COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JESUS RAMIREZ,	§	No. 08-15-00090-CR
Appellant,	§	Appeal from
v.	§	168th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20130D05462)

O P I N I O N

Appellant was indicted on two counts of indecency with a child, one by touching the child's genitals (Count I), and the other by touching the breasts (Count II). A jury convicted Appellant only on the second count. He brings this appeal complaining of the sufficiency of the evidence to support that conviction, the failure of the trial judge to declare a mistrial after a witness made an improper comment, and the alleged failure of his trial counsel to provide effective assistance. Finding no reversible error, we affirm.

FACTUAL SUMMARY

Appellant was indicted for touching the breasts and genitals of K.M., who was nine years old on the date of the alleged the crime.[1] Appellant was thirty years old at the time. The evidence at trial was sharply conflicting on some points, and undisputed on others.

[1] To protect the anonymity of the child in this case, we will use an alias and generic references to her father who testified at trial. *See* TEX.R.APP.P. 9.10(a)(3); *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex.Crim.App. [Panel Op.] 1982).

On July 20, 2013, K.M.'s parents were having a party at their house. Family and friends were invited and Appellant had either come to the party with K.M.'s uncle or a family friend. K.M. had never met Appellant before.

K.M. testified that at one point that evening Appellant asked her to rub his head for good luck. He apparently asked her to do this several times. She later went to play with a basketball that she tossed at a target affixed to a swing set. Appellant joined her and started playing the same game as well. Appellant clarified that it was K.M. who invited him to play.

After playing for a while, K.M suggested they watch some television in her bedroom. Appellant followed her there. Conversely, Appellant maintained that sometime after they played basketball, he went back inside to the party and later went to the restroom. When he came out of the restroom, K.M. was at the door and asked him to help with the television in her bedroom.

Both K.M. and Appellant agreed that no one else was in the bedroom and that the lights in the room were off. K.M. testified that the TV was already on, while Appellant claimed he had to turn it on. The door to the room was always open and was nearby the common bathroom that the party guests were using.

The testimony sharply diverges at this point. K.M. testified that she and Appellant sat next to each other on the bed watching a children's show on the Disney Channel. Appellant put his arm around K.M. for several minutes. He then stood her up and put both his hands on her breasts (over her clothes) and squeezed, and then moved his hands in a circular pattern. He then turned her around and placed his hands on her rear end, also squeezing. He then slipped his hand inside her clothing and touched her genitals (her words, "pee-pee"). She testified he squeezed when he did so, but she also described his hand as going "in and out."

At that point, K.M. got up and said she needed to go the bathroom. Appellant said he would go with her. She got up and hurried to the bathroom which was across the hall from her bedroom. As she exited the room, she saw her father coming and was relieved. She went into the restroom and heard her father talking to Appellant. She exited the restroom after Appellant had left and told her father what happened.

Appellant's version differed. After turning on the television, he responded to some small talk K.M. was making, but he was mostly texting his girlfriend. When he rose to leave, K.M. quickly got up and went the door saying she needed to go the bathroom. He also recalled that K.M.'s father was near the door, and Appellant asked him if he wanted another beer. Appellant then went to the refrigerator and retrieved a beer for K.M.'s father. Appellant then went outside. He denied touching K.M. at all.

K.M.'s father testified, recalling going inside to use the restroom. He saw K.M. leave her bedroom with Appellant following her out. It was about 12:20 a.m. at the time. His daughter had a relieved look on her face when she saw her father. Appellant looked shocked. Appellant asked the father where the beers were. The father thought the situation strange and looked in the bedroom and saw no one else in there. The television was on, but the lights were off.

K.M.'s father waited for his daughter to exit the restroom. He asked her what was wrong and she responded that Appellant had "touched her nasty parts." He sent K.M. to her room then went to the party to confront Appellant. At first he told others to have Appellant leave. Appellant testified that he did not leave when asked because he did not know why the father was mad at him. The father then accused Appellant of molesting his daughter, and Appellant denied it. The father then had to be held back from attacking Appellant. By the time the police arrived, Appellant had left the party on foot. He lived about a mile away.

Police later located Appellant in a desert area about a mile from K.M.'s house. One of the officers testified that Appellant smelled of alcohol and appeared intoxicated. He admitted to having consumed about ten beers that night, but denied being intoxicated. The police transported Appellant to his home to obtain proper identification, and left him there, saying that a detective would be in touch with him. Detective Steve Smith testified that he left several messages with Appellant to contact him, but Appellant never responded. Appellant denied that anyone ever attempted to contact him and get his side of the story. The State called a DNA expert who testified that none of the samples taken in the sexual assault kit yielded any usable DNA samples, nor did she expect that they would. Appellant called his father, mother, girlfriend, and sister to testify in the guilt-innocence phase of the trial. None had any first-hand knowledge of the party or the incident.

The jury returned a verdict of not guilty on Count One (touching the genitals) but convicted Appellant on Count Two (touching the breasts). Following the punishment phase of the trial, Appellant was sentenced to four years' incarceration.

SUFFICIENCY OF THE EVIDENCE

Appellant's first issue challenges the sufficiency of the evidence to support his conviction. Our legal sufficiency standard is articulated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex.Crim.App. 2010)(finding no meaningful distinction between the legal and factual sufficiency standards and applying *Jackson v. Virginia* as the only standard in Texas).

Under the *Jackson* standard, a reviewing court must consider all of the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found each element of the offense beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 894-95, *citing*

Jackson, 443 U.S. at 319, 99 S.Ct. at 2789. As the trier of fact, the jury is the sole judge as to the weight and credibility of evidence, and we must give deference to the jury's determinations. *Brooks*, 323 S.W.3d at 894-95. If the record contains conflicting inferences, we must presume the jury resolved such facts in favor of the verdict and defer to that resolution. *Id.* We consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from the evidence. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). On appeal, we serve only to assure that the jury reached a rational verdict; we may not reevaluate the weight and credibility of the evidence; nor may we substitute our judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex.Crim.App. 2000).

A person commits the offense of indecency with a child if he or she engages in sexual contact with a child who is younger than 17 years and not his or her spouse. *See* TEX.PENAL CODE ANN. § 21.11(a)(1)(West 2011). "Sexual Contact" is defined as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child" "if committed with the intent to arouse or gratify the sexual desire of any person." *Id*. at § 21.11(c)(1). Under Count Two, the State had the burden to present evidence sufficient to show beyond a reasonable doubt that Appellant touched the breast of a child younger than 17 years with the intent to arouse or gratify his sexual desire.

Appellant does not identify which element of the offense that he challenges. The two paragraphs in his brief which specifically apply the law to the facts of this case contend: (1) there was no DNA evidence linking him to the crime; (2) "[t]here was only contradictory and cursory evidence presented by the State of Texas, which only was the accusation by K.M. and circumstantial evidence" from her father; and (3) that no statement was taken from Appellant prior to his arrest. Later in his brief, he also contends that because the jury did not convict him

of Count I, they correspondingly could not convict him of Count II because the evidence was essentially the same as to each count. The balance of Appellant's analysis consists of reciting the facts of ten reported cases in which appellate courts reversed a conviction based on legally insufficient evidence. None of the cases involves a charge of indecency with a child.

Focusing on the elements of the offense, a rational jury could easily conclude that K.M. was under 17 years of age and not married to Appellant. Assuming that the jury favored her testimony over the conflicting account given by Appellant, as we must, that same rational jury could conclude that Appellant touched her breasts. K.M. testified that Appellant touched her breast (over her clothes), both squeezing and moving his hands in a circular fashion. The remaining element is Appellant's intent. The intent to arouse or gratify the sexual desire of the defendant can be inferred from his conduct, and all surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex.Crim.App. 1981); *Lozano v. State*, 958 S.W.2d 925, 927 (Tex.App.--El Paso 1997, no pet.). Touching the child's breasts, buttocks, and slipping his hand inside her pants could lead a rationale jury to find this element as well. Other circumstances support that this touching was done for sexual gratification. Earlier in the party he had her touch his head. He spent time with her, apart from the other party guests. He went to her room, which was dark, and put his arm around her. He touched and squeezed her buttocks. A rationale jury could find sufficient evidence for each element of the offense.

We also find no merit in Appellant's specific arguments. While Appellant summarily contends the State's evidence is "contradictory and cursory" and consists of no more than "the accusation by K.M. and circumstantial evidence" from her father, his own recitation of the standard of review as set out in his brief foreshadows the problem with this argument:

> A jury, as the sole judge of credibility, may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *See Sharp v.*

> *State*, 707 S.W.2d 611, 614 (Tex.Crim.App. 1986); *see also Henderson v. State*, 29 S.W.3d 616, 623 (Tex.App.--Houston [1st Dist.] 2000, pet. ref'd)(stating jury can choose to disbelieve witness even when witness's testimony is uncontradicted). The Court may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007). The Court must afford almost complete deference to the jury's credibility determinations. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex.Crim.App. 2008).

The jury could, and apparently did, find K.M. and her father to be the more credible witnesses. Nor is the evidence cursory, circumstantial, or merely accusatory. K.M testified directly to Appellant's conduct and in sufficient detail to meet each element of the crime.

Appellant also faults the verdict because there was no DNA evidence linking him to the crime. However, by statute the verdict is supportable on the uncorroborated testimony of the victim of the sexual offense. TEX.CODE CRIM.PROC.ANN. art. 38.07 (West Supp. 2016). "A complainant's testimony alone is sufficient to support a conviction for indecency with a child." *Connell v. State*, 233 S.W.3d 460, 466 (Tex.App.--Fort Worth 2007, no pet.); *accord Garcia v. State*, 563 S.W.2d 925, 928 (Tex.Crim.App. 1978)(testimony of 17-year-old rape victim sufficient); *Duke v. State*, 365 S.W.3d 722, 731 (Tex.App.--Texarkana 2012, pet. ref'd)(child's testimony was sufficient to uphold verdict). Additionally, the DNA expert testified that she would not expect DNA residue from a simple touching.

Appellant's one line argument that the police did not take his statement is also not availing. The detective testified that he left several unreturned messages asking for a statement, and at best, the argument criticizes the investigation, and not the sufficiency of the evidence presented at trial.

Finally, a rationale jury could have acquitted Appellant on one count, but convicted him on another. The child testified that Appellant squeezed and rubbed her breasts. She also testified that he slipped his hand "in and out" of her shorts, but she also said he squeezed her genitals.

Perhaps he did both, but this later event occurred at the end of the encounter, when the child was already very uncomfortable. A rationale jury might have concluded that this portion of the child's description was not sufficiency reliable to meet the beyond a reasonable doubt standard. A jury is of course free to accept or reject all or any part of a witness' testimony. *Lafoon v. State*, 543 S.W.2d 617 (Tex.Crim.App. 1976); *Lovings v. State*, 376 S.W.3d 328, 334 (Tex.App.--Houston [14th Dist.] 2012, no pet.); *Stone v. State*, 794 S.W.2d 868, 871 (Tex.App.--El Paso 1990, no pet.) Moreover, a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either. Some of the early case law in this area developed during prohibition, when prosecutors brought multiple counts charging the sale or possession of liquor, and juries acquitted on some counts, but convicted on others. That precise situation was addressed by Judge Learned Hand in *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925). Faced with inconsistent verdicts on different counts, he concluded:

> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

Id. at 60. In a similar situation, the United States Supreme Court later reached the same result in *Dunn v. United States*, 284 U.S. 390, 393-94, 52 S.Ct. 189, 76 L.Ed. 356 (1932)("Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.").[2] Texas courts have expressed a similar rationale for the approach. *Thomas v.*

[2] *Dunn* was overruled on other grounds by *Sealfon v. United States*, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), but the portion of the opinion addressing the effect of inconsistent opinions has continued to be followed by the court. *See United States v. Powell*, 469 U.S. 57, 63, 105 S.Ct. 471, 83 L.Ed.2d 461(1984)("Fifty-three years later most of what Justice Holmes so succinctly stated retains its force. Indeed, although not expressly reaffirming *Dunn* this Court has on numerous occasions alluded to its rule as an established principle."). The same rationale can also work in a defendant's favor. In *Yeager v. U.S.*, 557 U.S. 110, 112, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009) there was an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts. The government claimed the inconsistency undermined the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. The court disagreed and applied the logic of *Dunn*, holding

State, 352 S.W.3d 95, 101 (Tex.App.--Houston [14th Dist.] 2011, pet. ref'd)("Inconsistent verdicts do not necessarily imply that the jury convicted the defendant on insufficient evidence, but may simply stem from the jury's desire to be lenient or to execute its own brand of executive clemency."); *Jackson v. State*, 3 S.W.3d 58, 61-62 (Tex.App.--Dallas 1999, no pet.)("Because the State is precluded by double jeopardy from appealing an acquittal, it is unclear who benefits from inconsistent verdicts. Even where an inconsistent verdict might have been the result of compromise or mistake, the verdict should not be upset by appellate speculation or inquiry into such matters.").

This federal approach is not without criticism. *See State v. Ramos*, 479 S.W.3d 500, 508 (Tex.App.--El Paso 2015, no pet.)(noting that majority of states follow the rule, but others not). A number of intermediate appellate courts have previously followed the rule, as have we. *Id*. (collecting cases). Accordingly, we apply the same rule here and focus not on the inconsistency of the verdict as between the counts, but rather on whether the evidence supports the count upon which Appellant was convicted. Finding that it does, we overrule Issue One.

FAILURE TO GRANT MISTRIAL

Several days after the event, K.M. was interviewed at the police station. Detective Steven Smith was outside the room observing the interview through a one way mirror. He generally described the interview process, but not the substance of K.M.'s interview. When asked what he did after the interview, the detective volunteered that: "After the interview I determined that the victim gave a credible outcry." Appellant's counsel immediately objected. The trial judge instructed the jury they were to "disregard the testimony of the witness that the --

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that the acquittals, and thus their double jeopardy implication, were not affected by the jury's inability to reach a verdict on certain other counts.

the Complainant made a credible outcry, as a testimony." The trial court overruled a defense motion for mistrial. Appellant's second issue challenges this ruling.

We review the denial of a mistrial for an abuse of discretion, recognizing it is an appropriate remedy in "extreme circumstances" for a narrow class of highly prejudicial and incurable errors. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex.Crim.App. 2009). Prejudice is incurable when the objectionable material is clearly calculated to inflame the minds of the jury, or was of such a damaging character as to suggest it would be impossible to remove the harmful impression from the jurors' minds. *See Ladd v. State*, 3 S.W.3d 547, 567 (Tex.Crim.App. 1999); *Rojas v. State*, 986 S.W.2d 241, 250 (Tex.Crim.App. 1998). We must uphold the trial court's ruling if it was within the zone of reasonable disagreement. In determining whether a trial court abused its discretion by denying a mistrial, we balance three factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect); (2) the effectiveness of the curative measures taken; and (3) the certainty of conviction or the punishment assessed absent the misconduct. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex.Crim.App. 2004); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex.Crim.App. 1998).

The parties here do not challenge that the detective's statement was improper. *See Yount v. State*, 872 S.W.2d 706, 709 (Tex.Crim.App. 1993)(witness's opinion on the truthfulness of a child witness does not assist the jury in determining whether the child's allegations are in fact true; rather, it impermissibly decides the issue for the jury); *Duckett v. State*, 797 S.W.2d 906, 920 (Tex.Crim.App. 1990)(child abuse expert who testifies that child was telling the truth "would not only embrace the ultimate issue of whether the child was abused as charged, it would cross the line of *assisting* the trier of fact to *replace* that body as decision maker.")[Emphasis in

original].[3] Instead, our focus here is whether Appellant has met his burden under the three factors articulated in *Hawkins.*

Severity of the Misconduct

The comment at issue was a single statement by a detective who had worked in the crimes against children unit a little more than six months when he monitored, but did not conduct, the forensic interview. The only other testimony as to the believability of K.M. came from her father, in response to Appellant's questioning.[4] We contrast this with the record in *Fuller v. State,* 224 S.W.3d 823 (Tex.App.--Texarkana 2007, pet. ref'd) when each of the State's five witnesses at trial testified in some manner that the victim was a truthful and credible witness. *Id.* at 837. That bolstering testimony was further emphasized during closing argument, and the totality of the circumstances led the court of appeals in the context of an ineffective assistance of counsel claim to reverse the conviction. *Id.*

By contrast, the State's attorney neither solicited this comment from Detective Smith, nor again referred to it in the trial. The comment, while inappropriate, was not serious misconduct. *See Santamaria v. State,* No. 01-09-00433-CR, 2011 WL 2165153, at *4 (Tex.App.--Houston [1st Dist.] Jan. 20, 2011, pet. filed)(mem. op.)(not designated for publication)(single unsolicited comment by officer as to child's credibility was error, but not serious misconduct); *In re D.J.T.,* No. 12-08-00378-CV, 2009 WL 2517111, at *3 (Tex.App.--Tyler, 2009, no pet.)(mem. op.) (three instance of officer stating that he found child witness to be believable did not constitute serious misconduct).

[3] One of *Duckett's* holdings--that a child must be first be impeached before any bolstering testimony is permitted--was specifically disapproved of by *Cohn v. State*, 849 S.W.2d 817 (Tex.Crim.App. 1993). *Cohn*, however, acknowledged the distinction between competent expert testimony that a child's actions are consistent with demonstrated patterns of exploited children (which might be allowed) versus testimony that merely claims the child's testimony is truthful (which is not permitted). *Id.* at 818.

[4] Q. [By Defense Counsel] Right. Because you believe what your daughter had told you.
A. [By K.M.'s father] Yes, sir.

Curative Measures

The court immediately instructed the jury to disregard the answer concerning the victim's credibility ("Ladies and gentlemen, you are to disregard the testimony of the witness that the -- the Complainant made a credible outcry, as a testimony submitted as a substance of fact in this case."). We presume that jurors follow the trial court's instructions. *See Wesbrook v. State*, 29 S.W.3d 103, 116 (Tex.Crim.App. 2000); *Carter v. State*, 614 S.W.2d 821, 824-25 (Tex.Crim.App. 1981). Instructions in similar instances have been held sufficient to ameliorate any harm from a bolstering comment. S*ee Marles v. State*, 919 S.W.2d 669, 672 (Tex.App.--San Antonio 1996, pet. ref d)(any error from detective's statements that complaining witnesses "appeared truthful" and "credible" was cured by trial court's instruction to disregard); *McDonald v. State*, 148 S.W.3d 598, 603 (Tex.App.--Houston [14th Dist.] 2004), *aff'd*, 179 S.W.3d 571 (Tex.Crim.App. 2005)(prosecutor's statement that child was "very believable" was cured by instruction to disregard).

Another curative feature of this trial was that the jury had the opportunity to view both K.M. and Appellant on the witness stand. The detective did not repeat or restate the substance of the forensic interview, and then comment on its believability. Instead, the only accounts of what actually happened inside the bedroom that night came from the two participants and the jury was afforded the means to judge whose account was more credible.

Certainty of Conviction Absent Misconduct

As we have noted above, the testimony of the child victim alone is sufficient to support the conviction. *See* TEX.CODE CRIM.PROC.ANN. art. 38.07. The jury had several basis upon which they could judge the credibility of K.M. and Appellant. K.M.'s father offered testimony which contradicted Appellant's version of events. Appellant's credibility was also testable by

comparing his testimony to that of the police officers on issues such as his intoxication, and whether he was given a chance to make a statement. The evidence in favor of conviction was not so close that we can conclude the detective's single statement, which the jury was instructed to disregard, tipped the scale. Accordingly, we overrule Issue Two.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his third issue, Appellant, through new counsel on appeal, contends that his trial counsel was ineffective in the following particulars:

> Counsel for the Appellant performed ineffective assistance during the voir dire phase and at the punishment phase of the trial case by counsel's lack of presentation and blanket agreement to juror strikes. Counsel also failed to properly cross examine a State's witness concerning DNA evidence and failing to properly charge and explore probation after qualifying the Appellant for probation.

Applicable Law

To prevail on a claim of ineffective assistance of counsel, Appellant must establish by a preponderance of evidence that: (1) his attorney's performance was deficient; and that (2) his attorney's deficient performance deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Ex parte Chandler*, 182 S.W.3d 350, 353 (Tex.Crim.App. 2005). Appellant must satisfy both *Strickland* components, and the failure to show either deficient performance or prejudice will defeat his ineffectiveness claim. *Perez v. State*, 310 S.W.3d 890, 893 (Tex.Crim.App. 2010); *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex.Crim.App. 2003).

Under the first prong of the *Strickland* test, the attorney's performance must be shown to have fallen below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999). Stated otherwise, he must show his counsel's actions did not meet the objective norms for professional conduct of trial counsel. *Mitchell v. State*, 68 S.W.3d 640,

642 (Tex.Crim.App. 2002). Under the second prong, Appellant must establish that there is a reasonable probability that but for his attorney's deficient performance, the outcome of the case would have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2069; *Thompson*, 9 S.W.3d at 812. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Jackson v. State*, 973 S.W.2d 954, 956 (Tex.Crim.App. 1998).

We presume that the attorney's representation fell within the wide range of reasonable and professional assistance. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001), *citing Tong v. State*, 25 S.W.3d 707, 712 (Tex.Crim.App. 2000). Ineffective assistance claims must be firmly founded in the record to overcome this presumption. *Thompson*, 9 S.W.3d at 813. In most direct appeals, this task is very difficult because the record is undeveloped and cannot abundantly reflect a failing of trial counsel. *Id.* at 813-14; *see also Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex.Crim.App. 2000). When the record is silent and does not provide an explanation for the attorney's conduct, the strong presumption of reasonable assistance is not overcome. *Rylander*, 101 S.W.3d at 110-11 (noting that "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective"). Accordingly, when the record does not contain evidence of the reasoning behind trial counsel's actions, the attorney's performance cannot be found to be deficient. *Rylander*, 101 S.W.3d at 110-11; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994).

Voir Dire

Appellant claims trial counsel provided ineffective assistance based on a "lack of presentation and blanket agreement to juror strikes." The only lack of presentation mentioned in his briefing pertains to questioning about probation. Appellant filed a pre-trial application for

probation. Just prior to the start of voir dire, the State contended that Appellant was not eligible for probation. The court deferred its ruling on that issue, but the State was concerned about questioning the panel on probation, because a significant number of potential jurors might disqualify themselves. Appellant's counsel preempted the issue by agreeing not to voir dire on probation. The trade-off, however, was that neither could the State voir dire on the issue. The trial court specifically recognized that Appellant's decision not to voir dire on this issue was not an "accommodation" to the State, but was a "trial tactic." If the State was wrong about its view on probation not being available, it would have equally unqualified jurors on that issue. With nothing in the record to show that this trial strategy was inappropriate, the strong presumption of proper conduct is not overcome on this record. *Rylander*, 101 S.W.3d at 110-11; *Peralta v. State*, 338 S.W.3d 598, 609 (Tex.App.--El Paso 2010, no pet.)(decision to not object to evidence failed to meet test where record was silent as to counsel's actions).

Appellant's second complaint pertains to a blanket agreement to dismiss several jurors. The trial court called 120 prospective jurors for voir dire. The judge then explained to the panel the basis for legal disqualifications from jury service and the legal exemptions which the jurors might claim. A total of forty-four prospective jurors indicated they might be disqualified or exempt. The court then proceeded to question prospective jurors individually about their circumstances. During this process, Appellant's trial counsel stated that whatever the State's attorney wanted to do on these prospective jurors was "fine with me" and "You don't even need to ask me." After the trial court kept several persons on the panel who wanted to be dismissed for pecuniary or employment reasons, Appellant's counsel stated: "Yeah. I'm just letting you

know. Any of these people who are really worried about economics, if you want to let them go, I have no objection to that. Either way is fine with me. Just letting you know where we are."[5]

The trial judge dismissed a number of the prospective jurors for cause, or based on a claimed exemption.[6] Whether Appellant agreed to these excused jurors or not is irrelevant, as disqualification and exemptions are governed by statute which is administered by the trial court. *See* TEX.CODE CRIM.PROC.ANN. art. 35.03 § 1(West Supp. 2016)("The *court* shall then hear and determine excuses offered for not serving as a juror, including any claim of an exemption or a lack of qualification, and if the *court* considers the excuse sufficient, the court shall discharge the prospective juror . . . .")[Emphasis added]. Only a handful of prospective jurors were excused based on trial counsel's agreement. One was an FBI agent who may have been working an undercover operation at the time. Five jurors were excused by agreement after they claimed attendance at trial would be an economic or work hardship.[7] Two persons were released when they claimed a lack of English proficiency, but not to the degree the trial court would legally excuse them. One person was a former correctional officer who stated he "hates courts" and was excused by agreement. Another had a medical condition causing him to "fall asleep on a dime." A final prospective juror knew both counsel in the case.

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[5] Counsel repeated the offer to let these people go a third time:

> MR. DEKOATZ: Judge, just so everybody knows, any of these folks for either the State or me, I'm okay with it. So you don't even need to ask me, please, Your Honor.

[6] For instance, Jurors No. 2, 9, 26, 31, 32, 41, 42, 46, 57, 61, 76, 89 were caretakers of young children or persons needing medical assistance. Jurors No. 13, 23, 29, 40, 96, and 117 were dismissed on account of their own medical conditions. Jurors No. 28, 47, 67, 83, and 118 were students. Jurors No. 24, 60, 66, and 106 did not speak English. Jurors No. 1, 45, and 59 were Jehovah's Witnesses and claimed they could not judge the defendant. Each of these presented either legal disqualifications or legal exemptions for which Appellant's agreement to dismiss was irrelevant. See TEX.GOV'T CODE ANN. § 62.106(a)(2),(3),(6),(7)(West Supp. 2016)(caretaker of child under 12 or of disabled person, or student entitled to exemptions); TEX.GOV'T CODE ANN. § 62.102(6)(West Supp. 2016)(ability to read and write as basic juror qualification).

[7] Three additional jurors, No. 111, 112 and 120, were also let go for this reason, but were well behind the strike line such that they would not have been reached in any event.

The most that might be said of the "blanket" agreement was that some of the potential excuses were not tested under the sting of cross examination.[8] But trial counsel might well have chosen not to attack a prospective juror's desire to avoid or defer jury service, at the risk of that venire person becoming an unhappy juror. Nor does our record include the panel's questionnaire, such that we have any indication of the background of these particular prospective jurors. Trial counsel, who had the benefit of knowing something of their background, and seeing their dress, demeanor, expressions, may well have concluded that as a matter of trial strategy those persons did not fit an ideal juror profile. Based on the record before us, we cannot conclude that there was an error in trial counsel's judgment, nor that if it was an error, that it affected the outcome of the case.

Cross Examination of DNA Expert

Appellant also faults his trial counsel for not "properly" cross-examining the State's DNA expert, Cathy Serrano. The expert analyzed the sexual assault kit which included a swab from a "debris spot" on the child's breast (or her clothing covering the breast), a vaginal swab, and buccal swab. The expert's entire direct testimony, contained in barely more than two pages of the record, mainly informs us that the expert would not expect there be to any DNA evidence transferred in a simple touching, and the vaginal swab was negative for semen. Appellant's trial counsel developed in four pages of questioning what the jurors might have missed in the direct: there was no physical evidence tying Appellant to the crime.

[8] For instance, we note this exchange when both the State and Appellant were offered, but perhaps wisely declined to cross examine a venire person on their claim of a medical excuse:

> VENIREPERSON BUSTAMANTE: I have a medical condition.
> THE COURT: Okay. Interested? Interested? [asking either counsel if they wished to cross examine the prospective juror] All right. I'll go ahead and grant the -- the excuse. Thank you very much. Number 63, Medical. Excused.

In his brief, Appellant suggests that a DNA sample was obtained, but never tested. In context we understand the testimony to explain that no meaningful sample was ever obtained.[9] Appellant fails to inform us of any line of questioning that might have been pursued, how the failure to ask such questions would have violated any norm for defense counsel, or how any omission prejudiced Appellant.

Presenting Evidence at Punishment Phase

The punishment phase of the trial consisted of just two witnesses. The State called K.M.'s father to explain the impact of the events on his daughter. Appellant's father testified that Appellant had no prior felony convictions, that Appellant had a nine year old son, and that contrary to a claim made by the State, Appellant worked in warehouse delivery, and not as a salesperson. Following brief argument, the jury assessed a four year sentence which fell on the low end of the applicable range (two to twenty years).[10]

Appellant fails to point us to any additional testimony that he could have offered which might have reduced the length of sentence assessed here. This omission differentiates the decisions that Appellant cites where courts dealt with specific witnesses who were known, or knowable, and who were not called in the punishment phase of a trial. *See e.g. Williams v. Taylor*, 529 U.S. 362, 371, 120 S.Ct. 1495, 1501, 146 L.Ed.2d 389 (2000)(counsel's failure to discover and present specifically enumerated evidence of defendant's mental retardation and

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[9] Q. And did you actually locate any DNA profile from the swabbings that they took?
A. I did obtain a DNA profile with dilutant reference sample. It was a debris spot from the breast that I was not able to obtain.
Q. There wasn't any other DNA on the debris sample of the breast?
A. No, sir.
Q. And is that consistent with a -- just a touching over the clothes of the breasts?
A. Yes, sir.

[10] The charge informed the jury that Appellant would not be eligible for parole until he served half of his sentence, but for any sentence less than four years, he would have to serve at least two years. While there are no guarantees of receiving parole, the four year sentence may have been seen by the jury as effectively the same as the minimum sentence possible in terms of how much time Appellant would have to actually serve.

prior head injuries in mitigation of death penalty sentence); *Miller v. Dretke*, 420 F.3d 356, 359 (5th Cir. 2005)(noting specific doctors that treated defendant who could have been called, with summary of their knowledge); *Milburn v. State*, 15 S.W.3d 267, 270-71 (Tex.App.--Houston [14th Dist.] 2000, pet. ref'd)(successful ineffectiveness claim based on twenty witnesses who were available to testify to defendant's positive character); *Lair v. State*, 265 S.W.3d 580, 593 (Tex.App.--Houston [1st Dist.] 2008, pet ref'd)(successful ineffectiveness claim based on new trial motion which attached affidavits from almost two dozen witnesses who stated that they were not contacted by defendant's trial counsel and that they were ready, willing, and able to testify on defendant's behalf at the punishment stage).

Pursuing Application of Probation

Finally, Appellant complains that his counsel failed to pursue his application for probation. When applicable, Article 42.12 permits a jury to recommend to the judge that the prison sentence be suspended and that defendant should be placed on community supervision. TEX.CODE CRIM.PROC.ANN. art. 42.12 § 4 (West Supp. 2016). Before the defendant can ask the jury to make that recommendation, he must file an application attesting that he has no previous felony convictions. *Id*. at art. 42.12 § 4(e). He also must not be disqualified under any of the several grounds set out in Article 42.12 § 4(d)(1-8). One of those disqualifying grounds is a conviction for indecency with a child when the child is younger than fourteen. *Id*. at art. 42.12 § 4(d)(5). Appellant never explains how he would have been eligible to have the jury pass on the request for probation in light of the statutory exclusion.

A defense counsel's failure to file an application for probation might rise to the level of ineffective assistance of counsel. *In Ex parte Welch*, 981 S.W.2d 183, 185 (Tex.Crim.App. 1998)(in habeas proceeding, defendant was able to sustain burden that failure to file application

for probation constituted ineffective assistance of counsel). But Appellant must first show he was eligible for probation. *See Brooks v. State*, 991 S.W.2d 39, 42 (Tex.App.--Fort Worth 1998, pet. ref'd). Appellant has failed to do so here and has thus failed to meet his burdens under *Strickland*. We overrule Issue Three, and affirm the conviction below.

February 28, 2017

ANN CRAWFORD McCLURE, Chief Justice

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

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