AFFIRM; and Opinion Filed October 23, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01275-CR

RAMON MARTINEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F-1653661-H

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Lang-Miers

A jury found appellant Ramon Martinez guilty of aggravated assault with a deadly weapon in retaliation and assessed punishment at eighteen years' imprisonment. In two issues, appellant complains of ineffective assistance of counsel and contends that the evidence is legally insufficient to support his conviction. We affirm the trial court's judgment.

BACKGROUND

The State indicted appellant for aggravated assault with a deadly weapon, acting in retaliation against or on account of the service of another as a witness, prospective witness, informant, or person who has reported the occurrence of a crime. TEX. PENAL CODE ANN. §§ 22.02(a)(2), 22.02(b)(2)(C) (West 2011). The case proceeded to a jury trial.

The State offered evidence that on April 10, 2016, appellant threatened Elizabeth Aguirre with a knife. The State offered further evidence that the assault occurred shortly after Aguirre

met with a prosecutor and investigator to discuss appellant's upcoming trial on a previous assault against Aguirre that occurred on July 19, 2015. The State offered evidence relating to both the July 19, 2015 assault and the April 10, 2016 assault.

The July 19, 2015, assault occurred in and outside Aguirre's apartment over the course of the day. Aguirre testified that appellant was drunk and became violent, pushing and hitting her and pulling her hair. He pushed her into the bathroom and threatened her with a knife. He then pulled her out of the bathroom and threw her onto the couch in the living room. Appellant called a friend of Aguirre's in Chicago and told him that Aguirre was making a fool of him and that he was going to make her pay. As appellant spoke on the phone, he continued to hit Aguirre so hard that her friend could hear the blows and her cries of pain.

Eventually appellant calmed down and tried to make amends by taking Aguirre out to lunch. Aguirre was too frightened to refuse. After lunch, appellant stopped at a liquor store and purchased a bottle of tequila. Next, he stopped at a nearby cemetery and told Aguirre that he was going to kill her there. Telling appellant she was late for work, Aguirre convinced appellant to leave the cemetery and take her to the restaurant where she worked as a chef. He did so, but threatened her and her coworkers if she asked them for help.

When Aguirre returned home from work, she found appellant sleeping on the couch with the bottle of tequila and a beer nearby. Appellant awoke and became angry when he heard Aguirre crying in the bedroom. He assaulted her in the bedroom, choking her and then throwing her against a wall. Aguirre managed to run out of the second-floor apartment, down the stairs and onto the street. Appellant followed her, grabbing her by the arm and trying to force her to go back inside the apartment with him.

Elizabeth Schubert was driving by on her way home from a nearby club with her two roommates. Schubert testified that she saw appellant push Aguirre up against a fence. When she

looked in her rear view mirror, Schubert saw appellant choking Aguirre. Schubert reversed the car and went back to help. When Schubert parked her car, appellant stepped away from Aguirre. Schubert asked Aguirre if she needed help. Aguirre spoke very little English, however, and did not understand much of what Schubert was saying. Aguirre was crying and appeared to be afraid. Schubert testified that appellant pulled out a gun, pointed it at her, and tried to get in her car. She was able to drive away and notify the police.

Dallas Police Officer Joon Kim testified that he and his partner responded to a call about a man choking a woman and holding a gun. He observed appellant holding a woman down, possibly with his hands on her neck. Kim and his partner got out of the car with their guns drawn. Appellant stood up, threw something away, and tried to run, but the officers took him into custody. They located the gun appellant had thrown away, and determined that it was an air gun, although Kim and Schubert both testified that it looked real, and Schubert believed it was real. A Spanish-speaking officer came to translate for Aguirre, and photographs were taken of redness on Aguirre's neck and bruises on her arm. Appellant was arrested and charged with aggravated assault family violence by impeding breath. Until appellant's wife came to Aguirre's apartment to retrieve appellant's car after his arrest, Aguirre was not aware that appellant was married.

Aguirre and police officer David Igarashi testified about the April 10, 2016 assault. Aguirre explained that trial on the July 19, 2015 assault was set for April 11, 2016. The Friday before the trial setting, Aguirre met with the district attorney, an investigator, and an interpreter. She testified that appellant had tried to convince her "not to show up so the case would then get closed out." On April 10, Aguirre obtained a ride home from work from a co-worker. When they arrived at Aguirre's apartment, appellant was waiting outside. Aguirre gave the co-worker the papers she had received at her meeting with the district attorney so that appellant would not see them. She got out of the car and appellant began "pulling on me." He forced her to go upstairs to

her apartment, and began hitting her. Appellant told Aguirre she had ruined everything for him, and he wanted to kill her. Aguirre testified that appellant was upset because she was cooperating with the district attorney. She felt that appellant was trying to scare her to prevent her from appearing at trial to testify against him. She testified that appellant was "screaming at me" and telling her that he had gotten out of jail before and would do so again. Appellant tried to stab her in the head with a knife. He then threatened to kill himself. After appellant hit her again, Aguirre ran from the apartment and called the police. A bystander helped Aguirre, and translated for her when the police arrived.

Igarashi testified that he and his partner responded to the call and found Aguirre. She was "crying a lot" and "[v]ery afraid." While he was speaking with Aguirre, appellant "came around the corner and she pointed him out to us," although the officers did not apprehend appellant immediately. Aguirre told Igarashi that appellant threatened her with a knife and told her "not to go to Court on a previous arrest that was made." The officers took Aguirre back to her apartment, where she received a phone call from appellant. The officers instructed her to take the call so that they could locate appellant. They did so, and found him and arrested him. Igarashi identified the knife that Aguirre said appellant used to threaten her. Based on his investigation, Igarashi recommended to the jail sergeant that appellant be charged with retaliation.

Aguirre, Schubert, Kim, and Igarashi testified for the State during the guilt phase of the trial. Appellant's counsel did not call any witnesses, although he cross-examined each of the State's witnesses. Aguirre and appellant testified at the punishment phase. The jury found appellant guilty, and set punishment at eighteen years' imprisonment and a fine of $4,000. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

When reviewing the sufficiency of the evidence, we "consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt." *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). The jury is the exclusive judge of witness credibility and the weight to be given the witnesses' testimony. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). It is also the exclusive province of the jury to reconcile conflicts in the evidence. *Id.* Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Appellant committed the offense of aggravated assault with a deadly weapon in retaliation if he intentionally or knowingly threatened another with imminent bodily injury and used or exhibited a deadly weapon during the commission of the assault, in retaliation against or on account of the service of another as a witness, prospective witness, informant, or person who has reported the occurrence of a crime. TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02(a)(2), 22.02(b)(2)(C).

Appellant contends that Aguirre's testimony was contradictory, not credible, and lacked corroboration. He points out inconsistencies in her testimony and argues that she "could not keep her stories straight." He also argues that although the State told the jury there would be ten to fifteen witnesses to support Aguirre's testimony, the State brought only three. He points out that

the State did not introduce any 911 recording or the testimony of Aguirre's friend in Chicago who allegedly heard appellant's first assault to corroborate Aguirre's testimony.

The State responds that Aguirre consistently testified that on April 20, 2016, appellant assaulted her, threatened her with a knife, and tried to convince her by threats, intimidation, and guilt, not to testify against him. She made the same report to police on the night of the assault. Appellant's prior assault case was set for trial the following day. Aguirre's testimony regarding both assaults was corroborated by three other witnesses. The jury was the sole judge of the credibility of the witnesses and the evidence. *Wesbrook*, 29 S.W.3d at 111. Considering all of the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. We decide appellant's second issue against him.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, appellant contends he received ineffective assistance of counsel that resulted in harm. He argues that his counsel's goal was to obtain community supervision, but his counsel (1) failed to submit a verified application for probation, (2) did not present any evidence from which the jury could find that appellant had never been convicted of a felony in any jurisdiction, and (3) failed to present any mitigation evidence to persuade the jury that community supervision was justified under the circumstances. He points out that during voir dire, no juror responded that he or she would be unable to consider the full punishment range, but his counsel failed to present evidence from which the jury could find that probation was appropriate.

We examine ineffective assistance of counsel claims by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted in Texas in *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986). To obtain reversal based on ineffective assistance of

counsel, an appellant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. *See Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Andrews*, 159 S.W.3d at 101.

An appellate court's review of counsel's performance is highly deferential and begins with the assumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See Andrews,* 159 S.W.3d at 101. An ineffective assistance claim must be "firmly founded in the record," and the record must affirmatively demonstrate that the claim has merit. *Goodspeed v. State,* 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Because a silent record provides no explanation for counsel's actions, the record on direct appeal is usually not sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional. *Cannon v. State,* 252 S.W.3d 342, 349 (Tex. Crim. App. 2008); *Rylander v. State,* 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). Furthermore, counsel should ordinarily be given an opportunity to explain his actions before being condemned as unprofessional or incompetent. *Rylander,* 101 S.W.3d at 111; *Bone v. State,* 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). Consequently, the Texas Court of Criminal Appeals has repeatedly explained that an application for writ of habeas corpus is usually the more appropriate vehicle to raise claims of ineffective assistance of counsel. *See, e.g., Rylander,* 101 S.W.3d at 110.

Turning to appellant's specific complaints, appellant correctly notes that the clerk's record on appeal does not include a verified application for probation. But the court's charge on punishment instructed the jury that:

> In this case the defendant has filed before trial a sworn motion in which he requests that in the event he is convicted, that he be granted community supervision. Our law provides that if you find that the defendant's punishment at confinement for a term of not more than 10 years, you may recommend that the defendant be granted community supervision.

We presume regularity in trial court papers absent evidence of impropriety, *see Light v. State*, 15 S.W.3d 104, 107 (Tex. Crim. App. 2000), and no impropriety is alleged or shown here. The charge stated that an application for probation had been filed, and continued with further instruction on community supervision. The verdict form included an alternative paragraph in which the jury could, upon assessing punishment at a term of not less than five or more than ten years' confinement and finding that appellant had "never before been convicted of a felony in this state or any other state," "recommend that the Court suspend the imposition of sentence and place the defendant on community supervision." There was no challenge to the charge by either party. Under the charge, the jury could have considered probation.

Further, there is no evidence from which we could conclude that counsel's representation fell below an objective standard of reasonableness or that but for counsel's errors, the result of the proceeding would have been different. *See Andrews*, 159 S.W.3d at 101. Appellant complains that his counsel did not present any evidence that appellant had not been convicted of a prior felony in any jurisdiction. But on cross-examination during the punishment phase, appellant denied any prior arrests, and specifically denied any prior arrests or convictions for driving while intoxicated in New York. The State did not offer any evidence to contradict appellant's denials or prove any other prior offense. There was no evidence to preclude a finding by the jury that appellant had "never before been convicted of a felony in this state or any other state," as the charge required for a recommendation of probation, and appellant's counsel argued for probation in his closing.

Appellant also argues that his counsel presented no mitigation evidence to persuade the jury that community supervision was justified under the circumstances. But appellant does not suggest what evidence his counsel might have offered. In closing argument during the punishment phase, appellant's counsel argued that appellant should be given probation because he had "seen remorse" from appellant and because appellant "needs help[,] [n]ot imprisonment." Appellant's testimony on his own behalf, however, did not indicate remorse or other mitigating circumstances. He testified that his disagreements with Aguirre were her fault, because she could not accept his decision to return to his wife. He denied getting angry at Aguirre, testified that he had "no issues" with her, and stated that he had no intention of harming Aguirre in the future or ever seeing her again. He denied that he had a drinking problem. He testified that Schubert's testimony "[is] not coinciding what she said with the problem that I had," and that all of Aguirre's testimony was a lie. He thought the jury's verdict of guilt was unfair. In closing argument, appellant's counsel attributed this apparent lack of remorse and failure to accept the jury's verdict to the fact that appellant was "in shock" from the jury's finding of guilt. But the jury had the opportunity to assess both Aguirre's and appellant's credibility, as well as the credibility of the other witnesses who corroborated Aguirre's version of events. The jury assessed punishment at 18 years, outside the range for consideration of probation, but far below the maximum possible sentence of 99 years or life that the jury could have imposed. Appellant has not shown that his counsel's representation fell below an objective standard of reasonableness or that the deficient performance prejudiced him. *See Andrews*, 159 S.W.3d at 101. We decide appellant's first issue against him.

CONCLUSION

We affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RAMON MARTINEZ, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-16-01275-CR V.	Trial Court Cause No. F-1653661-H. Opinion delivered by Justice Lang-Miers;
THE STATE OF TEXAS, Appellee	Justices Brown and Boatright, participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 23rd day of October, 2017.