COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JIMMIE JONES, JR.,	§	No. 08-14-00122-CR
Appellant,	§	Appeal from the
v.	§	16th District Court
THE STATE OF TEXAS,	§	of Denton County, Texas
Appellee.	§	(TC# F-2011-0959-A)
	§	

OPINION

Appellant Jimmie Jones, Jr. was charged with five counts of indecency with a child. The trial court dismissed one count,[1] and Appellant's trial counsel convinced the jury to acquit Appellant of two counts (Counts III and IV), which concerned alleged improper sexual contact occurring in May and December 2010. The jury found Appellant guilty of the two remaining counts (Counts I and II), which concerned improper sexual contact occurring on or before April 2009, and sentenced him to three-year and four-year terms respectively. The trial court ordered the sentences to run consecutively.

Appellant filed a motion for new trial claiming ineffective assistance of counsel. The trial

[1] The trial court dismissed Count IV in the indictment, and then renumbered the counts so that Count V as alleged in the indictment became the new Count IV.

court held an evidentiary hearing, and Appellant's motion was ultimately overruled, presumably by operation of law.[2] The record does not show that the trial court made any findings of fact.[3] Appellant asserts he satisfied his burden to show ineffective assistance of counsel and requests we reverse and remand for new trial. We affirm the judgment of the trial court.[4]

BACKGROUND

Trial

Appellant, a police officer, lived with his wife Yanet, their two children, and Yanet's children from a previous relationship, D.V. and R.V. The four counts of indecency with a child arise out of Appellant's alleged sexual contact with D.V. At trial, D.V. testified that Appellant had touched her breasts many times, almost every week, from the time she was in third grade at school until fifth grade, when Appellant also began placing his hand in her shorts and touching her vagina on top of her underwear. D.V. told a friend that Appellant had inappropriately touched her genitals once and her breasts on multiple occasions, and in May 2010, they told a school teacher and then spoke to a school counselor. Yanet, D.V.'s mother, did not believe the allegations, and the allegations were no-billed by a grand jury. Subsequently, on an evening when D.V. was ill during her sixth-grade year at school, Appellant provided medicine to D.V. that rendered her drowsy. D.V. awakened in the middle of the night to find her shirt and bra raised up to her chin

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[2] The trial court informed the parties by email that it was denying the motion, but there is no written order denying the motion in the record on appeal. We therefore consider the motion was overruled by operation of law. *See* TEX.R.APP.P. 21.8(a, c) (motion for new trial not timely ruled on by written order is deemed denied 75 days after sentence is imposed in open court).

[3] *See* TEX.R.APP.P. 21.8(b) (the trial court may make oral or written findings of fact in ruling on a motion for new trial).

[4] This case was transferred from the Second Court of Appeals in Fort Worth, and we decide it in accordance with the precedent of that Court to the extent required by TEX.R.APP.P. 41.3.

and someone who she believed to be Appellant, the only adult male living in her home, lying next to her in her bed. The person then left the room, and D.V. adjusted her clothing and slept. Appellant awakened D.V. when it was time for school. Feeling sick and drowsy, possibly from the medicine, D.V. fell asleep again but woke at the sound of her mother screaming, "What are you doing[?]" and "I can't believe what you're doing[!]" at Appellant, who was lying behind D.V. in D.V.'s bed. Yanet later asserted that she saw Appellant touching D.V.'s breasts in December 2010, an allegation she recanted and later reasserted. Appellant was indicted on this new allegation and the previous no-billed allegations.

Prosecution of the case began on December 16, 2013, with pretrial motions and voir dire. The following day, Appellant pleaded not guilty, and the State began its presentation of the evidence. The jury ultimately rendered its verdicts late in the evening on December 19. Appellant was represented at trial by appointed counsel, Lee Ann Breading, a board-certified criminal law attorney and former prosecutor, who had served seven and one-half years as an Assistant District Attorney in Dallas trying death penalty, robbery, murder, and sexual assault cases, and had then served four years as a felony prosecutor in Denton before becoming the First Assistant District Attorney for over ten years.

Motion for New Trial and Hearing

Appellant filed a motion for new trial contending that Breading had rendered ineffective assistance of counsel. Appellant attached his affidavit to the motion, in which he complained of eight deficiencies in counsel's performance. Appellant averred that before trial: (1) he only first met with Breading in March 2013 and did not meet with her again until December 14, 2013, for only one hour of trial preparation prior to the commencement of trial on December 16; (2) at that

meeting, counsel advised him the district attorney's office had "just provided" her statements of the complaining witness, but that counsel did not provide him this evidence to review, "nor did she discuss the new versions of the offense with me"; (3) the DA had provided counsel a CD of 3,500 text messages Appellant had previously given to an investigator, but claimed he never had an opportunity to review these messages "and my lawyer never informed me if she reviewed them"; (4) counsel never discussed the possibility of probation before trial, and she advised him probation was not an option only after trial had begun; and (5) although counsel advised him she had filed a motion for continuance before trial, the "motion was never presented to the court or discussed further." Appellant averred that during trial: (1) counsel "never questioned witnesses about prior inconsistent statements"; (2) counsel never provided information to the jury that he was in school and in the police academy when the April 30, 2009 acts were alleged to have occurred; and (3) counsel never questioned D.V. or child protective services regarding inconsistent statements made by D.V. that she had convinced Appellant to stop the alleged acts on April 30, 2009, by telling him she needed to "get ready" for soccer practice, but had stated in a forensic interview that no abuse occurred on days she had soccer practice.

At the hearing on his motion for new trial, Appellant offered his affidavit into evidence and presented the testimony of three witnesses: Breading, himself, and the lead prosecutor. At the hearing, Appellant expanded on the allegations in his affidavit through his own testimony and through his new trial attorney's examination of Breading. The trial court denied the motion for new trial.

The *Strickland* Test

To prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the

two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The first prong requires a defendant to prove that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. at 2064. To do so, the defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689, 104 S.Ct. at 2065. The second Strickland prong—the prejudice prong—requires a defendant to prove that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. at 2068; *Perez v. State*, 310 S.W.3d 890, 893 (Tex.Crim.App. 2010). "A reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Thus, in order to establish prejudice, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. It is not sufficient for the defendant to show "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. at 2067. Rather, he must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 695, 104 S.Ct. at 2068-69, or in the case of punishment, there is a reasonable probability that the sentencing jury would have reached a more favorable penalty-phase verdict. *See Woodford v. Visciotti,* 537 U.S. 19, 22–23, 123 S.Ct. 357, 359, 154 L.Ed.2d 279 (2002) (when it is alleged that counsel performed deficiently at the punishment phase of trial, defendant must prove that there is a reasonable probability that, but for counsel's errors, the sentencing jury would have reached a more favorable penalty-phase verdict); *see also Ex parte Cash*, 178 S.W.3d 816, 818-19 (Tex.Crim.App. 2005).

It is the defendant's burden to prove ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex.Crim.App. 2003). Allegations of ineffectiveness must be based on the record, and the presumption of a sound trial strategy cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 269 (Tex.Crim.App. 1999); *see also Bone v. State*, 77 S.W.3d 828, 833 (Tex.Crim.App. 2002) (allegations of ineffectiveness must be firmly founded in the record).

The trial court, as the court deciding the ineffectiveness claim, was required to look at the totality of the representation, and to base its decision on the facts of the particular case, viewed at the time of counsel's conduct so as to eliminate hindsight bias. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. The ultimate focus of trial court's inquiry was required to be on "the fundamental fairness of the proceeding." *Id*. at 696, 104 S.Ct. at 2069; *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex.Crim.App. 2011).

Standard of Review

Because Appellant made his claim of ineffective assistance of counsel in a motion for new trial, we must determine whether the trial court erred in denying that motion. *See Riley v. State*, 378 S.W.3d 453, 457 (Tex.Crim.App. 2012). We review a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if the trial judge's opinion was clearly erroneous and arbitrary. *Id*.; *Freeman v. State*, 340 S.W.3d 717, 732 (Tex.Crim.App. 2011); *see Ramirez v. State,* 301 S.W.3d 410, 415 (Tex.App. – Austin 2009, no pet.) (when the trial court denies a motion for a new trial alleging ineffective assistance of counsel, "we view the relevant legal standards

through the prism of abuse of discretion"). A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. *Riley*, 378 S.W.3d at 457; *Webb v. State*, 232 S.W.3d 109, 112 (Tex.Crim.App. 2007). This deferential review requires us to view the evidence in the light most favorable to the trial court's ruling. *Riley*, 378 S.W.3d at 457; *Charles v. State*, 146 S.W.3d 204, 208 (Tex.Crim.App. 2004). We cannot substitute our own judgment for that of the trial court and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Riley*, 378 S.W.3d at 457; *Webb*, 232 S.W.3d at 112.

The deferential standard applies to our review of the evidence. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Riley*, 378 S.W.3d at 457 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). This same deferential review applies to the trial court's determination of historical facts even when based on affidavits, regardless of whether the affidavits are controverted. *Riley*, 378 S.W.3d at 457; *Charles*, 146 S.W.3d at 208. The trial court is free to disbelieve an affidavit. *Riley*, 378 S.W.3d at 457.

Both the performance and prejudice prongs of the *Strickland* ineffectiveness inquiry are mixed questions of law and fact, but the prejudice prong often contains subsidiary questions of historical fact, some of which may turn upon the credibility and demeanor of witnesses. *Riley*, 378 S.W.3d at 458; *see Kober v. State*, 988 S.W.2d 230, 233 (Tex.Crim.App. 1999). We must show almost total deference to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Riley*, 378 S.W.3d at 458; *State v. Krizan–Wilson*, 354 S.W.3d 808, 815 (Tex.Crim.App. 2011).

Because Appellant raised his ineffectiveness claim before the trial judge at the hearing on his motion for new trial and the trial judge denied the motion, we must presume that all findings made by the trial judge were made in favor of the State. *Riley*, 378 S.W.3d at 459. Accordingly, we assume that the trial judge implicitly found that there was no reasonable probability that the result of the proceedings would have been different. *Id.* This finding is a mixed question of law and fact requiring credibility decisions by the trial court. *Id.* The trial court is the sole fact finder and judge of appellant's and counsel's credibility at the motion for new trial hearing, both during live testimony and in affidavits. *Id.* For example, the trial court did not have to accept Appellant's claim that he would have changed his plea had he received correct advice. *Id.* Our role is to determine whether any reasonable view of the record, viewed in the light most favorable to the trial court's ruling, could support the trial court's implicit findings. *Id.*

DISCUSSION

In four issues, Appellant contends Breading rendered ineffective assistance during pretrial, the guilt-innocence phase, and the punishment phase, and that trial counsel's ineffective assistance during all these stages cumulatively deprived him of his right to the effective assistance of counsel. The State responds that Breading rendered effective assistance at all stages of her representation, and argues that even if Breading's representation is deemed deficient, Appellant has failed to demonstrate that he suffered any prejudice requiring either a new trial or a new punishment hearing.

Analysis

Many of Appellant's complaints are based on the alleged untimeliness or failure of Breading to act. However, absent a showing that a different outcome would have resulted in the

absence of counsel's unprofessional errors, Appellant cannot satisfy the prejudice prong. *Strickland,* 466 U.S. at 687, 694 104 S.Ct. at 2064, 2068; *Perez v. State*, 310 S.W.3d 890, 893 (Tex.Crim.App. 2010). Although we are not persuaded that Appellant has met his burden of showing that trial counsel rendered ineffective assistance at either phase of trial, we conclude it was Appellant's failure to satisfy the second *Strickland* prong regarding prejudice that resulted in the trial court's denial of his motion for new trial, which necessitates our overruling of his issues on appeal.[5] Because a failure to show prejudice will defeat an ineffectiveness claim, we restrict our analysis to the prejudice prong of *Strickland*. *Thompson,* 9 S.W.3d at 813.

Pretrial Prejudice

In Issue One, Appellant complains that Breading failed to prepare for trial and failed to obtain rulings on her pretrial motions in advance of trial. Regarding the former, Appellant asserts that had Breading made contact with the "numerous" witnesses and followed up on the evidence he presented to her in advance of trial, "it is more than probable that this would have made a difference in the verdict" because the jury was sent back to continue its deliberations after four and one-half hours of its consideration of the case, and later returned acquittals on two counts and guilty verdicts on two counts.

Appellant fails in his brief to identify any of the "numerous" witnesses to whom he refers, to explain what their testimony would have been at trial, or more importantly, to show how, but for counsel's alleged errors, a reasonable probability exists that the outcome of the proceedings would have been different. Within Appellant's emails to Breading that were admitted into

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[5] Counsel had a duty to make reasonable investigations or to make a reasonable decision that particular investigations were unnecessary, and the record does not clearly show that this duty was neglected. *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066.

evidence at the new trial hearing, Appellant identified a "godmother" and two babysitters as potential witnesses, but did not identify what the godmother's testimony would have been. He noted that the two babysitters initially informed him that Yanet did not tell them anything, but later informed him that Yanet had disclosed to them that when she was downstairs, she heard a loud noise, went to D.V.'s room, and saw Appellant touching D.V. Appellant also sent an email regarding the "godmother" and the babysitters to Breading's investigator Cami Sandifer, who was a former police officer and former district attorney investigator. He informed both Breading and Sandifer that they may want to speak to his neighbor but explained that he was uncertain what the neighbor would say because the neighbor did not want to get involved. Appellant does not explain what the witnesses' testimony would have been at trial or how it would have been beneficial to him, and he fails to show that, but for Breading's witness-related errors, a reasonable probability exists that the result of the proceeding would have been different.

Appellant contends that had the trial court timely ruled on Breading's pretrial motions, as well as the evidence and documents given to her prior to trial, counsel "most likely would have had time to adequately review and analyze those documents" and would have been better prepared to defend Appellant at trial or to cross-examine witnesses. Contrary to Appellant's complaints regarding Breading's handling of pretrial motions, most of Breading's pretrial motions were ruled on, and if not expressly ruled on, compliance with the motions, such as the jury's assessment of punishment and the State's notice of extraneous offenses, occurred.

Although Appellant complains that Breading should have sought an earlier ruling on her motion for discovery, Breading testified that she was able to review in advance of trial the documents provided to her, determined that they were not helpful to Appellant's defense, and

advised Appellant of her opinion. Breading also was aware that some of the helpful information provided to her pretrial had been introduced into evidence through D.V.'s testimony during trial. Breading's motion for continuance, which was filed for the purpose of reviewing records in advance of trial, was moot at the time the trial court made its ruling on the motion because Breading had been given and was able to review the records in advance of trial. Although Breading had filed her motion for discovery almost two years before trial, the trial court did not grant the motion until the day of trial. However, because of the State's delay in providing some evidence to Breading in compliance with her motion for discovery, the State agreed that it would not oppose her introduction of that evidence without a sponsoring witness. Again, Appellant does not show how counsel's failure to obtain rulings on pretrial motions was deficient or that, but for the alleged error of counsel, there was a reasonable probability that the outcome of his trial proceedings would have been different.

Plea Offers

Appellant notes that counsel has a duty to convey all plea offers and reasonable information regarding an offer, its consequences, and reasonable alternatives to permit a defendant to make an informed decision regarding the offer. *See Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948). Appellant summarily claims that Breading "never engaged in plea conversations," and asserts that if he had realized "how little" Breading had prepared for trial, "he most likely would have been in a better position to fully consider an offer of deferred probation to a non-sex[ual offense] charge." But this is not the measure of prejudice in a claim for ineffective assistance. Appellant was required to show that but for Breading's unprofessional plea-bargaining errors, there is a reasonable probability – one sufficient to undermine confidence in the

outcome - that the outcome of his proceedings would be different. *Strickland,* 466 U.S. at 687, 694, 104 S.Ct. at 2064, 2068; *Perez*, 310 S.W.3d at 893. Regarding the plea offers, Appellant admitted that he had maintained his innocence throughout the proceedings, and when Breading emailed Appellant and informed him that a new prosecutor on the case asked whether Appellant "would be willing to take anything on the case[,]" she responded that Appellant would not be interested. Appellant does not complain of Breading's response to the prosecutor, nor has he shown a reasonable probability that the outcome of the proceedings would have been different if Breading had not made the alleged unprofessional errors. Therefore, he cannot satisfy the prejudice prong of *Strickland.* *Strickland,* 466 U.S. at 687, 694, 104 S.Ct. at 2064, 2068; *Perez*, 310 S.W.3d at 893.

Duty to Investigate

Appellant notes that a defense attorney must make an independent investigation of the facts of the defendant's case. *See Butler v. State*, 716 S.W.2d 48, 54 (Tex.Crim.App. 1986). He complains that Breading failed to conduct any investigation in his case during her representation, but he does not specify how the act of Breading conducting an investigation independently of the one her investigator conducted would have presented different or additional information that would have been beneficial to him. The record shows that Breading secured funds from the trial court for Sandifer's investigator services, that Appellant met with investigator Sandifer, and that Sandifer testified at trial, but Appellant has failed to show that but for Breading's failure to independently conduct an additional investigation, there is a reasonable probability that the outcome of his proceedings would have been different.

Duty to Have Command of the Law

Appellant observes that a criminal defense attorney must have a firm command of the governing law so that reasonably effective assistance of counsel may be rendered. *See Ex parte Drinkert*, 821 S.W.2d 953, 956 (Tex.Crim.App. 1991). He suggests that Breading had no knowledge of the governing law in his case and was "surprised" on the morning of trial when the State provided notice of its intent to seek consecutive sentencing. Appellant does not claim that he received incorrect advice about cumulative sentencing or that he would have made a different decision regarding trial had he learned earlier of the possibility of cumulative sentencing. He also complains that Breading failed to advise Appellant that he was not eligible for probation until the morning of trial. During the new trial hearing, Breading testified that when the State made its first plea offer, she had discussed with Appellant the fact that he was ineligible for deferred-adjudication probation if he was found guilty of the charges against him, and additionally had discussed with Appellant his probation-ineligible status on two subsequent occasions: when they met prior to trial, and again on the morning of trial. In a pretrial hearing, Appellant admitted to the trial court that Breading had discussed with him, and he had understood that he would be ineligible for probation if found guilty, and that he continued to understand that he was probation-ineligible but wished to proceed to trial. Consequently, Appellant has not shown that, but for an unprofessional error committed by counsel, there is a reasonable probability that the result of the proceeding would have been different. *Strickland,* 466 U.S. at 687, 694, 104 S.Ct. at 2064, 2068. Issue One is overruled.

Prejudice at Guilt-Innocence Phase of Trial

In Issue Two, Appellant complains of the inadequate amount of time Breading spent preparing for trial during the course of her representation, and asserts that she did not play an

adversarial role nor assured Appellant a fair trial.

Voir Dire

Appellant complains that Breading failed to object during voir dire, but does not identify any objection that would have been properly made, and concedes that no harmful error is apparent.

Opening Statement

Appellant complains that Breading made no opening statement, provides citation to case law in which this Court has observed that the decision to make an opening statement is entirely discretionary, admits his inability to cite any case law wherein a case was reversed on the sole basis of counsel's decision to refrain from presenting an opening argument, and then summarily asserts that it is ineffective assistance to fail to give an opening statement during the defense's case-in-chief at trial. However, he does not assert or show that there is a reasonable probability that the outcome of trial would have been different if Breading had made an opening statement, which is optional under article 36.01(b). TEX. CODE CRIM. PROC. ANN. art. 36.01(b) (West 2007).

Failure to Object – Outcry Statement

Appellant also criticizes Breading's representation because she did not object to the State's motion regarding outcry statements, and failed to seek a hearing to determine their reliability and admissibility under TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2) (West Supp. 2016). Appellant asserts Breading's failure to request the hearing prejudiced him and asserts that "[i]f any or all of these statements would have been deemed not reliable . . . and excluded from evidence, it is more likely than not that the result in this cause would have been different." However, Appellant does not identify any objection that Breading should have made, and provides no

explanation or analysis to demonstrate why a trial court would find the outcry statements to be unreliable and inadmissible.

Failure to Impeach Witness Regarding Journal Entries

Appellant next complains that Breading failed to impeach or question the complaining witness about her journal entries wherein she expressed anger with Appellant and how her mother's marriage to Appellant had transformed her mother, but he does not show that but for this alleged unprofessional error that a reasonable probability exists that the outcome of the guilt-innocence phase of trial would have been different.

Failure to Vigorously Question Witnesses

Appellant criticizes Breading's cross-examination, complaining that it was non-existent or lacked vigor, and criticizes Breading for failing to ask more questions during her direct examination of Lewisville Police Department Investigator Todd Cooper who had been assigned to the Backgrounds and Internal Affairs division since 1995, but fails to show that a reasonable probability of a different outcome would have occurred but for her allegedly deficient cross-examination. Under direct examination, Investigator Cooper noted that two investigations had occurred regarding Appellant. The first had occurred when the police chief was informed by a Texas Ranger that Appellant was a suspect in a case involving indecency with a child. Investigator Cooper noted that his interview with Appellant was protected in criminal prosecutions. He stated, however, that he had interviewed Yanet during the second investigation, and at trial confirmed that Yanet had stated that she was going up a flight of stairs when she saw Appellant in bed with D.V., who was still wearing a bra, and observed some type of movement with Appellant's hand under the covers. When Breading asked Investigator Cooper whether

Yanet had stated that she was uncertain about or did not know whether there was any touching or inappropriate contact, Investigator Cooper recalled that Yanet had stated Appellant appeared to be rubbing on D.V. On cross-examination, Investigator Cooper admitted that he had not ever visited the house where the touching allegedly occurred, and noted that the second investigation had not been completed because Appellant's employment had been terminated. On re-direct examination, Breading elicited testimony that Appellant had been placed on administrative leave and was terminated for "job abandonment," which arose from his failure to return phone calls while on administrative leave.

Appellant complains that Breading should have objected to the State eliciting testimony regarding Appellant's "job abandonment" as an extraneous offense, in part because the trial court had already ruled that a hearing outside the presence of the jury would be required in advance of the presentation of such evidence, and argues that Breading opened the door for the testimony. The State had identified the conduct constituting job abandonment in its notice of intent to use evidence of other crimes, wrongs or acts at punishment after a finding of guilt in accordance with Sections 3(a)(1) and 3(g) of article 37.07, and Rules of Evidence 404(b) and 609(f). TEX.R.EVID. 404(b), 609(f)(Impeachment by Evidence of a Criminal Conviction); TEX. CODE CRIM. PROC. ANN. art. 37.07, §§ 3(a)(1), (g)(notice and admissibility of reputation or character evidence relevant to sentencing). We observe, however, that on re-direct examination, Breading clarified that Appellant's termination for "job abandonment" was based on his failure to return phone calls rather than on some other basis. This clarification may have constituted trial strategy, but Appellant has not shown that Breading's questions and failure to object to the testimony were not trial strategy, and more importantly, he has not shown that but for Breading's failure to object

regarding the job-abandonment testimony, there is a reasonable probability that the outcome would be different.

He next complains that it is apparent that Breading failed to prepare Appellant's mother Regina Jones for trial, and asserts that Ms. Jones' testimony failed to advance any defensive theory and bolstered the State's case. We disagree.

The record reveals that Ms. Jones was nervous about testifying during her son's trial. During her testimony, Ms. Jones recounted that Yanet, who was very upset, had called her at work before Christmas in 2010, and informed her that Appellant had stated that he was going to leave Yanet and take the children with him. Ms. Jones attempted to calm Yanet, and informed her that she doubted Appellant would leave. When Yanet asked Ms. Jones to attempt to call Appellant, Ms. Jones' efforts to reach her son were unsuccessful. Ms. Jones subsequently called Yanet and informed her that she would visit after work. Ms. Jones first went home to pick up her son so he could drive her to Appellant's Lake Dallas home, where they stayed for approximately three days. Appellant stayed at a motel. During the visit, Yanet never said anything to Ms. Jones about Appellant touching D.V. inappropriately, and at times, Yanet and Appellant spoke by telephone. Appellant later returned home, and Ms. Jones perceived everything to be normal.

In early January 2011, Yanet again called Ms. Jones at work, and stated that she had received a text from Appellant indicating that he may hurt himself. Yanet informed Ms. Jones that she had requested that police perform a safety check because Appellant had moved from the home into a hotel. Ms. Jones again traveled to visit Yanet and Appellant. After Ms. Jones arrived, Yanet informed her that she had seen Appellant rubbing D.V.'s stomach. On cross-examination, Ms. Jones confirmed that Yanet had only mentioned that she saw Appellant touching

D.V.'s stomach, not her breast, and noted that she was concerned when Yanet indicated that Appellant may have been contemplating self-harm because he had been in Iraq a couple of times, and she was uncertain whether he was experiencing problems after his return. Because Appellant has failed to demonstrate that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of his proceedings would be different, Issue Two is overruled.

Prejudice at the Punishment Phase

In Issue Three, Appellant asserts his counsel rendered ineffective assistance by failing to prepare for the punishment phase of trial, and contends that counsel's concise argument demonstrates she had "given up."

At the new trial hearing, Appellant testified he did not know that he could present witnesses during the punishment phase, and on appeal argues his punishment would have been different if Breading had called witnesses. Appellant, however, concedes that he neither identified any witnesses who should have been called to testify, nor informed the trial court what their testimony would have been or how it could have resulted in a different outcome. Rather, Appellant contends that the fact that the jury deadlocked after over four hours of deliberation during the guilt-innocence phase supports a conclusion that the outcome of the proceedings would have been different had his counsel presented other evidence during the punishment phase of trial. We disagree.

During the guilt-innocence phase, the jury did inform the trial court that three members would not consider a guilty vote on any count, and seven members would not consider an acquittal on four counts. However, after the trial court instructed the jury that it had before it all of the law and evidence permitted in the case, the jury returned its verdicts finding Appellant guilty of Counts

I and II and acquitting him of the charges alleged in Counts III and IV.

Thereafter, in the jury's absence, the State informed the trial court that it would not be presenting any witnesses during the punishment phase. Similarly, Breading informed the trial court that she did not anticipate calling any witnesses but noted that she would be seeking the introduction of records, which she believed would be admitted without objection.

At the commencement of the punishment phase, the trial court reminded the jury that the range of punishment was no less than 2 years' and no more than 20 years' confinement, that the jury would determine the proper sentence, and the trial court would then determine whether the sentences would run concurrently or consecutively. Neither the State nor Breading presented an opening statement. The State called no witnesses but reoffered the evidence presented in its case-in-chief and rested. Without objection by the State, Breading offered into evidence Defense Exhibit 34, which is Appellant's Certificate of Release or Discharge from Active Duty with the United States Army. The certificate shows that during Appellant's 4 years and 11 months of active duty in the U.S. Army, his primary specialty involved military policing, and further lists his military education as including military police battalion law enforcement, combat lifesaving, field sanitation certification, as well as a military police course. Appellant also was also awarded or authorized to be awarded decorations, medals, badges, citations, or campaign ribbons, including the Army Commendation Medal (2nd Award), Army Achievement Medal (2nd Award), Valorous Unit Award, Army Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal, Iraq Campaign Medal, Army Service Ribbon, Overseas Service Ribbon (2nd Award), and the Combat Action Badge.

During its closing argument, the State reminded the jury of the range of punishment but

did not suggest a specific sentence to the jury. The record shows that Breading was fully aware during the guilt-innocence phase that the jury had been deadlocked and did not have a unanimous view of the Appellant's guilt on the four charged offenses. During her closing argument, Breading noted that being found guilty of an offense is not the summation of one's life, and reminded jurors that Appellant is the father of two small children who will have contact with him again, and observed that the date on which that reunion would occur was dependent on the jurors' sentencing decisions. She also noted that Appellant had been supported by his mother and friend, who had been present during trial and cared very much for him. Finally, Breading explained that Appellant had an active career as a police officer following an exemplary military career, noted his military record and service to his country, and asked that the jury balance these factors when assessing punishment. In its rebuttal argument, the State again did not suggest a minimum sentence, but noted that Appellant had betrayed his family position as well as the trust of the public and law enforcement. The jury imposed sentences at the low end of the range of punishment, sentencing Appellant to 3 years' and 4 years' confinement respectively for Counts I and II, which exceeded the minimum possible sentence by only one and two years respectively. The trial court pronounced sentence the following day. At the outset of trial, Appellant had been advised by the State of its intent to seek consecutive sentencing, and the trial court declared that Appellant's sentences would be served consecutively.

Appellant argues on appeal that Breading improperly failed to inform the jury of the significance of the consequences of being found guilty of sex-based offenses, and the collateral consequences of sex-offender registration. However, he fails to show that a reasonable probability exists that, but for Breading's failure to make this argument to the jury during the

punishment phase, the result of his punishment proceedings would have been different, nor has Appellant shown, as he has alleged, that Breading's challenged conduct is so outrageous that no competent attorney would have engaged in it. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.Crim.App. 2005).

While we are mindful that Breading testified that she did not make any preparations for punishment that differed from her preparations for the whole of trial, we conclude Appellant has failed to meet his burden of showing that, but for Breading's alleged unprofessional errors, a reasonable probability exists that the outcome of his punishment proceedings would have been different. Issue Three is overruled.

Cumulative Prejudice

In Issue Four, Appellant argues that the collective and cumulative errors discussed in his first three issues establish that Breading rendered ineffective assistance of counsel and deprived him of a fair trial. It is conceivable that a number of errors may be found harmful in their cumulative effect. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App. 1999). We conclude, however, that Appellant has failed to satisfy the prejudice prong of *Strickland* concerning his counsel's representation in pretrial matters and in all phases of his trial. Likewise, examining all of Appellant's complaints and the totality of the allegedly erroneous representation, we are unable to conclude that Appellant has demonstrated that a reasonable probability exists that the outcome of Appellant's proceedings would have been different but for the cumulative alleged unprofessional errors of his trial counsel. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Perez,* 310 S.W.3d at 893. Issue Four is overruled.

CONCLUSION

Viewing the evidence in the light most favorable to the trial court's ruling, we conclude that, even assuming Appellant showed deficient performance by trial counsel, he failed to prove that but for the alleged errors of his trial counsel, there is a reasonable probability that his trial would have produced a different result. Appellant thus has failed to meet his burden under the second prong of *Strickland*. Viewed in the light most favorable to the trial court's ruling, any reasonable view of the record could support the trial court's implicit finding, and consequently, deferring as we must, the trial court did not err in denying Appellant's motion for new trial based on his claim of ineffective assistance. *Riley*, 378 S.W.3d at 459. The trial court's judgment is affirmed.

YVONNE T. RODRIGUEZ, Justice

July 19, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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