

Affirmed as Modified; Opinion Filed July 29 , 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00687-CR

CHRISTY ALLANE RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 397th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 064768**

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Bridges, and Justice Lang
Opinion by Justice Lang

Christy Allane Rodriguez appeals her jury conviction and five-year enhanced sentence for harassment of a public servant. In a single issue, she asserts her counsel was ineffective in failing to request a jury instruction on the legality of her arrest. As modified, we affirm the trial court's judgment.

I. PROCEDURAL AND FACTUAL BACKGROUND

Rodriguez was charged by indictment alleging in relevant part that, "with intent to assault, harass, or alarm," she caused Denison police officer Holly Jenkins "to contact [Rodriguez's] saliva" while Jenkins was effecting Rodriguez's arrest. *See* TEX. PENAL CODE ANN. § 22.11(a)(2) (West Supp. 2015). The charge arose after Rodriguez spit on Jenkins

numerous times while Jenkins was transporting Rodriguez to the city jail following Rodriguez's arrest for public intoxication.

Prior to trial, Rodriguez filed a motion to suppress all evidence obtained following the arrest, arguing her arrest was illegal. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005). At the hearing on the motion, Jenkins testified she had gone to Rodriguez's apartment to question Rodriguez regarding a theft Rodriguez had reported. Jenkins stayed at the door while Rodriguez remained inside. According to Jenkins, Rodriguez's speech was slurred, she swayed while standing, and she had a "strong odor" of alcohol on her breath. Determining Rodriguez was "too intoxicated" to answer any questions, Jenkins decided to return another time. As Jenkins walked to her car, Rodriguez left her apartment and stumbled across a breezeway, almost falling down a flight of stairs. Jenkins directed Rodriguez to return to the apartment, but Rodriguez refused. Concerned for Rodriguez's safety and because Rodriguez was "in a public place," Jenkins arrested her. Jenkins testified Rodriguez became "combative" and began screaming. Once in the patrol car, Rodriguez also repeatedly spit at Jenkins and kicked the partition in the car.

The events that transpired after Rodriguez was arrested were recorded, and a portion of the recording played to the trial judge. That portion appeared to include Jenkins explaining to a second officer, who had come to Rodriguez's apartment complex to check on Jenkins, why she had arrested Rodriguez.¹

Rodriguez did not call any witnesses, but argued she was "entrapped" by Jenkins. Specifically, she disputed Jenkins's testimony that she left her apartment voluntarily, contending the recording reflected Jenkins told the second officer that she asked Rodriguez to step outside

¹ The portion of the recording played to the trial judge was not transcribed into the record, and the record does not reflect what portion of the recording was played.

the apartment so they could talk about the alleged theft. Rodriguez argued that, instead of arresting her, Jenkins should have “sen[t] her back into her home.” The trial court denied the motion.

Jenkins testified similarly at trial, and her testimony was corroborated by the officer who came to the apartment complex to check on her. The recording of the events that transpired after the arrest was also admitted into evidence and played to the jury. Rodriguez did not testify or call any witnesses and did not re-urge her suppression motion. However, at the charge conference, she requested the jury be instructed on entrapment. The trial court denied the request.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In her sole issue, Rodriguez reasserts the argument she made at the suppression hearing where she asserted Jenkins entrapped her and, instead of arresting her, should have taken her back to her apartment. Rodriguez contends trial counsel should have requested a jury charge instruction on the legality of her arrest so the jury could consider that, and his failure to do so constituted ineffective assistance of counsel.

A. Applicable Law – Legality of Arrest Instruction

A defendant is entitled to a jury charge that instructs the jurors on the law applicable to the case. *See* TEX. CODE CRIM. PROC. ANN. 36.14 (West 2007); *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012). Illegally obtained evidence is inadmissible, and when a defendant raises a factual dispute as to whether evidence was legally obtained, the jury must be instructed to disregard that evidence if it believes, or has a reasonable doubt, it was illegally obtained. *See* TEX. CODE CRIM. PROC. ANN. 38.23(a); *Pickens v. State*, 165 S.W.3d 675, 680 (Tex. Crim. App. 2005). For purposes of determining whether a jury instruction is required, a factual dispute exists if evidence is presented controverting the basis upon which the evidence

was obtained. See *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012); *Rodriguez v. State*, 239 S.W.3d 277, 280 (Tex. App.—Amarillo 2007, pet. ref'd).

An arrest, with or without a warrant, is legal if it is predicated upon probable cause. See *State v. Woodard*, 341 S.W.3d 404, 411 (Tex. Crim. App. 2011); *Jones v. State*, 568 S.W.2d 847, 854 (Tex. Crim. App. 1978). Probable cause exists when a police officer has “reasonably trustworthy information sufficient to warrant a reasonable person to believe a particular person has committed or is committing an offense.” *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). Probable cause also exists when an offense is committed within the presence of an officer. See TEX. CODE CRIM. PROC. art. 14.01 (West 2015); *Woodard*, 341 S.W.3d at 412.

B. Applicable Law – Ineffective Assistance

To prevail on an ineffective assistance of counsel claim, a defendant must show by a preponderance of the evidence both that trial counsel’s performance was deficient and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812, 813 (Tex. Crim. App. 1999). The purpose of this two-pronged test is to assess whether “counsel’s conduct so undermined the proper functioning of the adversarial process” that the trial court cannot be said to have produced a reliable result. *Thompson*, 9 S.W.3d at 812-13.

To satisfy the first prong, the defendant must show counsel’s performance fell below “the range of competence demanded of attorneys in criminal cases as reflected by prevailing professional norms[.]” *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). Counsel is not expected to perform a useless or futile act, and a record silent as to why counsel took or failed to take a complained-of action proves nothing unless the record affirmatively demonstrates counsel’s performance was “so outrageous that no competent attorney would have engaged in it.” See *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed v.*

State, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)); *Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005); *Thompson*, 9 S.W.3d at 814. To satisfy the second prong, the defendant must identify objective facts in the record showing a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. 687, 694; *Bone v. State*, 77 S.W.3d 828, 836-37 & n.29 (Tex. Crim. App. 2002). A defendant's failure to satisfy either prong defeats the ineffective assistance claim. *Thompson*, 9 S.W.3d at 813.

In reviewing counsel's representation, an appellate court looks at the totality of the representation. *Id.* Review is highly deferential and a strong presumption exists that counsel's conduct "fell within the wide range of reasonable professional assistance." *Id.*

C. Application of Law to Facts

To establish trial counsel was ineffective, Rodriguez must first show she was entitled to an instruction on the legality of her arrest, as without that showing, she cannot establish either deficient performance or prejudice. *See Thompson*, 9 S.W.3d at 812-13; *Washington v. State*, 417 S.W.3d 713, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). To show she was entitled to the instruction, she must show a factual dispute arose at trial as to the basis for her arrest. *See Rodriguez*, 239 S.W.3d at 280. However, the record does not reflect a factual dispute.

As stated, Jenkins testified she was concerned for Rodriguez's safety because Rodriguez was intoxicated. Rodriguez slurred her speech, swayed while standing, had a "strong odor" of alcohol, and stumbled across the apartment complex's breezeway, almost falling down a flight of stairs. Jenkins's testimony demonstrated probable cause for Rodriguez's public intoxication arrest and was undisputed. *See TEX. PENAL CODE ANN. § 49.02(a)* (West 2011) ("A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another."); *Grubbs v. State*, 440 S.W.3d 130, 138 (Tex.

App.—Houston [14th Dist.] 2013, pet. ref'd) (undisputed officer testimony that appellant was in “drunken state” and had “slurred speech, bloodshot eyes, a strong odor of alcohol coming from his breath, and a staggered stance” demonstrated probable cause to arrest for public intoxication). What Rodriguez disputes is that she stepped outside her apartment voluntarily, as Jenkins testified she did. Rodriguez contends the recording of the events that transpired after she was arrested showed she stepped outside because Jenkins asked her. However, that Jenkins might have asked Rodriguez to step outside shows only why Rodriguez was in a public place, but it does not contradict that she was intoxicated and in a public place at the time of her arrest. In fact, Rodriguez’s contention that Jenkins should have taken her back to the apartment instead of arresting her is premised on her being intoxicated in a public place.

On the record before us, we conclude that, because Jenkins’s testimony was undisputed, Rodriguez was not entitled to an instruction on the legality of her arrest, and her ineffective assistance claim fails. *See Grubbs*, 440 S.W.3d at 138 (because officer’s testimony that appellant was drunk in public was undisputed, appellant not entitled to jury instruction on legality of arrest); *Washington*, 417 S.W.3d at 726 (“To demonstrate deficient performance based on the failure to request a jury instruction, an appellant must show that he was entitled to the instruction.”); *see also Chandler*, 182 S.W.3d at 356 (counsel not expected to perform futile act). Accordingly, we decide Rodriguez’s sole issue against her.

III. MODIFICATION OF JUDGMENT

We note the judgment reflects Rodriguez was prosecuted under Texas Penal Code section “22.11(b)” instead of section 22.11(a)(2). *See* TEX. PENAL CODE ANN. § 22.11. Because we have the authority to modify an incorrect judgment to make the record speak the truth, we modify the judgment to reflect the “statute for offense” as 22.11(a)(2). *See* TEX. R. APP. P.

43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. ref'd).

IV. CONCLUSION

As modified, we affirm the trial court's judgment.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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TEX. R. APP. P. 47
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

CHRISTY ALLANE RODRIGUEZ,
Appellant

No. 05-15-00687-CR V.

THE STATE OF TEXAS, Appellee

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Opinion delivered by Justice Lang. Chief
Justice Wright and Justice Bridges
participating.

Based on the Court's opinion of this date, we **MODIFY** the judgment to reflect the "Statute for Offense" is 22.11(a)(2). As modified, we **AFFIRM** the trial court's judgment.

Judgment entered this 29th day of July, 2016.