COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ROBERT JESSIE MORALES,	§	No. 08-20-00102-CR
Appellant,	§	Appeal from the
v.	§	143rd Judicial District Court
THE STATE OF TEXAS,	§	of Ward County, Texas
Appellee.	§	(TC# 19-09-06141-CRW)

O P I N I O N

A jury convicted Appellant, Robert Jessie Morales, of possession of a prohibited substance (methamphetamine) in a correctional facility, a third-degree felony enhanced to a second-degree felony. *See* TEX.PENAL CODE ANN. § 38.11. The enhancement paragraph included a conviction for the felony offense of evading arrest with a motor vehicle to which Appellant entered a plea of "true." Appellant elected for the trial court to assess punishment if convicted. The trial court assessed punishment at twelve years confinement in the Texas Department of Criminal Justice without a fine. In a single issue, Appellant contends that his trial counsel rendered ineffective assistance by failing to object, on Confrontation grounds, to State's Exhibit 14 ("the Exhibit"), which consists of two police reports containing testimonial statements. Because we find that counsel's representation was neither deficient nor prejudicial to Appellant, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

During Appellant's jury trial, the State produced evidence that there was a warrant out for Appellant's arrest, and Appellant voluntarily surrendered at the Ward County Jail. The State produced further evidence that during the booking procedure, officers found a small bag of a substance later identified as methamphetamine on Appellant's person. The State argued that because Appellant was voluntarily surrendering, he intentionally and knowingly attempted to smuggle methamphetamine into the jail. At the close of guilt/innocence, the jury found Appellant guilty.

During the punishment trial, Appellant entered a plea of true to the enhancement paragraph of the indictment for the felony offense of evading arrest with a motor vehicle. In the State's opening it stated that it intended to offer the judgment for Appellant's enhancement offense as well as "one of the initial police reports so that the Court [would have] an idea of what [Appellant's enhancement] cause was about." Additionally, the State informed the trial court of its intention to ask the trial court to take judicial notice of the enhancement cause number, which was previously tried in the 143rd Judicial District.[1]

During its punishment case, the State formally requested the trial court take judicial notice of the enhancement offense file. The trial court did so without objection by defense counsel. The State also offered the Exhibit, which Appellant's trial counsel objected to as "excessive." The State conceded the Exhibit was duplicative, and after removing the excess material, reoffered the Exhibit. Defense counsel objected again as to relevance and as excessive, stating the results of the

[1] Appellant's enhancement offense was tried in the 143rd Judicial District with the Honorable Cecil Puryear presiding. The Honorable Mike Swanson presided over this cause number.

prior offense were already in evidence. The trial court overruled the objection and admitted the Exhibit.

During the State's closing, it asked the trial court to consider the severity of the offense, Appellant's prior inability to complete misdemeanor probation, and Appellant's commission of a felony while on parole for his enhancement offense. The State called Appellant's enhancement offense "exceptionally dangerous," and asked the trial court to assess a sentence of more than ten years. Appellant's counsel asked the trial court to consider Appellant's apparent drug problem, his failure to complete probation based on inability to pay, and the small amount of methamphetamine found in his possession. Counsel urged the trial court to assess punishment at two years minimum or to place Appellant in a probation program for drug addiction counseling. The trial court sentenced Appellant to twelve years' confinement without a fine. No motion for new trial was filed in the trial court.

On July 27, 2020, Appellant's trial counsel filed a motion to withdraw and an "*Anders*" brief in this Court. After reviewing counsel's brief, we abated this appeal in an Order dated October 28, 2021, with instructions to the trial court to appoint new counsel to represent Appellant. On December 8, 2021, this appeal was reinstated.

STANDARD OF REVIEW

A criminal defendant is entitled to representation by effective, competent counsel under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We review a claim for ineffective assistance of counsel under the well-established standard set forth in *Strickland*. *See id*. To prevail on an ineffective assistance claim, "a defendant must demonstrate two things: deficient performance and prejudice." *Miller v. State*, 548 S.W.3d 497, 499 (Tex.Crim.App. 2018). To do so, a defendant must show that (1) his trial counsel's

representation fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's deficiency the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687; *see Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex.Crim.App. 1986). A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs of the *Strickland* test do not need to be analyzed in order, and an appellant's failure to satisfy either prong defeats a claim of ineffective assistance of counsel. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex.Crim.App. 2001)(citing *Strickland*, 466 U.S. at 697).

Our review of counsel's representation is highly deferential, and we presume that counsel's actions fell within the wide range of reasonable and professional assistance. *Bone v. State*, 77 S.W.3d 828, 833 (Tex.Crim.App. 2002). A defendant bears the burden of proving both elements by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). Absent evidence of counsel's strategic motivations for his actions at trial, we indulge a strong presumption that counsel rendered adequate assistance and that his actions were a result of a sound trial strategy. *Id.* "[T]he record must affirmatively demonstrate the alleged ineffectiveness." *Id.* Accordingly, the record on direct appeal is typically underdeveloped and thus insufficient to overcome the presumption that counsel's conduct was responsible and professional. *Lopez v. State*, 343 S.W.3d 137, 143 (Tex.Crim.App. 2011)(citing *Bone*, 77 S.W.3d at 833). Because of the strong presumption in favor of effective representation, claims of ineffective assistance are "generally not successful on direct appeal and are more appropriately urged in a hearing on an application for a writ of habeas corpus." *Lopez*, 343 S.W.3d at 143.

APPLICABLE LAW

Appellant contends his counsel was ineffective for failing to object, on Confrontation grounds, to testimonial statements contained in the Exhibit—two police reports for his

enhancement offense. He additionally asserts counsel's conduct was deficient because counsel's failure to object waived any Confrontation Clause claim for appeal. The Confrontation Clause of the Sixth Amendment bars the admission of a declarant's out-of-court statements that are "testimonial" in nature unless the declarant is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). Generally, a statement is testimonial when the surrounding circumstances objectively indicate that the statement's primary purpose is to "establish or prove past events [that are] potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

To preserve a complaint for review, a party must have presented the trial court with a timely request, objection, or motion that states the specific grounds for the desired ruling if those grounds are not apparent from the context of the request, objection, or motion. TEX.R.APP.P. 33.1(a)(1). Confrontation Clause complaints are subject to this requirement. *Davis v. State*, 313 S.W.3d 317, 347 (Tex.Crim.App. 2010).

ANALYSIS

The Exhibit is a three-page document that contains two police reports. The first report is a "Follow-up Report" prepared by Lieutenant Frarin Valle. Lieutenant Valle's report indicates that it was prepared on January 6, 2017, two days after the enhancement offense occurred on January 4, 2017. The report describes a small black passenger vehicle, refusing to stop, being pursued by police vehicles with their emergency lights activated. Lieutenant Valle's report indicates that the black passenger vehicle almost collided with his police vehicle before the driver abandoned the vehicle and fled on foot.

The second report is an "Offense Report" prepared by Deputy Jose Collazo of the Ward County Sheriff's Office. Deputy Collazo's report was prepared the day of the incident, and it

describes a reckless driver in a black Chevrolet Cruze "swerving from lane to lane and into oncoming traffic." The report describes the pursuit of the vehicle, its erratic driving, and the driver's eventual apprehension by law enforcement. Both reports indicate Appellant was the driver in question and he was charged with evading arrest with a motor vehicle.

We agree with Appellant these reports are testimonial in nature and contain statements which were inadmissible under the Confrontation Clause. The officers prepared the reports after the incident, when there was no ongoing emergency, and their primary purpose was to document past events for the purpose of obtaining a criminal conviction. *See Langham v. State*, 305 S.W.3d 568, 579 (Tex.Crim.App. 2010)(defining "primary purpose" as "first in importance" when analyzing testimonial statements of a confidential informant). Accordingly, counsel erred in failing to object to the Exhibit on Confrontation grounds.

We also agree with Appellant that counsel did not preserve a Confrontation Clause complaint for appellate review. Counsel objected to the admission of the Exhibit as excessive, duplicative, and irrelevant. The purpose of the preservation requirement is to give notice to the trial court and opposing party. *See e.g.*, *Reyna v. State*, 168 S.W.3d 173, 179 (Tex.Crim.App. 2005). Accordingly, Appellant is correct that counsel erred in failing to object with enough specificity to preserve a Confrontation Clause complaint for appeal.

Having determined that counsel erred, we must now determine whether counsel's conduct constitutes deficient representation under *Strickland's* first prong. To prove deficient performance, Appellant must show that counsel's performance diverged from "prevailing professional norms." *Cardenas v.* State, 30 S.W.3d 384, 391 (Tex.Crim.App. 2000)(quoting *Strickland*, 466 U.S. at 688). Appellant contends that there is no conceivable trial strategy for failing to object on Confrontation grounds—particularly because counsel did object on other grounds. The State contends that

counsel could have had sound strategy because the trial court had taken judicial notice of the entire enhancement offense file and any objection was meaningless.

The right of Confrontation is instrumental, and this Court does not see a reasonable trial strategy for failing to object to the Exhibit. However, it is not our role to speculate the strategy—or lack thereof—for defense counsel. Instead, our review is highly deferential to counsel, and we presume there was a strategic motivation. Any deficiency must be firmly grounded in the record, and Appellant has the burden to show by a preponderance of evidence that counsel's inaction was without reason or strategy. *See Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex.Crim.App. 2012) (reversing a court of appeal's finding that counsel was ineffective when the error was not affirmatively shown in the record).

This is a direct appeal—no motion for new trial was filed, and trial counsel was not given an opportunity to respond to Appellant's allegation. We do not know why counsel failed to raise a Confrontation Clause objection to the Exhibit because the record is silent on the matter. "In most cases, a silent record will not overcome the strong presumption of reasonable assistance." *Duckworth v. State*, 89 S.W.3d 747, 751 (Tex.App.—Dallas 2002, no pet.). Accordingly, we must conclude that the record does not show deficient performance.

Moreover, even if counsel's performance was deficient for failing to object, we cannot conclude on this record that Appellant was prejudiced by any such failure. To prove prejudice, Appellant must show that there is a reasonable probability that, absent his counsel's failure to object, "the sentencer would have assessed a more lenient punishment." *Miller*, 548 S.W.3d at 499; *see also Morrow v. State*, 486 S.W.3d 139, 151 (Tex.App.—Texarkana 2016, pet. ref'd). Appellant contends that, prior to the admission of the Exhibit, the details of his underlying enhancement offense were "not before the [trial c]ourt to consider during the punishment phase of Appellant's

trial." The thrust of Appellant's contention is that, without the Exhibit, the State would not have been able to invoke the "exceptionally dangerous" details of the offense during its closing statement. The State responds that the trial court did have the details of the enhancement offense because the State asked the trial court to take judicial notice of the entire file for Appellant's enhancement charge.

The record of the punishment hearing indicates the trial court took judicial notice of the file corresponding to Appellant's enhancement offense. However, that file does not appear in our record, and we have no way of knowing its contents. Without knowing the contents of the enhancement offense file, we are not persuaded by the State's assertion that the details in the Exhibit were already before the trial court.[2] With regards to Appellant's assertion that he was prejudiced by counsel failing to preserve the Confrontation error for review, we are equally unpersuaded. Prejudice for failure to preserve error requires an additional showing that the defendant likely would have been successful on appeal had counsel preserved the error. *See Ex parte Moore*, 395 S.W.3d 152, 158, 161 (Tex.Crim.App. 2013). Appellant makes no such showing here.

Instead, we find it persuasive that the State obtained a conviction for the enhancement offense, Appellant pleaded true, and the judgment appears in our record. The trial court sentenced Appellant to twelve years' confinement for a third-degree felony, enhanced to a second degree. The punishment range for a second-degree felony is no more than twenty and no less than two years and a fine not to exceed $10,000. TEX.PENAL CODE ANN. § 12.33(a), (b). The sentence of twelve years is in the middle of the range of possible sentences. Therefore, we conclude that any

[2] We make no comment on whether failure to object to the State's request for judicial notice of the entire enhancement offense file was deficient representation by counsel.

alleged errors by counsel were not sufficient to undermine confidence in the outcome of Appellant's punishment trial. *See Strickland*, 466 U.S. at 687. We overrule Appellant's sole issue.

CONCLUSION

The judgment of the trial court is affirmed.

October 14, 2022

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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