NO. 12-09-00358-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MARCUS DEWAYNE MATLOCK, APPELLANT	***§***	***APPEAL FROM THE 7TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Marcus Dewayne Matlock appeals his conviction for criminal nonsupport. On appeal, he raises four issues. We affirm in part, and reverse and render in part.

BACKGROUND

On March 19, 2009, Appellant was charged by indictment with sixteen counts of criminal nonsupport, a state jail felony.[1] Appellant was required to pay his child support on the first of each month during the alleged periods of nonsupport. The indictment alleged that Appellant failed to pay child support on the first of each month from February 2006 through November 2006, in January 2008 and June 2008, and from September 2008 through December 2008. Appellant pleaded "not guilty," and the case proceeded to a jury trial.

The trial court appointed trial counsel for Appellant. But before testimony in the trial began, Appellant asserted, and was granted, the right to represent himself. At trial, the State showed that Appellant was ordered to pay $191.40 each month beginning on November 1, 1999, as child support for his minor child. The State produced Appellant's payment record from the

[1] An individual commits an offense if he intentionally or knowingly fails to provide support for his child younger than eighteen years of age, or for his child who is the subject of a court order requiring him to support the child. *See* TEX. PENAL CODE ANN. § 25.05 (a), (f) (West 2011).

attorney general's child support disbursement unit and financial activity report from the attorney general's child support enforcement unit. The State also produced a community supervision order showing the amount of Appellant's child support arrearage as of January 31, 2008. The trial court admitted these documents into evidence. Before cross examining a child support officer from the attorney general's child support division, Appellant, acting as his own counsel, produced his Smith County jail "book-in, book-out" record. This record established the dates that Appellant was in jail for various offenses. The trial court admitted this document into evidence. After the State's first two witnesses testified, Appellant requested that his appointed counsel resume representing him. Appellant elected to testify during the guilt-innocence phase of the trial.

At the conclusion of the trial, the jury found Appellant guilty of sixteen counts of criminal nonsupport as charged in the indictment, and assessed his punishment at two years of confinement in a state jail facility and a $10,000 fine on each count.[2] The sentences were to run concurrently. This appeal followed.

EFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, Appellant argues that his trial counsel rendered ineffective assistance of counsel. In three subissues, Appellant contends that counsel failed to provide effective assistance because he (1) did not move to quash two counts of the indictment, (2) did not object to the State's improper use of Appellant's prior convictions for impeachment purposes, and (3) did not develop mitigating and exculpatory witnesses and evidence. In a fourth subissue, Appellant argues that the cumulative effect of trial counsel's errors deprived him of effective assistance of counsel.

Applicable Law

Claims of ineffective assistance of counsel are evaluated under the two pronged test articulated in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ***Hernandez v. State***, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). Under the first prong, the appellant must show that counsel's performance was "deficient." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064; ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel'

[2] An individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail facility for any term of not more than two years or less than 180 days and, in addition, a fine not to exceed $10,000. *See* TEX. PENAL CODE ANN. § 12.35(a), (b) (West 2011).

guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. To be successful, an appellant must "show that counsel's representation fell below an objective standard of reasonableness." ***Id***., 466 U.S. at 688, 104 S. Ct. at 2064; ***Tong***, 25 S.W.3d at 712. Further, the appellant must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. ***Strickland***, 466 U.S. at 690, 104 S. Ct. at 2066.

Under the second prong, an appellant must show that the "deficient performance prejudiced the defense." ***Id***., 466 U.S. at 687, 104 S. Ct. at 2064; ***Tong***, 25 S.W.3d at 712. The appropriate standard for judging prejudice requires an appellant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068.

An appellant must prove both prongs of ***Strickland*** by a preponderance of the evidence in order to prevail. ***Tong***, 25 S.W.3d at 712. Our review of counsel's representation at trial is highly deferential. ***Id***. We engage in a "strong presumption" that counsel's actions fell within the wide range of reasonably professional assistance. ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065; ***Tong***, 25 S.W.3d at 712. We look to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. ***Thompson v. State***, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). It is an appellant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065; ***Tong***, 25 S.W.3d at 712.

Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. ***McFarland v. State***, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and professional. ***Bone v. State***, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). But when no reasonable trial strategy could justify 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 counsel's subjective reasons for acting as he did. ***Andrews v. State***, 159

S.W.3d 98, 102 (Tex. Crim. App. 2005). It is also possible that a single egregious error of omission or commission by counsel may constitute ineffective assistance. ***Thompson***, 9 S.W.3d at 813.

Analysis

In this appeal, we have no record, usually developed in a motion for new trial hearing or on writ of habeas corpus, explaining trial counsel's thought processes and trial strategy. *See* ***Redmond v. State***, 30 S.W.3d 692, 698-99 (Tex. App.–Beaumont 2000, pet. ref'd). However, the record in this case is sufficient for us to resolve the issues Appellant presents. *See* ***Mitchell v. State***, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

Counts Time-Barred Under Statute of Limitations

Appellant contends that his trial counsel rendered ineffective assistance of counsel because he did not seek to quash, based on the statute of limitations, two counts of the indictment. The statute of limitations for the felony offense of criminal nonsupport is not specified. *See* TEX. CODE CRIM. PROC. ANN. 12.01 (West Supp. 2010). Thus, the statute of limitations for criminal nonsupport falls under the residual provision for limitations, which provides that indictments for "all other felonies" must be presented within three years from the date of the commission of the offense. TEX. CODE CRIM. PROC. ANN. 12.01(7) (West Supp. 2010). Therefore, Appellant argues, the first two counts of his indictment are barred by the statute of limitations because the dates of nonpayment alleged in the first two counts–February 1, 2006, and March 1, 2006–were more than three years before the presentation of the indictment on March 19, 2009. The State contends that the offense of criminal nonsupport is a continuing offense, and therefore the general rule for "all other felonies" does not apply to criminal nonsupport.

The Supreme Court has acknowledged that "[s]tatutes of limitations normally begin to run when the crime is complete." ***Toussie v. United States***, 397 U.S. 112, 115, 90 S. Ct. 858, 860, 25 L. Ed. 2d 156 (1970) (quoting ***Pendergast v. United States***, 317 U.S. 412, 418, 63 S. Ct. 268, 271, 87 L. Ed. 368 (1943)). Thus, the doctrine of continuing offenses should be applied in only limited circumstances since "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term." ***Id***., 397 U.S. at 115, 90 S. Ct. at 860 (quoting ***United States v. Toussie***, 410 F.2d 1156, 1158 (2d Cir. 1969), *rev'd*, 397 U.S. 112, 124, 90 S. Ct. 858, 865, 25 L.Ed.2d 156 (1970)). These considerations require that such a result should not be reached unless the explicit

language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that the legislature must assuredly have intended that it be treated as a continuing one. *See* ***id***., 397 U.S. at 115, 90 S. Ct. at 860.

The offense of criminal nonsupport is a continuing offense because the offense requires no overt act and is continuing in nature. ***Ex parte Beeth***, 154 S.W.2d 484, 486 (Tex. Crim. App. 1941). The gravamen of the offense "by its very nature is founded, not upon the commission of overt acts, but upon the neglect of a duty." ***Id***. Further, the offense continues as long as the neglect does not cease. ***Id***.; *see also* ***Ex parte Logan***, 205 S.W.2d 994, 996 (Tex. Crim. App. 1947) (concluding that failure to support minor child is continuing offense, committed not by overt act but by neglect and failure to act; offense continues so long as neglect continues without excuse); ***State v. Paiz***, 777 S.W.2d 575, 577 (Tex. App.–Amarillo 1989) (holding that criminal nonsupport is continuing offense), *aff'd as reformed***,** 817 S.W.2d 84 (Tex. Crim. App. 1991) (en banc)). Because the offense of criminal nonsupport is a continuing offense, the statute of limitations does not begin to run until the neglect ceases. *See* ***Ex parte Logan***, 205 S.W.2d at 996.

In this case, Appellant failed to pay his child support from February 1, 2006, until December 1, 2006. When he paid his child support on December 1, 2006, the offense of criminal nonsupport for the period from February 1, 2006, until December 1, 2006, was complete. *See* ***Ex parte Beeth***, 154 S.W.2d at 486; ***Ex parte Logan***, 205 S.W.2d at 996; ***Harvill v. State***, 13 S.W.3d 478, 481 (Tex. App.–Corpus Christi 2000, no pet.). The date the offense was completed (December 1, 2006) was less than three years prior to the presentment of the indictment (March 19, 2009). Because the offense of criminal nonsupport is a continuing offense, and the offense encompassing the first two counts was complete less than three years prior to the presentment of the indictment, the first two counts of the indictment were not barred by the statute of limitations.

Because the first two counts of the indictment were not barred by limitations, trial counsel's failure to file a motion to quash does not constitute ineffective assistance of counsel. *See* ***Thacker v. State***, 999 S.W.2d 56, 67 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd) (stating counsel not ineffective for failure to make meritless objections). Accordingly, we overrule the portion of Appellant's first issue regarding the statute of limitations.

Prior Convictions used for Impeachment

Next, Appellant argues that his trial counsel rendered ineffective assistance of counsel

because he did not object to the State's improper use of his prior convictions for impeachment purposes. More specifically, he contends that trial counsel failed to object under Texas Rule of Evidence 609 to four of his prior convictions. Instead, trial counsel objected that the prior convictions were not relevant under Texas Rule of Evidence 404(b).

While acting as his own counsel, Appellant produced his Smith County jail "book-in, book-out" record. This record established that Appellant was in jail fourteen times for numerous offenses, including criminal nonsupport, nonpayment of child support, interference with an emergency call, burglary of a habitation, criminal trespass, assault causing bodily injury family violence, driving while intoxicated, theft, harassment, and driving while his license was suspended. The trial court admitted this document into evidence. The record also established the dates he had been in jail for these offenses. Shortly thereafter, Appellant requested that his trial counsel resume representing him. Later, Appellant testified on his own behalf. The State then questioned Appellant extensively about his convictions, some of which related to the confinements shown in the "book-in, book-out" record.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible if the information was elicited from the witness or established by public record. TEX. R. EVID. 609(a). But the evidence is admissible only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party. ***Id***. Evidence of a conviction is not admissible under Rule 609 if more than ten years has elapsed since the date of the conviction, or of the release of the witness from the confinement imposed for that conviction, whichever is the later date. TEX. R. EVID. 609(b).

Here, Appellant complains that the State impeached him using his prior convictions for driving while intoxicated, interference with an emergency call, and criminal trespass. He contends that these convictions were neither felonies nor crimes of moral turpitude. However, these convictions were listed in the Smith County jail "book-in, book-out" record that Appellant introduced into evidence while acting as his own counsel. Evidence that is otherwise inadmissible may become admissible when a party opens the door to such evidence. *See* ***Williams v. State***, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); ***Hayden v. State***, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009). Here, when Appellant introduced the "book-in, book-out" record into evidence, he "opened the door" to an inquiry by the State about the evidence and his testimony

concerning the record. *See* ***Prescott v. State***, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988). The trial court then permitted the State to offer into evidence certified copies of judgments of conviction that corresponded to some of the arrests listed in the "book-in, book-out" record. Under these facts, any objection by trial counsel to the use of these prior convictions for impeachment purposes would have been overruled. *See* ***id***. Trial counsel was not ineffective for not making a meritless objection. *See* ***Thacker***, 999 S.W.2d at 67.

Appellant also complains about the admission of his prior conviction for misdemeanor assault. He contends that this incident occurred almost fifteen years prior to the trial in this case, and that trial counsel should have made an objection under Texas Rule of Evidence 609(b). The record shows that Appellant was convicted of misdemeanor assault on April 19, 1995, and the trial court assessed his punishment at thirty days of confinement in jail. Because more than ten years had elapsed since the date of the misdemeanor assault conviction, or of the release of Appellant from the confinement imposed for that conviction, Appellant argues his trial counsel rendered ineffective assistance of counsel when he did not object. *See* TEX. R. EVID. 609(b).

It is Appellant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Strickland***, 466 U.S. at 689, 104 S.Ct. at 2065; ***Tong***, 25 S.W.3d at 712. Moreover, 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. But Appellant did not file a motion for new trial and call his trial counsel as a witness to explain his reasoning. *See* ***Bone***, 77 S.W.3d at 836 (stating that defense counsel should be given opportunity to explain actions before being condemned as unprofessional and incompetent); *see also* ***Anderson v. State***, 193 S.W.3d 34, 39 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that because appellant did not call his trial counsel during motion for new trial hearing to give reasons for failure to investigate or present mitigating evidence, record does not support ineffective assistance claim). Because the record does not show deficient performance, we conclude that Appellant has failed to meet the first prong of the ***Strickland*** test. *See* ***Thompson***, 9 S.W.3d at 813.

Even if Appellant had met the first prong of the ***Strickland*** test, he has failed to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. Appellant contends that the admission of his past convictions allowed the State to "degrade [his] conduct" and ask him if

he had "spent the majority of [his] life impregnating women and going to the penitentiary or going to the Smith County Jail." By doing so, Appellant argues, the jury was asked to disregard the facts and convict him for having a criminal history. We note that Appellant, acting as his own counsel, introduced his Smith County jail "book-in, book-out" record establishing that he had been arrested and jailed for numerous offenses fourteen times from February 1995 through June 2009. Given the number of arrests introduced by Appellant and convictions properly admitted by the trial court, it is unlikely that, but for trial counsel's alleged unprofessional error in failing to object to the admission of his prior conviction for misdemeanor assault, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. Because Appellant failed to show that the result of the proceeding would have been different, he has failed to meet the second prong of the ***Strickland*** test. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. Therefore, even if he had met the first prong of ***Strickland***, he still could not prevail.

We overrule the portion of Appellant's first issue regarding his prior convictions being used for impeachment.

Failure to Develop Mitigating and Exculpatory Witnesses

Appellant next contends that trial counsel rendered ineffective assistance of counsel because he did not develop mitigating and exculpatory witnesses and evidence. Specifically, Appellant argues that, at the guilt-innocence phase of the trial, his trial counsel failed to call certain witnesses, including a community supervision officer, an employee of a rehabilitation center, and a pastor. Appellant also states that he requested his trial counsel to obtain the transcript of the hearing during which he asserts that the trial judge hearing his child support case orally modified his child support. Further, Appellant requested his trial counsel to obtain records from a temporary agency to establish that he had been working.

In a discussion on the record before the trial court, in which Appellant participated, Appellant's trial counsel described his trial preparation, including a three-way telephone call the night before trial between himself, the pastor, and Appellant. Appellant's trial counsel stated that, in the course of that telephone conversation, the pastor told Appellant that he did not want to testify at the trial but would be available if necessary. Counsel further informed the court that later in the conversation, Appellant "hung up" on trial counsel and the pastor. Counsel also stated that he tried to make further contact with the pastor, but was unsuccessful and was told the pastor was out

of town. After a lengthy discussion, Appellant conceded on the record that there were no other witnesses that his trial counsel needed to contact. Moreover, Appellant's community supervision officer testified at the guilt-innocence phase of the trial.

Trial counsel is not necessarily ineffective for failure to call every witness requested by a defendant. ***Lopez v. State***, 838 S.W.2d 758, 759 (Tex. App.–Corpus Christi 1992, no pet.). However, trial counsel's representation may be ineffective when it is established in the hearing on a motion for new trial that available and willing witnesses could have been called to testify on behalf of the defendant, but trial counsel failed to investigate and interview potential witnesses. ***Milburn v. State***, 15 S.W.3d 267, 269-70 (Tex. App.–Houston [14th Dist.] 2000, pet. ref'd) (ineffective assistance to fail to interview or call any of twenty potential defense witnesses whose readiness to testify was established at motion for new trial hearing); ***Rodd v. State***, 886 S.W.2d 381, 384 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd) (ineffective assistance not to call any of twenty-two affiants whose affidavits were produced at motion for new trial hearing). However, an appellant who complains about trial counsel's failure to call witnesses must show the witnesses were available and that he would have benefitted from their testimony. ***Rodd***, 886 S.W.2d at 384. Absent a clear showing that a defendant would have benefitted from the testimony, the decision not to call witnesses is not ineffective assistance. ***King v. State***, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983).

The record in this case reflects that Appellant and his trial counsel communicated with the pastor by telephone and the pastor told trial counsel that he did not want to testify, but would be available if necessary. When counsel again tried to contact the pastor, he was told that the pastor was out of town. Appellant did not file a motion for new trial to develop the matter further. Consequently, the record before us does not show that the pastor was available to testify or that Appellant would have benefitted from the pastor's testimony. The record is similarly silent as to the rehabilitation center employee, but the community supervision officer testified at trial. Appellant admitted to the trial court that he could not identify any other witnesses his trial counsel should have contacted.

Additionally, the record does not include any facts relating to Appellant's alleged requests that trial counsel obtain the hearing transcript and certain records from the temporary agency. Based on a silent record, we cannot conclude that counsel's failure to obtain these records shows that he was ineffective.

It is Appellant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065; ***Tong***, 25 S.W.3d at 712. 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. But Appellant did not file a motion for new trial and call his trial counsel as a witness to explain the actions Appellant contends he should have taken but did not. *See* ***Bone***, 77 S.W.3d at 836; ***Anderson***, 193 S.W.3d at 39. Therefore, the record does not show deficient performance, and Appellant has therefore failed to satisfy the first prong of ***Strickland***. *See* ***Thompson***, 9 S.W.3d at 813. Accordingly, we overrule the portion of Appellant's first issue regarding mitigating and exculpatory witnesses and additional records allegedly requested from trial counsel.

Cumulative Effect of Trial Counsel's Errors

Finally, Appellant contends the cumulative effect of trial counsel's errors combined to undermine any confidence that he received a fair and just trial. The record does not support Appellant's allegations of error by his trial counsel. Accordingly, we overrule the portion of Appellant's first issue regarding the cumulative effect of trial counsel's errors.

MOTION TO QUASH SUBPOENA

In his second issue, Appellant argues that the trial court erred in granting the State's motion to quash a subpoena. Before trial, Appellant requested that the trial judge who presided over the underlying child support case be subpoenaed to testify in this case. The State filed a motion to quash the subpoena. At a pretrial hearing, the trial court granted the State's motion and quashed the subpoena.

A criminal defendant has a right to compulsory process for obtaining witnesses in his favor under both the United States and Texas constitutions. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; ***Washington v. Texas***, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967); ***Etheridge v. State***, 903 S.W.2d 1, 7 (Tex. Crim. App. 1994). A trial court's ruling on a motion to quash a subpoena is reviewed for an abuse of discretion. *See* ***Moore v. State***, 109 S.W.3d 537, 543 (Tex. App.—Tyler 2001, pet. ref'd). However, as a prerequisite to presenting an issue on appeal, the record must show that a complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a)(1).

Here, after granting the State's motion to quash, the trial court noted that it "was not barring [trial counsel] from" raising a request for the trial court to reconsider quashing Appellant's subpoena. Appellant's counsel acknowledged the trial court's ruling, stating that he understood "the Court's ruling. I'm happy with [the] ruling. I don't have any problem with that whatsoever." Appellant's counsel never reurged his subpoena. By failing to make a timely objection to the trial court's ruling and failing to reurge his subpoena during trial, Appellant has waived this issue on appeal. *See* TEX. R. APP. P. 33.1(a)(1). Accordingly, Appellant's second issue is overruled.

EVIDENTIARY SUFFICIENCY

In his third issue, Appellant contends that the evidence is legally and factually insufficient to support his conviction. More specifically, Appellant argues that, with regard to Count I and Count II, he was in jail the entire two months in which it was alleged that he failed to pay child support. Further, Appellant contends that, even when he was not in jail, he was in a rehabilitation center that limited his ability to earn extra income to pay child support.

Standard of Review

The Texas Court of Criminal Appeals recently held that the ***Jackson v. Virginia*** legal sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. *See* ***Brooks v. State***, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.). Appellant did not have the benefit of the court of criminal appeals' opinion in ***Brooks*** at the time he submitted his brief raising only the issue of factual sufficiency. Accordingly, we construe Appellant's issue liberally in the interest of justice and review the sufficiency of the evidence under the ***Jackson*** standard. *See, e.g.*, ***White v. State***, 50 S.W.3d 31, 40 (Tex. App.–Waco 2001, pet. ref'd).

Under this single sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether 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, 2789, 61 L. Ed. 2d 560 (1979); ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App.2007). We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Jackson***, 443 U.S. at 319, 99 S. Ct at

2789; ***Hooper***, 214 S.W.3d at 13. The jury is entitled to accept one version of the facts and reject another version or any portion of a witness's testimony. ***Penagraph v. State***, 623 S.W.2d 341, 343 (Tex. Crim. App.1981). Every fact does not need to point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper***, 214 S.W.3d at 13. Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and may alone be sufficient to establish guilt. ***Id***. On appeal, the same standard of review is used for both circumstantial and direct evidence cases. ***Id***.

Applicable Law

"[I]t is an affirmative defense to prosecution [for criminal nonsupport] that the actor could not provide support for the actor's child." TEX. PENAL CODE ANN. § 25.05(d) (West 2011). But the issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense. TEX. PENAL CODE ANN. § 2.04(b) (West 2011). If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge the jury that the defendant must prove the affirmative defense by a preponderance of the evidence. TEX. PENAL CODE ANN. § 2.04(d) (West 2011). When courts of appeals examine whether an appellant proved his affirmative defense by a preponderance of the evidence, the correct standard of review is whether after considering all the evidence relevant to the issue, the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust. ***Meraz v. State***, 785 S.W.2d 146, 154-55 (Tex. Crim. App. 1990); *see also* ***Brooks***, 323 S.W.3d at 924 n.67 (Cochran, J., concurring); ***Smith v. State***, No. 01-09-00634-CR, 2011 WL 1233367, at *8 (Tex. App.–Houston [1st Dist.] Mar. 31, 2011, pet. ref'd). Even if the only evidence offered on the question of the affirmative defense is produced by the defendant, "the jury may accept or reject any or all of the testimony of any witness." ***Madrid v. State***, 595 S.W.2d 106, 118 (Tex. Crim. App. 1979). "The jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given their testimony." ***Id***.

Analysis

According to Appellant, the sixteen counts of the indictment against him result in two categories of issues: whether his incarceration established an affirmative defense as to Counts I and II, and whether Appellant's drug rehabilitation efforts established his affirmative defense as to Counts III through XVI. We will discuss Appellant's affirmative defense to Count I first,

followed by his arguments regarding Counts II through XVI.

Count I

Appellant admitted into evidence the Smith County jail "book-in, book-out" record. This record shows that Appellant was in jail "off and on" beginning February 16, 1995. Further, the record shows that Appellant was in jail from March 6, 2005, through March 24, 2006, for charges of interference with an emergency call and burglary of a habitation. Gary Pinkerton, chief deputy of the Smith County Sheriff's office at the jail division, testified that the exhibit introduced by Appellant showed periods of confinement and the charges for each confinement. He agreed that Appellant was confined in 2005 for a charge of interference with an emergency call. Pinkerton also agreed that while an individual is incarcerated, he is unable to make any money, including payments towards child support. The State conceded in its closing argument that Appellant was in jail all of February 2006.

In Count I, the State alleged that Appellant failed to pay child support on February 1, 2006. There is nothing to suggest that Appellant, having been confined for eleven months (March 6, 2005, through March 24, 2006), had the money to pay his child support that was due on February 1, 2006, or had a source from which he could borrow or obtain the money to pay that child support obligation. Therefore, after considering all the evidence relevant to Appellant's affirmative defense of inability to pay child support, we hold that the jury's finding of guilt as to Count I of the indictment is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* ***Meraz***, 785 S.W.2d at 154-55; ***Brooks***, 323 S.W.3d at 924 n. 67; ***Smith***, 2011 WL 1233367, at *8. Accordingly, we sustain the portion of Appellant's third issue relating to Count I of the indictment.

Count II through Count XVI

In Count II through Count XVI in the indictment, the State alleged that Appellant failed to pay child support from March 2006 through November 2006, in January 2008 and June 2008, and from September 2008 through December 2008. The Smith County jail "book-in, book-out" record admitted into evidence established that Appellant was in jail for most, but not all, of March 2006. The record shows further that he was not in jail for the months in which the State alleged in Count III through Count XVI that he failed to pay his child support. Appellant testified that he voluntarily chose to reside in a church affiliated rehabilitation facility for approximately eleven months in 2006. He stated that, after six or seven months in the rehabilitation center, he was

allowed to work outside the center as a truck driver, making $13.00 per hour. Appellant testified he has a college degree in electronics, and was a licensed commercial truck driver. However, he admitted quitting his first job while in rehabilitation, and being unable to find work.

Appellant had the burden to establish by a preponderance of the evidence his inability to pay child support when he was not confined. Appellant's testimony was at times equivocal, conflicting, and unclear. In this case, the jury determined the credibility of the witnesses and resolved the evidentiary inconsistencies in the State's favor, which is its prerogative as fact finder. *See* ***Madrid***, 595 S.W.2d at 118. Thus, after considering all the evidence relevant to Appellant's affirmative defense of inability to pay child support, we hold that the jury's finding of guilt as to Count II through Count XVI of the indictment is not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* ***Meraz***, 785 S.W.2d at 154-55; ***Brooks***, 323 S.W.3d at 924 n. 67; ***Smith***, 2011 WL 1233367, at *8. Accordingly, we overrule the portion of Appellant's third issue relating to Count II through Count XVI of the indictment.

ADMISSION OF PRIOR CONVICTIONS

In his fourth issue, Appellant argues that the trial court abused its discretion by admitting written judgments of his prior convictions and overruling his Rule 404(b) objection. As noted above, while acting as his own counsel, Appellant produced his Smith County jail "book-in, book-out" record. This record established that Appellant has been in jail fourteen times, beginning on February 16, 1995, for numerous offenses, and also established the dates he was in jail. The trial court admitted this document into evidence. Shortly thereafter, Appellant requested that his trial counsel resume representing him.

Later, Appellant testified on his own behalf. During the State's cross examination, he stated that not all of the arrests in the Smith County jail "book-in, book-out" record resulted in convictions. The State then questioned Appellant extensively regarding his convictions related to his confinements in the Smith County jail "book-in, book-out" record. Specifically, the State showed Appellant certified copies of the docket sheets, judgments, and sentences for each offense for which he was convicted, including driving while intoxicated, misdemeanor assault, interference with an emergency call, theft by check, assault causing bodily injury family violence, criminal trespass, and possession with intent to deliver a controlled substance. When the State offered the certified copies of the court records regarding the offenses, Appellant objected "as to

relevance under 404(b)." The trial court overruled Appellant's objection and admitted the documents.

Here, Appellant's convictions for driving while intoxicated, interference with an emergency call, theft by check, assault causing bodily injury family violence, and criminal trespass related to arrests listed in the "book-in, book-out" record introduced into the evidence by Appellant. We have already determined that Appellant "opened the door" to the admission of this evidence, and therefore any objection by counsel would have been overruled.

However, the State also introduced copies of docket sheets, judgments, and sentences for Appellant's convictions for misdemeanor assault and possession with intent to deliver a controlled substance. These convictions were not included in the "book-in, book-out" record. As a prerequisite to presenting a complaint for appeal, the record must show that a complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). To be a "timely" objection, the defense must have objected to the evidence, if possible, before it was actually admitted. ***Ethington v. State***, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). Having failed to object throughout the extensive, and exacting, cross examination of Appellant regarding certified copies of the dockets, judgments, and sentences of these past convictions, Appellant's objection to the evidence was not timely. By failing to make a timely objection to the evidence regarding his past convictions for misdemeanor assault and possession with intent to deliver a controlled substance, Appellant has waived this issue on appeal. *See* TEX. R. APP. P. 33.1(a)(1).

Appellant's fourth issue is overruled.

DISPOSITION

We have sustained the portion of Appellant's third issue relating to the sufficiency of the evidence to support his conviction for failure to pay child support on February 1, 2006. However, we have overruled Appellant's remaining issues. Accordingly, we ***reverse*** the trial court's judgment and ***render*** a judgment of acquittal as to Count I of the indictment. In all other respects, the judgment of the trial court is ***affirmed***.

SAM GRIFFITH
Justice

Opinion delivered October 26, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)