IN THE
TENTH COURT OF APPEALS

No. 10-17-00348-CR

LOGAN MARQUIES NEWSOME,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 361st District Court
Brazos County, Texas
Trial Court No. 15-05251-CRF-361

MEMORANDUM OPINION

A jury found Appellant Logan Marquies Newsome guilty of the offense of arson, with a deadly weapon finding. Newsome pled "true" to an enhancement paragraph, and the jury sentenced Newsome to thirty-five years in the Texas Department of Criminal Justice. Newsome challenges his conviction in two issues: (1) his trial counsel rendered ineffective assistance of counsel; and (2) the evidence is legally insufficient to support the verdict and the deadly weapon finding. We affirm.

Background

On October 25, 2015, a fire started in the apartment closet of Newsome's on-again, off-again girlfriend ("Girlfriend"). The fire did extensive damage and required the temporary relocation of at least twelve residents. Girlfriend, who was pregnant with Newsome's child, identified Newsome to the police as someone who had a motive to start the fire.

Discussion

A. Sufficiency of the Evidence. Newsome argues that the evidence at trial was legally insufficient to support the verdict or the deadly weapon finding.

The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. We may not re-weigh the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (*citing Jackson*, 443 U.S. at 319, 99 S.Ct. 2781); *see also Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368

> S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.
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> We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

A person commits arson if the person starts a fire, regardless of whether the fire continues after ignition, with intent to destroy or damage a habitation knowing that it was located on property belonging to another. TEX. PENAL CODE ANN. § 28.02(a)(2)(D). "There must be some proof, direct or circumstantial, showing the willful burning of the building by [someone] and the criminal connection of the accused therewith . . . ." *Massey v. State*, 226 S.W.2d 856, 859, 154 Tex. Crim. 263 (Tex. Crim. App. 1950).

Newsome denied setting the fire which required the State to prove beyond a reasonable doubt that he was the person who started the fire or was "criminally connected therewith." *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). The latter element is sometimes referred to as "identity." *See id.* at 524–25. "Although motive

and opportunity are not elements of arson and are not sufficient to prove identity, they are circumstances indicative of guilt." *Id*. at 526. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Motive is a significant circumstance indicating guilt. Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant."). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

The evidence presented at trial reflected that a fire started in the closet in Girlfriend's apartment. Girlfriend was not at home. The firefighters who responded found the door to the apartment had been kicked in, and both of the flatscreen televisions, one in the living room and one in the bedroom, were smashed. Firefighters reported that they also had damaged the television in the bedroom but did not cause the damage to the one in the living room. A firefighter testified that the fire originated in a bedroom closet, which was odd because there was nothing in the closet that would constitute an ignition source. A deputy fire marshal, who is a licensed arson investigator, testified that the fire was incendiary in nature and intentionally set. There was no electrical plug inside the closet, and the electrical wiring connected to the light socket inside the closet was intact. Nothing else in the closet would cause ignition. An iron in the closet had the electrical cord wrapped around the handle, indicating it was not plugged in when the fire started.

The deputy fire marshal further testified that it appeared that the fire started in at least two locations about two feet off the ground. The sheetrock near the floor was not burned. The clothing on both sides of the closet was set on fire, indicated by the fact that

plastic hangers were melted, and clothing from the hangers fell on to the shoes underneath, shielding them from extensive damage. Many of the shoes on the floor of the closet were not damaged, and the carpet on the floor of the closet was not burned badly. The deputy fire marshal testified that clothing is very flammable and does not require an accelerant to burn. Analysis of the debris did not indicate the presence of accelerants. The deputy fire marshal learned during his investigation that the door to the apartment was damaged during a break-in a few days earlier and that the door had been temporarily repaired by nailing a board over it to hold it up.

The deputy fire marshal also testified that fire is dangerous within a structure, and particularly so in an apartment building where numerous individuals reside. The fire in this case created a risk to the lives and property of those who lived in Girlfriend's apartment building. The smoke was so thick in this case that some residents had to be extracted through their windows by firefighters on ladders.

No one witnessed the fire being started. No one saw Newsome around the apartment on the day of the fire, and no physical evidence linked him to the fire. The fire caused damage to sixteen apartment units and displaced at least twelve people.

The deputy fire marshal testified that Girlfriend identified Newsome as a possible suspect in the arson. Newsome did not reside with Girlfriend, but she had previously given him a key to her apartment. Girlfriend told the deputy fire marshal that Newsome texted a threat to her immediately prior to the break-in, and that someone who she believed was Newsome called her on the morning of the fire from an unknown number. The phone call was made approximately thirteen minutes before a 9-1-1 call from one of

Girlfriend's neighbors was made reporting the fire. Newsome was questioned and arrested.

Girlfriend testified that she had been in an on-again/off-again relationship with Newsome for two years. Girlfriend described their relationship as unhealthy and classified Newsome as abusive, controlling, and jealous. Girlfriend testified that one thing that was a frequent source of argument with Newsome was the clothing she wore to work as opposed to what she wore "lounging around the house or with him." Newsome did not want to co-parent their child and told Girlfriend that it was either "going to be all three of us or there is no baby." Girlfriend took that statement as a threat to her child.

On October 22, 2015, three days before the fire, Girlfriend was in her apartment studying when Newsome showed up irate because Girlfriend had not been responding to his texts. Newsome checked her apartment and accused her of cheating, although there was no one in the apartment other than Girlfriend. Girlfriend left the apartment in part because she wanted witnesses as they continued their argument. Once they were outside, Newsome raised his fist at Girlfriend and stated something to the effect of "don't bring me to that point, don't tempt me." Girlfriend then drove to her mother's home in Houston, receiving texts from Newsome the entire trip. In one text, Newsome wrote, "If u not home by the time I.make it there again "Down goes Frazier"." Girlfriend took that as a threat and called College Station police. The police found that Girlfriend's apartment had been broken into. Water was dripping from inside both her living room and bedroom televisions and pooling underneath. There was no evidence that anything was

stolen from the apartment. The door had been kicked in and had to be repaired. The security officer for the apartment complex, who was also a College Station patrol officer, made sure the door and the scene were secured before he left. The police did not collect any physical evidence related to the break-in. Girlfriend believed Newsome was responsible for the break-in.

On Sunday morning, October 25, 2015, Newsome called Girlfriend at approximately 8:30 a.m. from an unknown number. Girlfriend testified that she recognized Newsome's voice. Newsome asked Girlfriend if she was running off with his child. Girlfriend did not respond and disconnected the call. Girlfriend then received notification about the fire in her apartment. Girlfriend testified that she knew it was Newsome because no one else had any reason to set her apartment on fire. Girlfriend denied that she set the fire herself, or that she was accusing Newsome in order to get revenge.

Girlfriend also testified regarding her tumultuous relationship with Newsome. On one occasion in November 2014, Girlfriend and Newsome went out to dinner. They had an argument that continued once they returned to the Girlfriend's car. Girlfriend testified that they argued because Newsome demanded she repay him for the $10 he paid for dinner. Girlfriend recorded the argument on her phone. Girlfriend began hitting at Newsome because he started to grab her parking permit and tear it up. Newsome threatened to put Girlfriend in the hospital. Girlfriend testified that Newsome ripped a watch from her wrist and ripped a scarf from her neck and set it on fire. Girlfriend dropped Newsome off at a friend's house. Girlfriend then saw Newsome and the friend

walking down the road, and Girlfriend hit Newsome with her car. Girlfriend testified that she was only attempting to scare Newsome. Girlfriend was arrested for aggravated assault and spent two nights in jail, but the charge was later dismissed.

After Newsome was incarcerated, a recorded telephone call with Girlfriend included the following exchange:

> Girlfriend: I didn't do anything. So, get that damn straight. I was not the one who did anything.
>
> Newsome: I know you didn't do the crime
>
> . . .
>
> Girlfriend: No, no it is true. Because it's very very simple [inaudible] Do I set a house on fire or do I not set a house on fire? Do I set a house on fire and that's the thing, I know you expected to walk away from me which is the crazy part. That's the crazy part. I'm flabbergasted how you really expected to walk away from it. You put the family across the hall in danger. You had everybody kicked out, never mind the damage the financial damage and emotional damage that you did to my place. The memories that you destroyed, my memories. You have no right. You had absolutely no right. What's done is done. What's done is done. You made your choice, I have to make mine for this baby for once. The time will come when I will have to now explain it . . . and when I do God will have my back. In the meantime, I'm doing what I know is right, and in the meantime leave me be. You are not my partner; this child will not know you had she met her father.
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> Newsome: I wanna be . . .
>
> Girlfriend: You destroyed that. You literally set that up in flames.
>
> Newsome: I destroyed something material. And now it's -

During this conversation, Newsome never denied setting the fire.

Newsome argues that although there is no expert testimony disputing the evidence relied upon by the State for the conclusion that the fire was "incendiary and

intentional," the testimony itself used to support that conclusion was not supported by sufficiently reliable data. Newsome contends that there was no expert testimony as to what type of fabric was in the closet. However, the deputy fire marshal's testimony was sufficient to establish that any type of fabric can be used to start a fire and that there was no other source of ignition in the closet. While the deputy fire marshal was not presented as an expert, he was qualified from his training and experience to offer his opinion regarding the origin and circumstances of the fire. The deputy fire marshal testified that he has thirty years' training as a firefighter, is a certified peace officer, is a licensed arson investigator, and has worked for the fire marshal's office for approximately four years.

Newsome also argues that the circumstantial evidence linking him to the fire is tenuous because no one witnessed or recorded him around the apartment at the time the fire was set and no physical evidence linked him to either the fire or the break-in and vandalism that occurred three days before the fire was discovered. Newsome notes that the he did not confess to setting the fire in the phone call to Girlfriend, but was merely acknowledging his poor treatment of Girlfriend and his sorrow over not being able to be part of their unborn child's life.

The jury could have determined from the totality of the evidence that Newsome started the fire in Girlfriend's closet. There was more than motive and opportunity for the jury to consider. Viewing the evidence in the light most favorable to the jury verdict, the jury could have concluded that Newsome confessed that he set the fire in Girlfriend's apartment in the recorded telephone conversation.

Viewing the evidence in the light most favorable to the verdict, the jury could additionally have found the deputy trial marshal's testimony credible that fire constitutes a deadly weapon.

The evidence was therefore sufficient to support the verdict and the deadly weapon finding.

We overrule Newsome's second issue.

B. Ineffective Assistance of Counsel. In his first issue, Newsome asserts that he received ineffective assistance of counsel due to a number of alleged missteps committed by his trial counsel. Newsome summarizes his ineffective assistance of counsel claims in his brief as follows:

> - Trial Counsel failed to conduct any meaningful jury selection. Trial Counsel did not cover the following critical topics related to the trial about to occur: Range of punishment, Panelist's exposure to abusive relationships, and prior jury service;
>
> - Trial Counsel failed to oppose the State's challenge for cause on Panelist 18. The State's challenge was based on this Panelist's purported inability to sentence within the range of punishment. Panelist 18 did not say he was unable to sentence within the range. Instead he had commented on a State question about whether a person can respond by destroying property if their "buttons are being pushed," but this answer could not have led to a valid challenge;
>
> - Trial Counsel failed to ask Panelists about abusive relationships. Specifically, Panelists 12, 14 or 31. Trial Counsel did not request Panelists 14 or 31 be brought back for individual questions on the issue. Panelist 12 was brought back for individual questions by the State on another challenge issue, but Trial Counsel failed to use the opportunity to ask questions about her mother's abuse and if it would substantially impair her ability to serve. Panelists 31

and 12 were peremptory [sic] struck by Trial Counsel. Panelist 14, a victim of abuse, was not struck, making the jury;

- Trial Counsel failed to take the necessary steps to preserve a harm showing on the Trial Court's denial of his tepid challenge for cause on Panelist 12 on the topic he chose to challenged [sic] her upon – ties to law enforcement;

- Trial Counsel failed to prepare for trial by not listening to the February 13, 2016 jail call placed by Newsome to Complainant (State's Exhibit 76) in which the State contended Newsome confessed. The jail call had been provided in discovery and Trial Counsel was aware of its importance. Trial Counsel never listened to the jail call until trial. More significantly, there are plausible alternatives for Newsome's use of the language the State maintained was incriminating, but these alternatives were not used by Trial Counsel on cross or closing;

- Trial Counsel affirmatively opening the door to extraneous act evidence from an argument between Newsome and Complainant in November 2014, a year before the October 25, 2015 fire. Part of this argument included a 16-minute recorded abusive tirade (State's Exhibit 79) by Newsome. It was the single most visceral piece of evidence against Newsome received by the jury;

- Trial Counsel failed to preserve objection to extraneous act evidence concerning an argument Thursday (October 22, 2015), before the Sunday morning (October 25, 2015) fire. On October 22, 2015, Newsome allegedly threatened Complainant with a raised fist. She then left College Station for Houston. While travelling she received a text message "Down goes Frazier" (State's Exhibit 77) if she did not return. She called the College Station Police Department who investigated and found her apartment had been vandalized;

- Trial Counsel failed to secure *Ake* funding for the purposes of preparing for the arson expert he knew was [sic] State was required to call and testify [sic] establish the elements of the indicted offense. Trial Counsel knew that [the deputy fire marshal] would provide the State arson opinion evidence, but

never sought expert assistance to meet or seek to challenge the reliability of [the deputy fire marshal's] conclusions;

- Trial Counsel failed to investigate Newsome's alibi witnesses. Original Trial Counsel had secured $750 in investigator fees. The alibi witnesses' names had been known by Trial Counsel since May 5, 2017, the day following his appointment on the case, yet he had not taken steps to contact them until the weekend before the Monday, October 16, 2107 [sic] start of jury selection;

- Trial Counsel failed to investigate mitigation evidence for punishment. Trial Counsel presented no witnesses or exhibits during the punishment phase – leaving the jury with no explanation for Newsome's alleged conduct and treatment of Complainant. The State called 10 witnesses and admitted 34 exhibits;

- Trial Counsel failed as late as final pretrial on September 25, 2017 to know or understand the proper punishment range for the indicted enhance [sic] first-degree felony.

To prevail on an ineffective assistance of counsel claim, the familiar *Strickland v. Washington* test must be met. *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)); *Andrews v. State*, 159 S.W.3d 98, 101-02 (Tex. Crim. App. 2005) (same). Under *Strickland*, the appellant must prove by a preponderance of the evidence that (1) counsel's performance was deficient, and (2) the defense was prejudiced by counsel's deficient performance. *Wiggins*, 539 U.S. at 521, 123 S.Ct. at 2535; *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Andrews*, 159 S.W.3d at 101. Absent both showings, an appellate court cannot conclude that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

The right to "reasonably effective assistance of counsel" does not guarantee errorless counsel or counsel whose competency is judged by perfect hindsight. *Saylor v. State*, 660 S.W.2d 822, 824 (Tex. Crim. App. 1983). "Isolated instances in the record reflecting errors of commission or omission do not cause counsel to become ineffective, nor can ineffective assistance of counsel be established by isolating or separating out one portion of the trial counsel's performance for examination." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990).

Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). When the record is silent, as in this case, regarding the reasons for counsel's conduct, a finding that counsel was ineffective requires impermissible speculation by the appellate court. *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Therefore, absent specific explanations for counsel's decisions, a record on direct appeal will rarely contain sufficient information to evaluate or decide an ineffective-assistance claim. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "Thus an application for a writ of *habeas corpus* is the more appropriate vehicle to raise ineffective assistance of counsel claims." *Rylander*, 101 S.W.3d at 110. To warrant reversal without affording counsel an opportunity to explain his actions, "the challenged conduct must be 'so outrageous that no competent attorney would have engaged in it.'" *Roberts v. State*, 220 S.W.3d 521, 533 (Tex. Crim. App. 2007) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

Newsome filed a motion for new trial but there was no hearing, and he did not raise ineffective assistance of counsel or otherwise offer his trial counsel an opportunity to explain his actions. The record is, therefore, completely silent as to counsel's strategy on any of the grounds raised by Newsome. A record such as this "'cannot adequately reflect the failings of trial counsel' sufficiently enough for an appellate court 'to fairly evaluate the merits of such a serious allegation.'" *Buckholtz v. State*, No. 10-12-00436-CR, 2014 WL 31422, at *1 (Tex. App.—Waco Jan. 2, 2014, no pet.) (mem. op., not designated for publication) (quoting *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011)).

The record before us does not reflect the motives behind trial counsel's actions. We cannot conclude from the cold record before us that any of the grounds alleged by Newsome are so "outrageous" that no competent attorney would have engaged in them. *Roberts*, 220 S.W.3d at 533. Based upon the totality of the record, we cannot conclude that Newsome has established that trial counsel's performance fell below an objective standard of reasonableness and constitutes ineffective assistance. Therefore, we are unable to conclude that appellant has met the requirements of *Strickland*. Newsome's first issue is overruled.

Conclusion

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

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 26, 2020
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