COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CRUZ LOPEZ BERNAL,	§	No. 08-14-00158-CR
Appellant,	§	Appeal from the
v.	§	112th District Court
THE STATE OF TEXAS,	§	of Pecos County, Texas
Appellee.	§	(TC# 3310-112-CR)

O P I N I O N

Appellant Cruz Lopez Bernal appeals his conviction on one count of injury to a child. In his sole issue, Lopez Bernal contends the judgment in this case should be reversed because he received ineffective assistance of counsel. We affirm Lopez Bernal's conviction.

BACKGROUND

Factual Background

This case arises out of a head injury sustained by M.G., the eight-month-old infant daughter of Lopez Bernal's then-girlfriend Patricia Grado. Although the ineffective assistance of counsel issues on appeal are straightforward, we will discuss the factual background and trial testimony in some detail so as to place Lopez Bernal's appellate issues and trial counsel's possible strategic moves in the proper context.

At trial, Grado testified that the morning in question, she and Lopez Bernal dropped her older daughter A.G. at school and returned home. Later, Grado went with her mother to get insurance coverage for a new truck and run some errands. Because M.G. was falling asleep, Grado did not take her to the insurance office, but instead left M.G. sitting in her swing in Lopez Bernal's care at their home. Grado said that before she left with her mother to the insurance office, M.G. had not been sick and had not vomited. Grado testified that Bernal Lopez called her twice while she was out with her mother running errands after stopping at the insurance office. The first time he called, Grado asked Lopez Bernal how M.G. was doing. Lopez Bernal replied M.G. was fine. The second time, Lopez Bernal called Grado's mother to tell her that M.G. was throwing up. After buying groceries with her mother, Grado returned briefly to her house, where she spoke with Lopez Bernal. From far away, M.G. looked like she was asleep. Grado asked if M.G. was still asleep. Lopez Bernal said yes. Grado then drove her mother home before returning to the house.

When Grado returned home, Lopez Bernal helped her unload the groceries, and Grado went into the house to see M.G. Grado testified that M.G. "did not look normal. Her face looked sunken in. She looked like an ugly doll. Her face was pushed in. Her lips were purple, blue, and red . . . [a]nd then she had, like, this look of pain on her face; and her hair was staticy. It was standing up, and her head was shaped odd." Grado further testified that M.G. had goose bumps, that one leg was outstretched while another was under her, and that M.G. was shaking, although Grado conceded that M.G.'s swing was seated near the air conditioner. When she called M.G.'s name, M.G. could not open her eyes all the way. According to Grado, when she asked Lopez Bernal what happened to the baby, he made no response, but he was sweating and had a "look on his face" like "a little boy that had done something very, very, very wrong." Grado took M.G. out of her swing. Then Lopez Bernal took M.G. from Grado and stood under a fan. After Lopez

Bernal took M.G., Grado scratched Lopez Bernal with her fingernails and bit him while he was holding M.G. in his arms, but Grado denied injuring M.G. or that her attack on Lopez Bernal caused him to drop M.G. Lopez Bernal handed M.G. over to Grado, and Grado and Lopez Bernal took M.G. to the doctor's office and ultimately the emergency room. Grado denied ever dropping M.G. that day. Grado testified that while they were in the truck on the way to the doctor's office, Lopez Bernal told her to "please not take the baby" and go home instead because "there was going to be CPS, that the cops were going to be there, and that they were going to take her away and my kids away[.]" Grado further testified that at the emergency room, she was present when police questioned Lopez Bernal. He told police that she had fallen, but Grado did not remember what Lopez Bernal specifically said. Separately, Socorro Grado—the mother of Patricia and the grandmother of M.G.—testified that the night M.G. was admitted to the hospital, Lopez Bernal said that M.G. had hit her head on the sharp edge of a door while Patricia Grado was attacking him.

M.G.'s older sister Lluvia Moreno said she also saw M.G. that day, before Grado arrived at the house. Moreno testified that she went to her mother Grado's house for about fifteen to twenty minutes and saw Lopez Bernal there. M.G. was in her swing, not moving. Moreno further testified that M.G. looked "different" to her, but when she pointed that out to Lopez Bernal, he told her it was because she never visited the baby. Moreno tried to touch M.G., but Lopez Bernal told her not to because he had just put her to sleep. As she walked through the house, Moreno saw that M.G.'s clothes and blankets by her crib were covered in vomit. According to Moreno, Lopez Bernal told her that he had patted the baby on the back, and she threw up, though he may have patted her too hard. Moreno testified that forty-five minutes after she left the house, her mother called her to tell her M.G. was in the hospital.

M.G. presented at the Pecos County Memorial Hospital with two bruises on her head and a skull fracture. A.G., who is M.G.'s older sister, testified that after M.G. went to the hospital, Lopez Bernal told her that M.G. had been crawling on the bed and that she had fallen off the bed when he had his back turned. A.G. further testified that later that same day, Lopez Bernal told her that M.G. had been in her swing and that after he went outside to take a phone call, he came back inside and saw M.G. on the floor.

M.G. was flown by helicopter from Pecos County to Lubbock for medical treatment. Grado testified that a week after M.G. was flown to Lubbock, Lopez Bernal called and told her for the first time that he had placed M.G. on the bed, that he turned around to get clothes from the dresser drawers, and that when he turned back around, M.G. had stood up by the wall, but when she sat down she bumped her head on the wall. Lopez Bernal had then put M.G. in her swing, but then "forgot to tie her." According to Grado, Lopez Bernal said he went outside for a while, and when he came back inside, the baby was on the floor crying.

In Lubbock, medical tests revealed that M.G. had a skull fracture, a subdural hematoma, swelling of the brain, and hemorrhaging in her eyes. As part of M.G.'s treatment, Pediatric Neurosurgeon Dr. Lazlo Nagy performed a decompressive craniectomy, in which a portion of the skull is removed, in order to relieve pressure on M.G.'s swollen brain after she suffered a stroke. Dr. Patty Patterson, who monitored M.G. during her approximately one month stay at the hospital, testified at trial that "[s]ignificant violent force" consistent with trauma caused M.G.'s injuries, "not a simple drop or bump." Dr. Patterson also testified that vomiting shortly after a brain injury like M.G.'s is very common. Dr. Patterson opined that without treatment, M.G. would have died.

As of the date of trial, M.G. did not have any use of her left arm and her left hand was permanently clenched. Her cousin Marla Garcia testified that M.G. had some difficulty running,

as her left leg still dragged somewhat.

Procedural History

Lopez Bernal was represented in the trial court by Sandy Wilson. Prior to trial, defense counsel filed a motion in limine generally asking the trial court to prohibit the State from alluding to or mentioning any prior convictions or extraneous offenses. There is nothing in the record indicating that the trial court ever ruled on this motion in limine. In anticipation of trial, defense counsel subpoenaed eleven witnesses. At the beginning of trial, defense counsel indicated that she would reserve her opening statement until after the State closed its case-in-chief. During trial, the State introduced a partially-redacted video statement that Lopez Bernal gave to Fort Stockton Police Sgt. Will Jackson. In the course of his interrogation, Lopez Bernal denied intentionally hitting or striking M.G., but during one portion of the tape relevant to this appeal, Lopez Bernal admitted to having a prior criminal history. Lopez Bernal's specific statements will be discussed later in this opinion. While certain parts of the video were manually redacted by having the prosecutor press mute and hold her hand over the projector lens as the video played, the portions of Lopez Bernal's interrogation containing his admissions to prior unrelated criminal activities or bad acts were played for the jury without redactions. Prior to the tape's admission, defense counsel twice stated she had "no objection" to the video being admitted as-is, nor did counsel object after Lopez Bernal made reference to his criminal history on the tape.

Defense counsel cross-examined all the State's witnesses. At the close of the State's case, defense counsel rested and closed, electing not to give an opening statement or call any of the eleven defense witnesses. Instead, the case proceeded directly into closing arguments. The jury convicted Lopez Bernal of one count of injury to a child and sentenced him to seventy years' in prison. This appeal followed.

DISCUSSION

In his only issue on appeal, Lopez Bernal maintains his trial counsel Sandy Wilson rendered ineffective assistance by committing several errors. Although Lopez Bernal's brief recounts numerous actions taken by counsel during trial, it is unclear as to which acts he specifically complains were ineffective. We construe his brief as raising the following objections to counsel's performance: (1) failing to obtain a ruling on a pretrial motion in limine; (2) failing to make an opening statement; (3) failing to object to the admission of improper character evidence; (4) failing to "put up a defense or call a single witness;" and (5) failing to request a directed verdict. We will regroup these issues and first address whether each claimed error rose to the level of ineffective assistance before turning, if necessary, to an analysis of whether the combined effect of any ineffective acts prejudiced Lopez Bernal's defense.

Standard of Review: Ineffective Assistance of Counsel on Direct Review

A defendant unquestionably has a right to be represented by effective, competent counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). But a defendant's right to effective assistance of counsel does not mean that the defendant is entitled to flawless performance from counsel; "isolated lapses or mistakes during the trial are not necessarily indicative of ineffectiveness." *Calderon v. State*, 950 S.W.2d 121, 128 (Tex.App.--El Paso 1997, no pet.).

We review claims for ineffective assistance of counsel under the two-step standard set by *Strickland v. Washington*. First, we must decide whether counsel was actually ineffective—in other words, did the appellant show, "by a preponderance of the evidence, that his counsel's representation fell below the objective standard of professional norms[?]" *Bone v. State*, 77 S.W.3d 828, 833 (Tex.Crim.App. 2002). If so, we must then determine whether counsel's

ineffective assistance prejudiced the defendant. Stated another way, did the error so undermine our confidence in the outcome in the trial that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different? *Bone*, 77 S.W.3d at 833. "The two prongs of *Strickland* need not be analyzed in a particular order—the prejudice prong may be analyzed first and the performance prong second." *Ex parte Martinez*, 330 S.W.3d 891, 900 n.19 (Tex.Crim.App. 2011).

Establishing a claim of ineffective assistance of counsel on direct appeal is notoriously difficult, given that proving the claim often, though not always, involves adducing evidence not readily apparent in the record. *Andrews v. State*, 159 S.W.3d 98, 103 (Tex.Crim.App. 2005)(noting that habeas corpus proceedings are often the better avenue for relief on ineffective assistance of counsel claims, since additional extra-record evidence may be introduced and counsel can have the opportunity to explain thought processes); *cf. State v. Frias*, 511 S.W.3d 797, 809-10 (Tex.App.--El Paso 2016, pet. ref'd)(counsel's testimony at new trial hearing sufficient to allow court on direct appeal to determine counsel was ineffective). "We refer to standards published by the American Bar Association and other similar sources as guides to determine prevailing professional norms . . . [but] such publications are only guides because no set of detailed rules can completely dictate how best to represent a criminal defendant." *Id.* at 810. We indulge a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[,]" *Mallet v. State*, 9 S.W.3d 856, 866 (Tex.App.–Fort Worth 2000, no pet.)[Internal quotations marks omitted], and generally, in the absence of affirmative record evidence, we will assume counsel's moves in a given case were strategic. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999)(allegation of ineffectiveness "must be firmly founded in the record" and "record must affirmatively demonstrate the alleged

ineffectiveness"). "We have said that we commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it." *Andrews*, 159 S.W.3d at 101. "But, when no reasonable trial strategy could justify the trial 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 the trial counsel's subjective reasons for acting as she did." *Id*. at 102.

Failure to Give An Opening Statement

We turn to Lopez Bernal's first complaint. He contends that by failing to give an opening statement at this trial, his counsel rendered ineffective assistance. We disagree that ineffective assistance can be shown on this record on that point.

Counsel indisputably never gave an opening statement in this case. At the beginning of the trial, defense counsel stated that she was "going to open after the State has concluded." However, once the State rested, counsel elected not to call any defense witnesses and instead proceeded directly into closing argument. This situation is not unique, and our prior precedent controls here on the question of whether this course of action is ineffective. In *Calderon*, defense counsel also chose to reserve his opening statement until after the State's case-in-chief. However, at the close of the State's case-in-chief, defense counsel, apparently believing that his efforts solely attacking the State's evidence were sufficient, ultimately decided not to present any defense witnesses after all. Thereafter, the case proceeded directly into closing arguments. *Calderon*, 950 S.W.2d at 127-28. We held that counsel was not ineffective there because, under the circumstances, "an opening statement may have been deemed unnecessary, if not strategically undesirable." *Id*. at 128.

The facts of this case are similar to *Calderon*. Here, counsel reserved her opening

statement, but then elected not to put on a defense after the State put on its case. Although counsel had subpoenaed eleven defense witnesses, after consulting with her client at the close of the State's case, she ultimately decided not to call a single witness, which, as we discuss below, we must assume was a strategic decision that arose after hearing the State's evidence. Given that counsel did not call defense witnesses for guilt-innocence, but instead focused her efforts on challenging the State's evidence, the need for an opening statement was obviated, as her closing arguments served essentially the same purpose of summarizing and contextualizing the evidence. Under these circumstances, Lopez Bernal cannot establish that trial counsel was ineffective by failing to give an opening statement.

Failure to Call Witnesses

Lopez Bernal next contends trial counsel was ineffective by failing to call any witnesses in his favor or otherwise putting on an affirmative defense case.

"Counsel's conscious decision not to pursue a defense or to call a witness is not insulated from review, but, unless a defendant overcomes the presumption that counsel's actions were based in sound trial strategy, counsel will generally not be found ineffective." *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex.Crim.App. 2012). To prevail on an ineffective assistance claim for failing to call a witness, the defendant must identify who the uncalled witness was, show that the witness "had been available to testify," and that the "testimony would have been of some benefit to the defense." *Ex parte White*, 160 S.W.3d 46, 52 (Tex.Crim.App. 2004). Here, we have no evidence in the record that would explain why trial counsel failed to call any of the eleven subpoenaed witnesses. Although defense counsel alluded to two defense witnesses she intended to call during voir dire, at the close of the State's case, defense counsel consulted with her client during a break and ultimately elected to rest and close. Appellant's brief fails to explain who the uncalled

witnesses were or why their testimony would have been of some benefit. Without this information, we cannot determine from this record that counsel's failure to call any witnesses during the guilt-innocence phase constituted ineffective assistance.

Failure to Obtain In Limine Ruling and Failure to Object to Character Evidence

We will address the next two claimed errors jointly, as the motion in limine and objection issue intertwine character evidence issues and allusions to extraneous bad acts injected into the trial through Lopez Bernal's video interrogation with Sgt. Jackson.

At trial, the State, through witness Sgt. Jackson, admitted and published State's Exhibit 72—a video recording of Sgt. Jackson's fifty-minute interrogation of Lopez Bernal. The video was admitted with redactions. According to the record made by the trial court, the first redacted portion is from 34:20 to 34:25. The second redacted portion is from 36:22 to 36:30. The State "redacted" these portions by having one of the prosecutors place her hand over the projector so as to block the image and press mute on the computer during those particular time periods. Despite these redactions, Lopez Bernal contends that three objectionable references to extraneous bad acts still made their way into trial through this video. At 33:39, Lopez Bernal told Sgt. Jackson: "I might have been to prison for drugs or whatever . . . ."

At 35:40, Lopez Bernal said to Sgt. Jackson: "I may be a thief, I may be a drug addict or whatever, just like her, I've got no family violence . . . ." At 48:12, Lopez Bernal stated: "I have a background for other charges, drugs or whatever . . . ."

In two sub-points on appeal, Lopez Bernal complains that trial counsel was ineffective by failing to request a ruling on her motion in limine, and by failing to object to the admission of the extraneous bad acts evidence described in the three excerpts above. Although we concede that the failure to block the admission of this evidence beforehand through a motion in limine and the

failure to object shortly after it was admitted appear to be problematic, we cannot say those decisions were outside the zone of reasonable trial strategy on this record.

During her extensive cross-examination of Sgt. Jackson, defense counsel repeatedly referred to the fact that Sgt. Jackson had only interviewed three witnesses: Patricia Grado, Cruz Lopez Bernal, and a doctor who treated M.G. Defense counsel also elicited the fact that Sgt. Jackson apparently either had previous run-ins with Lopez Bernal or was at least aware of Lopez Bernal's prior history, and that this knowledge played a part in Sgt. Jackson's disbelief of Lopez Bernal's story:

> Q. Did those scratches on him not support his story, in your opinion?
>
> A. Knowing your client at the time, knowing his history with law enforcement, I didn't believe him at the time, no, ma'am.
>
> Q. You didn't believe him? Because you knew him?
>
> A. Yes, ma'am.
>
> Q. Is that how you investigate all of your cases?
>
> A. No, ma'am.

During another point in her cross-examination, defense counsel focused on attempting to get Sgt. Jackson to concede that Lopez Bernal's story about the baby hitting her head during Grado's attack was plausible by discussing photographs and using a demonstrative doll. After going through the version of events Lopez Bernal told Sgt. Jackson, defense counsel again questioned Sgt. Jackson regarding his opinion of Lopez Bernal's credibility:

> Q. But the bruise here (indicating) -- the bruise on the thigh and the bruise here (indicating) can be very consistent with his story?
>
> A. In a way, yes, ma'am.
>
> Q. Could it not be consistent with his story?

A. In a way, yes, ma'am.

. . .

Q. Did you -- did you go and actually look at the pictures of the child and get a doll or do anything like that and check it out?

A. No, ma'am.

Q. You didn't do any of that?

A. No, ma'am.

Q. You didn't do any of that because you knew Cruz and you were pretty well finished, weren't you?

A. Yes, ma'am.

Toward the end of her cross-examination of Sgt. Jackson, defense counsel summed up her points about the investigation through a series of questions, again raising the issue of Sgt. Jackson's opinion of Lopez Bernal's credibility:

Q. You initiated an investigation on an injury to a child where the child was severely injured. You interviewed Mr. Bernal. You interviewed the mother and nothing else – oh, you briefly talked to the doctor; is that correct?

A. Yes, ma'am.

Q. And you did nothing else on this case?

A. No, ma'am.

Q. You didn't look at the bruises on the baby?

A. I believe at the hospital, I did, yes, ma'am.

Q. You didn't try to put that together with all your forensic training and make a determination on the cause of injury?

A. I don't understand the question.

Q. All of that – you did those three things, you interviewed mom, interviewed dad, and briefly talked to the doctor. You decided that because you knew Cruz and you didn't like him –

A. I didn't say I didn't like him, ma'am. No.

Q. But you –

A. I didn't testify –

[Interruption by court reporter]

Q. You knew Cruz, and that was enough?

A. No, ma'am. That wasn't enough. No, ma'am. I don't understand the question.

Following this line of questioning, the trial court *sua sponte* excused the jury and held a conference with the prosecutors and defense counsel:

> THE COURT: [. . .] There's a motion in limine pending before the Court to exclude the fact that he's been to the penitentiary, that he tested positive for cocaine and methamphetamine; and I think you've asked him at least three times: Is this how you reached your decision, because you knew him?
>
> And at some point you're going to open that door, if it hasn't already been done, and I've excluded it and allow Mr. Dobbins [sic] to answer the question or he's just going to answer it because you keep asking him. So, how far do you want to go with that?
>
> MS. WILSON: I'm finished.
>
> THE COURT: All right. I mean, I'm not going to stop you from asking the questions. I'm just telling you that you've asked him more than once how he reached that decision and my thinking is that his background might have something to do with it and I don't know how much knowledge he has about whether or not he tested positive for drugs, but that door will be open.
>
> Do you want to ask more questions?
>
> MS. WILSON: No, sir.
>
> THE COURT: Okay. All right. Bring them back in. For now it's excluded. Okay?

It is not incumbent on this Court to speculate as to what defense counsel's strategy was. Suffice to say, after reviewing defense counsel's cross-examination of Sgt. Jackson and her colloquy with the trial court, we cannot discount the possibility that defense counsel's failure to object to Lopez Bernal's own previous reference to his criminal history was strategic. It is clear

that defense counsel's strategy was to attack the integrity of Sgt. Jackson's investigation and suggest to the jury that Sgt. Jackson decided to arrest Lopez Bernal not on the basis of probable cause, but on the basis of personal animus toward Lopez Bernal and the belief that Lopez Bernal could not be believed because he was a criminal. Thus, counsel may have had a valid strategic reason for allowing the issue of Lopez Bernal's criminal history to enter into the jury box during the guilt-innocence phase.

As for counsel's failure to object when Lopez Bernal ostensibly admitted to specific instances of extraneous bad conduct in the video interrogation, our sister court in Houston noted in a case where defense counsel failed to object to witness impact statements in a capital murder trial, "defense counsel may have strategically determined that the likelihood of success, and its potential benefits, was outweighed by the potential of drawing further attention" to the objectionable testimony. *See Matta v. State*, No. 14-15-00104-CR, 2016 WL 3268610, at *8 (Tex.App.--Houston [14th Dist.] June 14, 2016, no pet.)(mem. op., not designated for publication). While the facts of that case were different—there, unfavorable evidence about the defendant came from another witness's mouth rather than his own—and while we hesitate to fully endorse that idea that we may always wholly disregard a failure to object to evidence as a strategic decision in every case, *Matta* guides us here. It is possible that counsel's decision not to object to this evidence after it was played was done for strategic reasons.

Finally, Lopez Bernal also complains that counsel was ineffective by affirmatively offering Sgt. Jackson's arrest affidavit into evidence. The affidavit relayed a statement Lopez Bernal purportedly made to Sgt. Jackson in which Lopez Bernal stated that if anyone hurt the baby, it was him. Again, we cannot say this was ineffective assistance. Rather, it appears that counsel may have used the probable cause affidavit as a way to attack Sgt. Jackson's credibility, diligence, and

memory, as well as impeaching him by omission:

> Q. You also put in here that -- you stated, If anyone hurt the child, it was me. You're referring to Mr. Bernal?
>
> A. Yes ma'am.
>
> Q. That was in the video, too?
>
> A. I don't know where he said that. I don't believe it was on the video. I don't remember where he could have said that.
>
> Q. Would it be in your six-page report?
>
> A. No, ma'am
>
> Q. Okay. Now, it shows here that you -- looks like you initiated this on January 23rd of 2012.
>
> A. Which one, ma'am?
>
> Q. The probable cause affidavit. Looks like you completed it on that date.
>
> MS. WILSON: May I approach, your Honor, and show him, again?
>
> THE COURT: Yes, ma'am.
>
> Q. (By Ms. Wilson) Can you tell me what date that shows to be?
>
> A. Yes, ma'am. On the 23rd of January, 2012.
>
> Q. Okay. Shouldn't that be 2013?
>
> A. It could be, yes ma'am. It should be '13, yes, ma'am.

Ultimately, in light of the presumption of effectiveness and the paucity of affirmative record evidence that would rebut the presumption, our result is inescapable. Perhaps counsel's decision to let the jury hear Lopez Bernal say that he "might be a thief, I might be a drug addict or whatever" but that he did not hit the child was a strategic decision aimed at allowing the jury to see that Lopez Bernal was a credible witness. Perhaps she intended to show that Sgt. Jackson allowed his prejudicial opinion of Lopez Bernal to cloud his judgment and taint the investigation.

Perhaps counsel's use of the probable cause affidavit was part of a strategy to cast doubt on Sgt. Jackson's testimony. Perhaps not. On this record, we cannot say which scenario was the true one. As such, deficient performance cannot be established on this basis on direct appeal.

Failure to Request a Directed Verdict at the Close of the State's Case

Finally, Lopez Bernal complains that his attorney was ineffective by failing to move for a directed verdict at the close of the State's case-in-chief. Where the "State introduces more than [a] scintilla of evidence to support conviction, then defense counsel's failure to move for [a] directed verdict is not ineffective assistance of counsel[.]" *Wooster v. State*, No. 08-05-00177-CR, 2007 WL 2385925, at *7 (Tex.App.--El Paso Aug. 16, 2007, no pet.)(not designated for publication). Here, the State introduced more than a scintilla of evidence in support of conviction. Medical testimony established that M.G.'s head injury could have only resulted from significant violent and likely intentional trauma. Various witnesses testified that M.G.'s condition changed significantly from the morning to the afternoon, and that she was in Lopez Bernal's sole custody during that time. While Lopez Bernal's alternative explanation of facts may be relevant on a criminal legal sufficiency review, the State here provided non-frivolous evidence beyond a mere scintilla in support of each element of the crime. As such, trial counsel's failure to request a directed verdict was not ineffective assistance.

Summary

Because none of the alleged deficiencies in performance were unreasonable per se, the presumption that counsel's moves were strategic applies. Absent other evidence showing that counsel's moves were actually not strategic, the presumption cannot be overcome on any of Lopez Bernal's points. No prejudice analysis is necessary; Lopez Bernal cannot establish here on direct appeal that counsel's performance was deficient.

CONCLUSION

Issue One is overruled. The judgment of the trial court is affirmed.

May 3, 2017

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., Not Participating

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