury resolved any inconsistencies in the evidence in a manner that will allow the reviewing court to uphold the jury's verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). In our review of the record, we consider all of the evidence that the trial court admitted during the trial regardless of whether it was properly admitted. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Direct and circumstantial evidence are equally probative of an actor's guilt, and "'circumstantial evidence alone can be sufficient to establish guilt.'" *Temple*, 390 S.W.3d at 359 (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). In a circumstantial evidence case, each fact need not point directly and independently to the guilt of the defendant, so long as the combined and cumulative force of all of the incriminating circumstances warrants the jury's conclusion that the defendant is guilty. *Id.* (quoting *Johnson v. State*, 871 S.W.2d

183, 186 (Tex. Crim. App. 1993)); *Hooper*, 214 S.W.3d at 13. "After giving proper deference to the factfinder's role, we will uphold the verdict unless a rational factfinder must have had reasonable doubt as to any essential element." *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009).

To prove that Bowen possessed marijuana, the State was required to prove, beyond reasonable doubt, that Bowen "knowingly or intentionally possesse[d] a usable quantity of marihuana." Tex. Health & Safety Code Ann. § 481.121(a). Bowen does not argue that a usable quantity of marijuana was not recovered from her mother's car; instead, she argues that the evidence did not show that she was in possession of the car, and she points to her testimony and the testimony of her fiancé that she did not know the marijuana was in the car, and to the testimony of her fiancé that the marijuana in the car was his.

It is undisputed that the car in which the marijuana was found was not owned by Bowen. However, the evidence conflicts on the question of whether Bowen drove the car to work on the date the alleged offense occurred. Our review of the record reveals that one of the officers testified that Bowen told him before the police searched the car that the car belonged to a family member, and he testified that Bowen told him "she was driving the car." While Bowen denied in her testimony that she drove the car to work that day, the officer's testimony about

what Bowen told him on the day of her arrests conflicts with the testimony Bowen provided in the trial.

To prove that Bowen knowingly or intentionally possessed the marijuana in the car, the State had to prove that Bowen (1) exercised control, management, or care over the substance in question and (2) knew that the substance was contraband. *See id*. § 481.002(38) (West Supp. 2016) (defining possession); Tex. Penal Code Ann. § 1.07(a)(39) (West Supp. 2016) (defining possession as "actual care, custody, control, or management"); *see also Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016); *Martin v. State*, 753 S.W.2d 384, 386 (Tex. Crim. App. 1988). Given that Bowen was not in the car when the marijuana was discovered and the fact that Bowen did not own the car, the State was required to produce evidence in Bowen's case sufficient to affirmatively link Bowen to the marijuana discovered in her mother's car. *See Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995); *Gabriel v. State*, 842 S.W.2d 328, 331 (Tex. App.—Dallas 1992), *aff'd*, 900 S.W.2d 721 (Tex. Crim. App. 1995). Nonetheless, to link Bowen to the marijuana in the car, the State was not required to prove that Bowen was the only person with the right to use the car. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *State v. Derrow*, 981 S.W.2d 776, 779 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). As the factfinder, the jury had

the discretion to believe the officer's testimony about whether Bowen was driving the car and to disbelieve the testimony of Bowen and her fiancé regarding who was in charge of the car on the day Bowen was arrested. *See Curry*, 30 S.W.3d at 406.

Additionally, in arguing the evidence is insufficient to support the verdict, Bowen points to the testimony of her fiancé that the marijuana belonged to him and that Bowen did not know that it was there. However, the issue is not whether the State proved that the marijuana was under Bowen's exclusive control; instead, the question is whether the evidence sufficiently demonstrates, beyond reasonable doubt, that the marijuana in the car was subject to Bowen's actual care, custody, control or management. *See Poindexter v. State*, 153 S.W.3d 402, 406 (Tex. Crim. App. 2005) (quoting *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. 1981)). In evaluating whether sufficient evidence was before the jury to support a finding that a defendant possessed contraband discovered in a location that is not subject to the defendant's exclusive control, courts examine the following non-exhaustive factors, including:

- whether the defendant was present when the search was conducted,
- whether the contraband was in plain view,
- whether the defendant was in proximity to and had access to the drugs,
- whether the defendant was under the influence of drugs when arrested,

- whether the defendant possessed other contraband or narcotics when arrested,
- whether the defendant made incriminating statements when arrested,
- whether the defendant attempted to flee,
- whether the defendant made furtive gestures,
- whether there was an odor of contraband,
- whether other contraband or drug paraphernalia were present,
- whether the defendant owned or had the right to possess the place where the drugs were found,
- whether the place where the drugs were found was enclosed,
- whether the defendant was found with a large amount of cash, and
- whether the conduct of the defendant indicated a consciousness of guilt.

Evans v. State, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006); *see also Nixon v. State*, 928 S.W.2d 212, 215 (Tex. App.—Beaumont 1996, no pet.). To prevail on a claim that a defendant possessed contraband, the State need not prove that all of the links listed above are present; instead, the "number of ... links is not as important as the logical force that they collectively create." *Hubert v. State*, 312 S.W.3d 687, 691 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd); *see also Jones v. State*, 338 S.W.3d 725, 742 (Tex. App.—Houston [1st Dist.] 2011), *aff'd*, 364

S.W.3d 854 (Tex. Crim. App. 2012). And, the evidence linking a defendant to contraband can be direct or circumstantial, but the logical force of the collective links must show the defendant's connection to the contraband is not merely fortuitous. *See Evans*, 202 S.W.3d at 161; *Smith v. State*, 176 S.W.3d 907, 916 (Tex. App.—Dallas 2005, pet. ref'd). Moreover, "[t]he absence of various affirmative links does not constitute evidence of innocence to be weighed against the affirmative links present." *James v. State*, 264 S.W.3d 215, 219 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd); *see also Williams v. State*, 313 S.W.3d 393, 398 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Finally, the evidence regarding the number of links present in a case need not exclude every innocent explanation the defendant may have on the subject of who possessed the contraband. *See Brown*, 911 S.W.2d at 748.

The jury was not required to accept the testimony of any particular witness, including Bowen's fiancé, and it was entitled to rely on the circumstantial evidence and direct testimony about who was in charge of the car on the day of Bowen's arrest. *See Jackson*, 443 U.S. at 326; *Poindexter*, 153 S.W.3d at 406. As the sole judge of the credibility of the witnesses, the jury was also free to reject the testimony of Bowen and her fiancé that she did not know the marijuana was in the car. *See Johnson v. State*, 571 S.W.2d 170, 173 (Tex. Crim. App. 1978) (jury is the

sole judge of the credibility of the witnesses); *see also Nelson v. State*, No. 09-08-00503-CR, 2009 Tex. App. LEXIS 6759, at **4-5 (Tex. App.—Beaumont Aug. 26, 2009, no pet.) (mem. op.). Additionally, the jury was entitled to infer from the circumstances that the marijuana had been in the car since Bowen drove it to work, and that the locations where the marijuana was discovered—in the glove box and in the passenger seat—were locations that were accessible by anyone travelling in the car's front seat. *See Poindexter*, 153 S.W.3d at 406. Finally, the testimony before the jury shows that Bowen was the person who gave the police permission to search the car, and that before the search occurred, one of the officer's heard Bowen say that marijuana would be found in the car's glove box. This testimony supports the jury's conclusion that Bowen knew the marijuana was in the car. While Bowen argues that she relayed the location of the marijuana to police based on information she obtained from individuals standing near the car just before the car was searched, as the factfinder, the jury was not required to believe Bowen's claim that she learned marijuana was in the car only shortly before the car was searched. *Id*.

Under the *Jackson* standard, when evaluating whether the evidence allowed the jury to reasonably infer that Bowen had care, custody, control, or management over the contraband, Bowen's innocent explanation about the presence of the

contraband is not taken in isolation. *See Tate*, 500 S.W.3d at 417. Since the State was not required to prove that the marijuana was in Bowen's exclusive possession, her fiancé's testimony that the marijuana belonged to him is not dispositive of whether the marijuana was also in her possession. *See Martin*, 753 S.W.2d at 386; *McGoldrick*, 682 S.W.2d at 578. Given the logical force of all of the evidence before the jury, we conclude the evidence allowed the jury to reasonably conclude that Bowen was guilty of possessing the marijuana that the police recovered in searching the car. *See Thornton v. State*, 425 S.W.3d 289, 305 (Tex. Crim. App. 2014). Bowen's links to the car and to the marijuana discovered inside were sufficient to allow a rational jury to reasonably find, beyond reasonable doubt, that Bowen intentionally or knowingly exercised care, custody, control, or management over the marijuana in the car. We overrule Bowen's fourth issue.

Evidence of Prior Arrests

In issue one, Bowen complains the trial court erred by allowing the State to ask one of the officers who testified if Bowen had ever been arrested. In response to Bowen's complaint, the State argues that Bowen opened the door to testimony about her criminal history. According to the State, when Bowen was asked about her past history with the police, she responded by stating that she was never arrested for distributing marijuana. Her answer led to further questions about her

prior history with the police, which included the evidence that addressed her history of arrests.

We review a trial court's ruling to admit or to exclude evidence using an abuse of discretion standard. *Carrasco v. State,* 154 S.W.3d 127, 129 (Tex. Crim. App. 2005). When the trial court's evidentiary ruling can be sustained under any theory of law that applies to the case, the ruling will not be reversed on appeal. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). To demonstrate the trial court committed error, the appellant is required to show in the appeal that the trial court's ruling "was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State,* 268 S.W.3d 571, 579 (Tex. Crim. App. 2008).

Generally, the credibility of a witness can be attacked with evidence showing the defendant was convicted of a crime if the crime involved a felony or a crime of moral turpitude, but only if the trial court determines that the probative value of the evidence regarding the conviction outweighs the prejudicial effect arising from the conviction. *See* Tex. R. Evid. 609(a). Nonetheless, if a witness, when testifying, makes statements concerning the witness's past conduct that suggests to the jury that the witness has never before been arrested, charged, or convicted of any offense, Rule 609 does not exclude evidence about the witness's

prior criminal conduct. *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993). In other words, a witness who testifies that she has never been arrested may be impeached with evidence showing her history of arrests to avoid allowing the witness to create the impression of the witness's character as a law-abiding citizen. *See id.*

Bowen did make several statements related to her history of arrests when she testified. In response to a question posed by Bowen's attorney, Bowen testified that she "beat the charges [arising from a case involving her employer] because they never arrested me." Bowen made this statement in response to her attorney's question about how one of the officers who was present when she was arrested in June 2014 knew her. Subsequently, on cross-examination, the prosecutor asked Bowen again how the officers knew her before she was arrested for possession. In answering that question, Bowen volunteered that the officers knew her because she had previously been arrested for driving with a suspended license. Subsequently, without objection, the prosecutor asked Bowen whether she had been arrested more than once. In response, Bowen indicated that she had been arrested "the one time[,]" but that she "beat that charge because [she] didn't do it."

In the rebuttal phase of the State's case, the State recalled one of the officers who had been involved in the investigation that led to Bowen's arrest on the charge

that was the subject of Bowen's trial. The officer testified that he knew Bowen from his past dealings with her. Then, the officer indicated that in another matter, Bowen and another individual were supposed to help the County with a case but that they never did. When asked whether Bowen had ever been arrested, the officer answered, without objection, that she had. When the prosecutor then asked: "How many times[,]" Bowen's attorney objected, and he argued that he had not opened the door to testimony regarding Bowen's history of arrests. However, the trial court ruled: "I think the door has been opened as to her prior dealings, she testified to that." Then, the Court limited the scope of the prosecutor's question to a period encompassing the prior ten years. Based on that limitation, the officer testified that Bowen had been arrested twice, including her arrest for possessing the marijuana in her mother's car. He further explained that Bowen's other arrest involved an arrest for engaging in organized crime, which appears to contradict her testimony that she was never arrested on the case involving her employer. Subsequently, Bowen's attorney asked the officer whether he knew Bowen's criminal history; the officer responded that to his knowledge, Bowen had "been arrested for marijuana four times."

In our opinion, the trial court could have reasonably concluded that Bowen was attempting to leave the jury with a false impression about the number and

nature of her prior arrests. In our opinion, the trial court's conclusion that Bowen opened the door to the evidence regarding her history of arrests was a matter that falls within the zone of reasonable disagreement. *See* Tex. R. Evid. 404(a)(2) (allowing the prosecutor to offer evidence to rebut evidence presented by the defendant of a pertinent trait); *Delk*, 855 S.W.2d at 704 (allowing the State to expose a falsehood regarding otherwise irrelevant evidence concerning a witness's character). Because the trial court did not abuse its discretion by ruling that Bowen opened the door to her history of arrests, we overrule issue one.

Failure to Preserve Alleged Error

In issues two and three, Bowen complains about several questions the prosecutor asked her fiancé and one of the police officers during the trial. The record shows that when the testimony was introduced, the testimony was admitted without objection. In her brief, Bowen recognizes that her trial attorney failed to object to the testimony that is the subject of the argument she raises in issues two and three. Nevertheless, Bowen argues that the error presented by admitting the testimony was egregious, and that the harm the testimony created destroyed the presumption that she was innocent, violated her double-jeopardy rights, and operated to deprive her of her right to a fair trial.

Bowen's complaints about the manner the prosecutor cross-examined Bowen's fiancé concern her fiancé's claim that the marijuana in the car belonged to him. While cross-examining Bowen's fiancé, the prosecutor asked Bowen's fiancé whether Bowen's attorney was aware that Bowen's fiancé had claimed the marijuana was his before Bowen's trial. The prosecutor also asked Bowen's fiancé why he failed to go to the courthouse before Bowen's trial in an effort to have the case against Bowen dismissed. Bowen's complaints about the manner the prosecutor examined the officer concern the prosecutor's question to the officer about the significance of a person being arrested multiple times without being convicted. In response to the question, the officer testified that the circumstances showed that "[s]he's skating by."

In our opinion, the matters that Bowen complains about in issues two and three are evidentiary matters that do not raise any concerns relating to Bowen's fundamental rights. The Texas Court of Criminal Appeals has explained that the requirement that a defendant make timely and specific objections during a trial do not apply "to two relatively small categories of errors: violations of 'rights which are waivable only' and denials of 'absolute systemic requirements.'" *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002) (quoting *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v.*

State, 947 S.W.2d 262 (Tex. Crim. App. 1997)). Waivable-only rights, or "'rights of litigants which must be implemented by the system unless expressly waived,'" include the right to assistance of counsel and the right to trial by jury. *Mendez v. State*, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004) (quoting *Marin*, 851 S.W.2d at 279); *Saldano*, 70 S.W.3d at 888. Fundamental rights, as discussed in *Mendez*, are not at issue here, since Bowen's complaints in issues two and three relate solely to the admission of testimony in her trial. *See id*.

Bowen's issue two and three complaints, which concern the admissibility of testimony, also do not concern any of the systemic requirements of the judicial system, as systemic requirements arise from laws "that a trial court has a duty to follow even if the parties wish otherwise." *Mendez*, 138 S.W.3d at 340. Systemic requirements of the judicial system encompass matters that include whether a court possesses jurisdiction over the person, whether a court has jurisdiction over the subject matter of the case, or whether a penal statute complies with the separation of powers provision of the Texas Constitution. *Saldano*, 70 S.W.3d at 888. Unless the matter is one that involves a denial of an absolute systemic requirement or a right classified as a right that must be expressly waived, the rules of error preservation apply, and complaints regarding such errors may not be raised for the first time on appeal. *See id*. Since Bowen's complaints concern the admission of

testimony, her complaints relate to rights a litigant may have that the litigant can seek to implement upon request. *See Mendez*, 138 S.W.3d at 340-41.

Because issues two and three concern the admission of evidence, this is not the rare case in which we are authorized to take "'notice of fundamental errors affecting substantial rights although they were not brought to the attention of the [trial] court.'" *Boler v. State*, 177 S.W.3d 366, 373 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (quoting Tex. R. Evid. 103). We are not persuaded that Bowen is excused from following the ordinary rules of error preservation regarding the matters she complains about in issues two and three. *See* Tex. R. App. P. 33.1. Rule 33.1 requires that parties preserve their rights to appellate review by raising their complaints during the trial through a timely and specific objection or motion pointing out the complaint to the trial court. *See id; Mendez*, 138 S.W.3d at 340-41. We hold that by failing to complain about the testimony of the officer and of Bowen's fiancé in a timely manner during the trial, Bowen forfeited her right to appellate review regarding the complaints she raised about the testimony for the first time in her appeal. *See, e.g., Saldano*, 70 S.W.3d at 890 ("Because the appellant did not object to the admission of the testimony of which he now complains, the question he seeks to present has not been preserved for review on appeal."); *Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000) ("To

preserve error regarding the admission of evidence, a defendant must lodge a timely and specific objection . . . to give to the trial court . . . the opportunity to correct the error[.]"). Issues two and three are overruled.

Presentence Investigation Report

In her fifth issue, Bowen argues that the trial court committed error by sentencing Bowen without first obtaining a presentencing report. According to Bowen, article 42.12, section 9(a) of the Texas Code of Criminal Procedure requires judges in misdemeanor cases to obtain a presentencing report before pronouncing a defendant's sentence. Tex. Code Crim. Proc. Ann. art. 42.12, § 9(a) (West Supp. 2016). Bowen argues that because she did not waive the trial court's obligation to obtain a presentencing report before imposing her sentence, the error entitles her to receive another punishment hearing.

Generally, a trial court must order a presentencing report in misdemeanor cases. *Id.* However, there are two statutory exceptions to the statutory requirement. *Id.* art. 42.12, § 9(b) (West Supp. 2016). The exceptions apply if "(1) the defendant requests that a report not be made and the judge agrees to the request; or (2) the judge finds that there is sufficient information in the record to permit the meaningful exercise of sentencing discretion and the judge explains this finding on the record." *Id.*

In this case, the record does not show that Bowen requested that no report be made, nor does it show that the trial court agreed no report was required. *Id*. Also, the record does not contain the trial court's affirmative explanation that sufficient information existed based on the evidence already before it to allow the court to exercise meaningful discretion in determining an appropriate sentence. *Id.* The record also does not show that Bowen's attorney agreed to waive the requirements regarding the trial court's obligation to obtain a presentencing report.

In response to Bowen's argument, the State argues that Bowen was not harmed by the trial court's failure to obtain a presentencing report. However, we are unable to conclude on the record before us that Bowen was not harmed by the error. Only two witnesses testified during the punishment hearing in Bowen's case. The witnesses, the two police officers who were familiar with Bowen's arrest for entering the courthouse while in possession of marijuana, did not address the topics required to be addressed by a presentencing report such as the defendant's social history and the programs and sanctions the corrections department could provide to Bowen should the trial court suspend Bowen's sentence. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 9 (outlining the information included in a presentencing report). Given the testimony in the trial that Bowen had never been previously convicted of any crimes, the argument presented by Bowen's attorney that Bowen

needed treatment, the absence of information in the record addressing the programs available to assess and address Bowen's drug use, and that the prosecutor suggested Bowen receive a more lenient sentence than the one the trial court imposed, we conclude Bowen was harmed by the trial court's failure to obtain the statutorily required report.

Consequently, we sustain Bowen's fifth issue, we reverse the judgment as to punishment, and we remand Bowen's case to the trial court to allow the trial court to conduct a new punishment hearing. *Id.* art. 42.12, § 9 (a), (b); Tex. R. App. P. 43.2(d); Tex. Code Crim. Proc. Ann. art. 44.29(b).

Ineffective Assistance of Counsel

In issue seven, Bowen argues that she received ineffective assistance of counsel throughout her trial. According to Bowen, her trial counsel failed to object to testimony during the guilt-innocence phase of her trial addressing Bowen's history of arrests, failed to request that the trial court stay the punishment hearing pending an evaluation to determine if Bowen was competent to stand trial, and failed to object when the trial court sentenced Bowen without the benefit of a presentencing report.

Because we have reversed Bowen's sentence and ordered that she receive another hearing on her punishment, we do not address Bowen's complaints that

assert she received ineffective assistance of counsel in the punishment phase of her trial. Tex. R. App. P. 47.1. Nonetheless, we are still required to resolve Bowen's complaint that she received ineffective assistance of counsel during the guilt-innocence phase of her trial. *Id*.

To establish a claim of ineffective assistance of counsel, the defendant must show that the performance of her attorney fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). When making an ineffective assistance of counsel claim, the defendant bears the burden of developing the facts needed to show that her attorney was ineffective under the standards identified in *Strickland*. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (citing *Strickland*, 466 U.S. at 689). Generally, to prove a claim of ineffective assistance, the defendant must overcome the "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) (citing *Strickland*, 466 U.S. at 690).

Ordinarily, if the defendant failed to raise a claim of ineffective assistance with the trial court, the record of the proceedings that occurred during the

defendant's trial will not be sufficiently developed to allow the appeals court to conclude that counsel's alleged errors violated the *Strickland* standards. *Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012). When the record before the appellate court indicates that the attorney who represented the defendant was never provided an opportunity to explain the conduct that the defendant is challenging on appeal, appellate courts generally presume that, had the attorney been given the opportunity to respond to the complaints being levelled in the appeal, the explanation would show that the counsel made a choice between different possible trial strategies. *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

In Bowen's case, although Bowen filed a motion for new trial, her motion did not raise a claim of ineffective assistance of counsel. As a result, the record before us contains no explanation by trial counsel regarding whether Bowen's complaints about the manner her case was handled are explainable because they arose from a choice between differing trial strategies. Because Bowen's attorney was not given an opportunity to respond to Bowen's complaints, we are unable to conclude that Bowen's attorney was constitutionally ineffective under the *Strickland* standards. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003).

With respect to Bowen's ineffective assistance claims during the guilt-innocence phase of the trial, Bowen's case does not present "the rare case where the record on direct appeal is sufficient to prove that counsel's performance was deficient[.]" *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). On this record, Bowen has not overcome the strong presumption that she received reasonable professional assistance. *See Thompson*, 9 S.W.3d at 813-14. To the extent that Bowen's seventh issue complains that Bowen received ineffective assistance during the guilt-innocence phase of her trial, the issue is overruled without prejudice to Bowen's right to raise her claim in a post-conviction writ. *See Goodspeed*, 187 S.W.3d at 392; *Robinson*, 16 S.W.3d at 813 n.7.

Conclusion

Given our resolution of issues one through four and seven, Bowen's conviction for possession of marijuana is affirmed. We need not resolve issue six, or resolve Bowen's ineffective assistance of counsel arguments that involve the punishment phase of Bowen's case because resolving these arguments would not entitle Bowen to relief that exceeds that which she has been granted based on our resolution of issue five. *See* Tex. R. App. P. 47.1. Because the trial court failed to obtain a presentencing report, we reverse the judgment as to punishment and

remand the cause to the trial court for a new punishment hearing. *See* Tex. R. App. P. 43.2(a), (d); Tex. Code Crim. Proc. Ann. art. 44.29(b).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

HOLLIS HORTON
Justice

Submitted on May 17, 2016
Opinion Delivered May 31, 2017
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Before McKeithen, C.J., Kreger and Horton, JJ.