NUMBER 13-22-00396-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

GENARO DOMINGUEZ-TREVINO, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 156th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Justices Tijerina, Silva, and Peña
Memorandum Opinion by Justice Tijerina

Appellant Genaro Dominguez-Trevino challenges his conviction of aggravated assault with a deadly weapon with a prior dating relationship, a first-degree felony. *See* TEX. PENAL CODE ANN. § 22.02(b)(1). Appellant was sentenced to sixty years' confinement. By one issue, appellant contends that his trial counsel was ineffective. We affirm.

I. STANDARD OF REVIEW AND APPLICABLE LAW

Claims of ineffective assistance of counsel are evaluated under the two-part test articulated by the Supreme Court in *Strickland v. Washington*. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). First, appellant must show that counsel's performance was deficient, or in other words, that counsel's assistance fell below an objective standard of reasonableness. *Thompson*, 9 S.W.3d at 812; *see Strickland*, 466 U.S. at 687. Then appellant must show that there is a reasonable probability that, but for counsel's errors, the result would have been different. *Thompson*, 9 S.W.3d at 812; *see Strickland*, 466 U.S. at 694.

The burden is on appellant to prove counsel was ineffective by a preponderance of the evidence, and we review counsel's performance in the totality of the representation, not by isolated acts or omissions. *Thompson*, 9 S.W.3d at 812–813. Appellant must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and that his actions could be considered sound trial strategy. *See Strickland*, 466 U.S. at 689; *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi–Edinburg 2006, no pet.). We do not second-guess legitimate tactical decisions made by trial counsel. *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008) (en banc). Therefore, an allegation of ineffectiveness must be "firmly founded in the record," and the record must affirmatively demonstrate the alleged ineffectiveness. *Bone v. State*, 77 S.W.3d 828, 833 n.13 (Tex. Crim. App. 2002) (quoting *Thompson*, 9 S.W.3d at 813–14); *see Jackson v. State*, 877 S.W.2d 768, 771–72 (Tex.

Crim. App. 1994) (en banc).

II. PERTINENT FACTS

The evidence at trial established that appellant was giving his ex-girlfriend a ride in his truck when the pair began arguing. Subsequently, the ex-girlfriend exited the vehicle and began walking on the side of the road. Appellant then struck her with his truck causing multiple injuries, including among other things, a concussion, a fractured spine, and an injury to her foot requiring multiple surgeries. The attack was documented by a video surveillance camera near the scene of the incident, which was played for the jury.

An officer with the Beeville Police Department testified that he was dispatched to the scene due to reports that a woman was lying on the ground. When officers arrived, a body camera video of the incident shows that appellant stood over the victim with several other men, who it appears had reported the incident to police. Video of one of the responding officer's first encounter with appellant shows another man at the scene lighting a cigarette for appellant who is standing over the victim. Once appellant was identified by the officers as the suspect who the victim alleged hurt her, he walked away from the victim to talk with the officers. Appellant informed them that the victim was injured by exiting his vehicle and that he did not "touch" her.[1]

During closing argument, while reviewing one video of appellant after the incident, the prosecutor stated, "Just smoking and joking after this. He thinks that he can sell that to the police that, hey, maybe there were no witnesses. Maybe I won't get caught. Maybe

[1] The jury was shown surveillance video of the incident showing that appellant traveled at a high rate of speed, ran a stop sign, struck the victim, struck a fire hydrant, destroyed a wire-and-post fence, and failed to flag down a passing motorist.

I won't be held accountable." Appellant's trial counsel did not object. The jury found him guilty, and this appeal followed.

III. DISCUSSION

Appellant complains that the statement, "Maybe I won't get caught. Maybe I won't be held accountable" is a comment on his failure to testify. Specifically, appellant argues it is a comment on the accused's failure to testify, if the State uses the pronoun, "I", to speak for the defendant. Thus, appellant claims his trial counsel rendered ineffective assistance of counsel by failing to object on this basis.

Here, the record is silent regarding trial counsel's reason for failing to object to the complained-of statement. Therefore, appellant has not overcome the strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance and that trial counsel's actions could be considered sound trial strategy. *See Strickland*, 466 U.S. at 689; *Jaynes*, 216 S.W.3d at 851; *see also Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001) (explaining that "the bare record does not reveal the nuances of trial strategy" and recognizing that concluding trial counsel was ineffective by failing to request a limiting instruction based on a silent record "would call for speculation and such speculation is beyond the purview" of an appellate court).

In addition, it is not clear that an objection to the argument would have been sustained by the trial court. "To establish ineffective assistance of counsel based on a failure to object, appellant must demonstrate that the trial court would have committed harmful error in overruling the objection had trial counsel objected." *Toledo v. State*, 519 S.W.3d 273, 287 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). "The State is allowed

wide latitude in drawing inferences from the evidence as long as the inferences drawn are reasonable and offered in good faith." *Temple v. State*, 342 S.W.3d 572, 602 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013) (citing *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997)). A prosecutor is allowed to argue "her opinion concerning issues in the case so long as the opinion is based on the evidence in the record and does not constitute unsworn testimony." *Id.* (citing *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985)). Reversible error due to improper jury argument must be "extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding." *Id.* at 602–03 (citing *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000)). We do not analyze alleged improper jury argument in isolation; instead, we analyze the statement in light of the entire argument considering it in the context in which it appears. *Id.* (citing *DeLarue v. State*, 102 S.W.3d 388, 405 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd); *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988)). The court of criminal appeals has clarified that using the word, "I" alone does not necessarily amount to a comment on the defendant's decision not to testify and that we must consider the facts on a case-by-case basis. *See Cruz v. State*, 225 S.W.3d 546, 549 (Tex. Crim. App. 2007) (concluding "[w]hat determines the impermissibility of a reference to the defendant's failure to testify is not the use of 'I' or 'he' or 'she' or any other word, but rather the entirety of the prosecutor's statements, taken in the context in which the words were used and heard by the jury," which must be examined on a case by case basis).

Here, in context, the prosecutor was stating his opinion that appellant's demeanor indicated that he thought that "maybe" he would not be caught based on evidence that appellant ran over the victim with his vehicle, lied to police about what had happened, nonchalantly smoked a cigarette while lying to the police, and was unaware that the entire episode had been captured on surveillance video. Additionally, "[t]o violate the right against self-incrimination, the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify *must be clear*. It is not sufficient that the language might be construed as an implied or indirect allusion." *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001) (emphasis added). Here, it is not clear that the prosecutor was referring to appellant's failure to testify even if the language may be construed as an implication or indirect allusion. *See id.* Therefore, we disagree with appellant that the prosecutor's statement constituted a comment on his failure to testify at trial simply because the prosecutor used "I." Because the prosecutor's statement is not clearly a comment on appellant's choice not to testify, the trial court could have properly overruled an objection to that comment. *See id.*

Accordingly, we conclude that appellant's trial counsel was not deficient, and we need not address appellant's claim that the outcome of the proceeding would have been different but for counsel's failure to object to the complained-of comment. *See Goodspeed*, 187 S.W.3d at 392. We overrule appellant's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

JAIME TIJERINA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed on the
10th day of August, 2023.