COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DAVID PAUL NAVARRO,	§	No. 08-20-00204-CR
Appellant,	§	Appeal from the
v.	§	409th District Court
THE STATE OF TEXAS,	§	of El Paso, Texas
Appellee.	§	(TC# 20140D03126)

O P I N I O N

Appellant, David Paul Navarro, appeals from a jury verdict finding him guilty of aggravated assault with a deadly weapon, assault family violence by strangulation, and burglary of a vehicle with two or more prior convictions. TEX.PENAL CODE ANN. §§§ 22.02(a)(2), 22.01(b)(2)(B), 30.04(D)(2)(A). In two issues, Appellant challenges his conviction asserting the evidence is legally insufficient to support his conviction of burglary of a vehicle and claims ineffective assistance of trial counsel. We affirm.

BACKGROUND

Factual Background

Appellant and the complaining witness, Cynthia Carrasco, dated from around 2012 to 2013. Carrasco ended the relationship because Appellant became "jealous," "obsessive," and began to

stalk her. Between the breakup and the attack at issue, Appellant reinitiated contact aggressively, and made various attempts to reestablish the relationship, which scared Carrasco. On the night of April 12, 2013, Appellant confronted Carrasco at a bar. He demanded that she leave with him as he pulled out a knife and held it against her ribcage. Appellant forcefully led Carrasco out of the bar while he restrained one of Carrasco's arms and continued to hold the knife against her ribcage. Appellant took Carrasco to Carrasco's vehicle. Appellant yelled at her, punched the mirror of her truck, and choked her up against the vehicle. Appellant forced Carrasco into Carrasco's truck, drove to his home and when they arrived, he took Carrasco to the back of the residence where he stayed. Appellant took out his knife and demanded that Carrasco take her clothes off or he would hurt her. Carrasco complied and after arguing with Appellant, Appellant got on top of Carrasco and choked her as he held his knife to her neck. Appellant then sexually assaulted Carrasco. When Appellant finished sexually assaulting Carrasco, Carrasco pled to be let go and Appellant ultimately agreed.

Carrasco went straight to her mother's house and told her everything. After a few hours, Carrasco went to the police station to report the attack. Carrasco then went to the hospital where an examination and a rap kit was conducted on her.

Procedural Background

Appellant was indicted of aggravated kidnapping, aggravated assault with a deadly weapon, assault family violence by strangulation, and burglary of a vehicle with two or more prior convictions. TEX.PENAL CODE ANN. §§§§ 22.04(A)(1-6), 22.02(a)(2), 22.01(b)(2)(B), 30.04(D)(2)(A). Following a trial, the jury acquitted Appellant of aggravated kidnapping and found him guilty of aggravated assault with a deadly weapon, assault family violence by strangulation, and burglary of a vehicle with two or more prior convictions. The trial court

assessed punishment at twenty years confinement in the Texas Department of Criminal Justice Institutional Division, to run concurrently. This appeal followed.

DISCUSSION

In two issues, Appellant challenges his conviction. In Issue One, Appellant asserts the evidence was legally insufficient to convict him of burglary of a vehicle. In Issue Two, Appellant claims ineffective assistance of counsel during *voir dire*.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, Appellant challenges the sufficiency of the evidence to support his conviction of burglary of a vehicle.

Standard of Review & Applicable Law

Under the Due Process Clause of the U.S. Constitution, the State is required to prove every element of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The critical inquiry in a legal sufficiency challenge is whether the evidence in the record could reasonably support a conviction of guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007).

When reviewing the legal sufficiency of the evidence, we must view all the evidence in the light most favorable to the verdict to determine whether any rational juror could have found the defendant guilty of the essential elements of the offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex.Crim.App. 2005). A lack of direct evidence is not dispositive on the issue of the defendant's guilt; guilt may be established by circumstantial evidence alone. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex.Crim.App. 2004). We measure the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Thomas v. State*, 303 S.W.3d 331, 333 (Tex.App.—El Paso 2009, no pet.)(*citing Malik v. State*, 953 S.W.2d 234, 240

(Tex.Crim.App. 1997)). A hypothetically correct charge accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State's theories of liability, and adequately describes the offense for which the defendant was tried. *Malik*, 953 S.W.2d at 240.

We bear in mind the trier of fact is the sole judge of the weight and credibility of the evidence, and we must presume the fact finder resolved any conflicting inferences in favor of the verdict and we defer to that resolution. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014)(*citing Jackson*, 443 U.S. at 319). A reviewing court may not reevaluate the weight and credibility of the evidence or substitute its judgment for that of the fact finder. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex.Crim.App. 2010). Our only task under this standard is to determine whether, based on the evidence and reasonable inferences drawn therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

Burglary of a vehicle is committed when, without consent of the owner, a defendant enters a vehicle with intent to commit any felony. TEX.PENAL CODE ANN. § 30.04(a). Direct evidence of entry is not required to support a burglary conviction; the State may prove entry through circumstantial evidence. *Hernandez v. State*, 190 S.W.3d 856, 865 (Tex.App.—Corpus Christi 2006, no pet.).

Analysis

The indictment for burglary of a vehicle stated:

> [Appellant] did then and there, without the effective consent of Cynthia Carrasco, the owner thereof, break into or enter a vehicle, to-wit: an automobile or a part thereof, with intent to commit a felony, to-wit: Assault Family Violence by Strangulation, or Aggravated Kidnapping, or Aggravated Assault with a Deadly Weapon[.]

Appellant was charged with entering Carrasco's vehicle with the intent to commit a felony, to-wit: assault family violence by strangulation, aggravated kidnapping, or aggravated assault with

a deadly weapon. Appellant argues Count II—aggravated assault with a deadly weapon—and Count III—assault family violence by strangulation—occurred *before* Appellant entered Carrasco's vehicle. Thus, according to Appellant, he could not have had the requisite intent because the felonies listed had already been committed before Appellant entered Carrasco's vehicle. Additionally, Appellant argues the State failed to present any evidence that Carrasco did not consent to the entry of her vehicle. We disagree.

At trial, Carrasco relayed the night of her attack. Carrasco was at a bar when Appellant approached her and told her, "You are going with me now and you better not make a scene," as he pulled out a knife and held it against her ribcage. Appellant led Carrasco out of the bar while he restrained one of Carrasco's arms and continued to hold the knife against her ribcage. Appellant took Carrasco to Carrasco's vehicle. He yelled at her, punched the mirror of her truck, and choked her up against the vehicle. Carrasco claims she lost consciousness and when she awoke, she remembers seeing blood coming from Appellant's hand; at this point, Appellant stopped choking her. Carrasco maintains Appellant then forced her into her own truck, got in the driver seat, and exited the parking lot. Appellant drove to Sunland, New Mexico, where he was living, and took Carrasco to the back of the residence where he stayed. Appellant took out his knife and threatened her, "Take your clothes off or I'm going to hurt you." Carrasco complied and the two began to argue. After arguing back and forth, Appellant got on top of Carrasco and choked her as he held the knife to her neck. Appellant then sexually assaulted Carrasco. Carrasco pled to be let go; she promised Appellant she would not tell anyone and convinced Appellant everything was fine and that they were back together. Appellant agreed and Carrasco went straight to her mother's house and told her everything. Carrasco later went to the police station and the hospital to report the attack.

The State does not need to present direct testimonial evidence from Carrasco, the owner, to establish the owner's lack of consent; the State may prove lack of consent through circumstantial evidence. *Moreno v. State*, No. 08-18-00179-CR, 2020 WL 7090696, at *6 (Tex.App.—El Paso Dec. 4, 2020, no pet.)(not designated for publication). Before Appellant entered Carrasco's vehicle, he yelled at her, punched the mirror of her truck, and choked her up against the vehicle. She lost consciousness and awoke to Appellant still choking her. Appellant then forced Carrasco into her own vehicle and Carrasco drove out of the parking lot.

At trial, the State asked Carrasco, "Did you give your consent to [Appellant] to use your vehicle?" to which Carrasco responded, "No." The testimony of the owner that consent was not given for the entry is sufficient to establish the absence of consent. *Morgan v. State*, 501 S.W.3d 84, 92 (Tex.Crim.App. 2016).

The evidence presented at trial demonstrates Carrasco was forced and threatened, at knifepoint, to leave the bar and get into her vehicle with Appellant. Consent is not effective if induced by force or threat. TEX.PENAL CODE ANN. § 1.07(19)(A). We find Carrasco did not consent to Appellant's entry of her vehicle.

We also find Appellant's argument that he could not have had the requisite intent because the listed felonies had already been committed before Appellant entered Carrasco's vehicle, is without merit. Appellant cites to no authority, nor are we aware of any, to support the contention that after a felony is first committed, intent is thereafter eliminated, irrespective of the defendant continuing to commit the underlying offense throughout the entirety of the criminal transaction.

Appellant committed aggravated assault with a deadly weapon—when Appellant forced Carrasco out of the bar and into her vehicle, when he forced her to remove her clothing, and as means to sexually assault her, all at knifepoint—assault family violence by strangulation—when

Appellant choked Carrasco outside of the bar against her vehicle and before sexually assaulting her—throughout the *entirety* of the criminal transaction. Burglary of a vehicle is committed when, without consent of the owner, a defendant enters a vehicle with intent to commit any felony. TEX.PENAL CODE ANN. § 30.04(a). We find, based on the evidence and reasonable inferences drawn therefrom, a rational juror could have found the essential elements of the burglary of a vehicle beyond a reasonable doubt—that is, Appellant entered Carrasco's vehicle without her consent with the intent to commit a felony. *Isassi*, 330 S.W.3d at 638.

Issue One is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second issue, Appellant claims ineffective assistance of trial counsel during *voir dire*

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Standard of Review & Applicable Law

A trial judge's denial of a motion for new trial is reviewed under an abuse of discretion standard. *Colyer v. State*, 428 S.W.3d 117, 122 (Tex.Crim.App. 2014). The U.S. Constitution and the Texas Constitution guarantee an accused the right to assistance of counsel. U.S. CONST. Amend. VI; TEX.CONST. art. I, § 10. The proper measure of attorney performance is simply reasonableness under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Among the basic duties owed to a criminal defendant is to assist the defendant, and hence counsel owes the client a duty of loyalty and a duty to avoid conflicts of interest. *Id*. Additional overarching duties include to advocate the defendant's cause, to consult with the defendant on important decisions, and to keep the defendant informed of important developments during the prosecution. *Id*. These basic duties neither exhaustively define the obligations of counsel, nor form a checklist for the evaluation of attorney performance. *Id*. No particular set of detailed rules for

counsel's conduct can satisfactorily account for the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Id*. at 688-89. Any such set of rules would interfere with the constitutionally protected independence of counsel and would restrict the wide latitude counsel has in making tactical decisions. *Id*. at 689. Thus, the purpose of the effective assistance guarantee of the Sixth Amendment is simply to ensure criminal defendants receive a fair trial. *Id*.

The court must determine whether, in light of all the circumstances, the identified acts or omissions of defense counsel were outside the wide range of professionally competent assistance. *Id*. at 690. We must also recognize the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. An error by counsel, even if professionally unreasonable, does not warrant reversal if the error had no effect on the judgment. *Id*. at 691. Texas courts adhere, as we must, to the Supreme Court's two-pronged *Strickland* test to determine whether counsel's representation was inadequate. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999).

A defendant claiming ineffective assistance of counsel must show (1) counsel's performance was deficient; and (2) he was prejudiced as a result of trial counsel's deficient performance. *Strickland*, 466 U.S. at 690. To prove prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694.

Analysis

During *voir dire*, defense counsel asked the following question:

> One last thing I'm going to discuss with you. At the end of this trial, when you go back to deliberate, there is a possibility that the jury may be sequestered. Do y'all know what sequestration is? You don't go home. Somebody in your family brings your bag. You'll go to a hotel with the rest of the jurors and a couple of bailiffs.

> So I want to ask y'all if -- and I'm not saying it's going to happen, but it's a possibility under the law. So if you were sequestered, would you be so concerned about children, your spouse, your job, or whatever, that you could not be fair to David Navarro? And if you think it's going to bother you, I need you to raise your hand.

Juror 19 answered in the affirmative and a bench conference occurred in which the trial judge overruled defense counsel's motion to challenge juror for cause. The trial judge explained he did not think it was a basis for challenge because, "Even the likelihood of sequestering -- I look at the length of the trial. If it were a longer trial, I would be concerned. But since we're talking about maybe the better part of the week, I'm not -- I really don't think that's a concern." The trial court overruled the challenge for cause. Defense counsel then requested a motion for mistrial, which was overruled.

To preserve error for appellate review, trial counsel must: (1) use all afforded peremptory strikes; (2) ask for and be refused additional peremptory strikes; and (3) be forced to take an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause or granted him additional peremptory strikes. *Mason v. State*, 905 S.W.2d 570, 578 (Tex.Crim.App. 1995). Defense counsel did not request a peremptory strike.

Appellant maintains defense counsel's failure to properly preserve this error for appellate review amounts to ineffective assistance of counsel. As a threshold matter, "When a trial court errs in denying a challenge for cause, the defendant is harmed only if he uses a peremptory strike and, thereafter, *suffers a detriment from the loss of that strike*." [Emphasis added]. *Mason*, 905 S.W.2d at 578. The reason for defense counsel's challenge for cause was the possibility of sequestration. Although Juror 19 sat on the jury and returned a guilty verdict, sequestration *did not occur*; Juror 19 was never sequestered. Appellant could not have, and did not, suffer detriment from the loss of the challenge. Accordingly, we do not reach a *Strickland* analysis.

Issue Two is overruled.

CONCLUSION

For these reasons, we affirm.

June 14, 2022

YVONNE T. RODRIGUEZ, Chief Justice

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

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