AFFIRM; and Opinion Filed November 8, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01503-CR

NICHOLAS RYAN RIGGS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 397th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 066591

MEMORANDUM OPINION

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

A jury found Nicholas Ryan Riggs guilty of possession of a controlled substance, methamphetamine in an amount of four or more grams but less than 200 grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115 (West 2017). The court assessed punishment at 12 years' imprisonment. In a single issue, appellant complains that his counsel was ineffective. We affirm the trial court's judgment.

BACKGROUND

Before the parties offered any evidence to the jury, appellant's counsel called appellant to testify outside the jury's presence. Appellant testified that he had rejected the State's plea offers. His counsel then asked,

> Q. I also informed you this morning—we talked about this in the past—that ordinarily I would file a Motion in Limine or a motion which would ask the

Judge to order the State not to get into certain aspects of your past, including your criminal history; you understand that?

A. Yes, sir.

Q. It's my understanding that you and I have spoken about this many, many times, and our trial strategy will be, among other things, to discuss your criminal history; is that correct?

A. Yes, sir.

Q. Including your SAFPF trip, your State jail trip and what's been going on since your release from prison; is that correct?

A. Yes, sir.

Q. And you ordinarily understand that those particular pieces of evidence ordinarily would not come in but for you testifying?

A. Yes, sir.

Q. And you and I have spoken to the State. We've agreed that if, for whatever reason, those are addressed during the State's case in chief, we're not going to object. We want that evidence to come in; is that correct?

A. Yes, sir.

In his opening statement, appellant's counsel explained to the jury that appellant would testify, to "tell you his version of what happened and why it happened and why he thinks it happened." He explained that appellant had been working for Officers Shane Kumler and Brian McClaran as a confidential informant in the months before his arrest.

Appellant's direct testimony before the jury began as follows:

Q. Mr. Riggs, could you please introduce yourself to the jury?

A. Nicholas Ryan Riggs.

Q. Have I explained to you—have I explained to you that you have a right not to testify?

A. Yes, sir, you have.

Q. Have I explained to you that nobody, including the Court or I, can make you waive your right to remain silent and testify; is that correct?

A. Yes, sir, you have.

Q. You're doing this freely, intelligently and voluntarily; is that correct?

A. Yes, sir.

Q. I've also explained to you, have I not, Mr. Riggs, that you have a privilege against self-incrimination?

A. Yes, sir.

Q. I've explained to you that you have a right not to say or do anything that might incriminate you. Incriminate, I've explained to show [sic] is something that tends to show your guilt in some form or fashion?

A. Yes, sir.

Q. And I've explained to you that while you're testifying, either through my questioning or through the cross-examination by the State, you may make one or more incriminating statements; you understand that?

A. Yes, sir.

Appellant then testified about his prior criminal history in some detail. He explained that after one of his prior arrests for possession of methamphetamine, he became a confidential informant in exchange for the State's agreement not to prosecute him for the offense. He testified that he cooperated with police for several months on drug-related cases, but then explained to police that he could no longer work with them without relapsing into his methamphetamine addiction. The following day, he was arrested for failure to signal a turn. Appellant testified that he was strip-searched and later confronted with a packet of methamphetamine that police claimed had been concealed in his boot.

The jury saw a video of appellant's arrest. On it, appellant discussed his service as a confidential informant with the arresting officer, Jeremy Monroe. Monroe, Kumler, and McClaran also testified at trial regarding appellant's arrest and his prior service as a confidential informant. In closing argument, appellant's counsel highlighted appellant's testimony that "he didn't want to do the job anymore. He's a recovering addict. You heard him say that. You can't be in the game and not be part of the game. He did not want to be in the game and part of the

game anymore." Counsel argued that "[i]t comes down to a credibility issue," and that appellant "is telling—telling you the way it was that afternoon, on October 28th."

The jury found appellant guilty, and the court imposed punishment. This appeal followed. In his sole issue, appellant contends that his counsel's question quoted above, asking appellant to acknowledge that "you may make one or more incriminating statements; you understand that?" constituted ineffective assistance by his counsel. He argues, "[n]o rational juror could be expected to ignore an accused's own lawyer stating that if his client testifies he may make 'one or more incriminating statements,'" and "[n]o rational lawyer can explain how asking a client such a question *in the presence of the jury* could possibly constitute sound legal strategy." He contends he is "entitled to a re-trial, represented by trial counsel who will refrain from hinting to the jury that [he] is a liar or a perjurer."

APPLICABLE LAW AND STANDARD OF REVIEW

To establish ineffective assistance of counsel, the appellant must show by a preponderance of the evidence that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's errors prejudiced the defense so that appellant was deprived of a fair and impartial trial. *See Strickland v. Washington*, 466 U.S. 668, 688–94 (1984); *Rylander v. State*, 101 S.W.3d 107, 109–10 (Tex. Crim. App. 2003); *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). Under the first prong, we must be highly deferential in our review of counsel's performance. *Andrews v. State*, 159 S.W.3d 98,101 (Tex. Crim. App. 2005). There is a strong presumption that the conduct of counsel was not deficient, and that it falls within a wide range of reasonable professional assistance. *Nava v. State*, 415 S.W.3d 289, 307–08 (Tex. Crim. App. 2013); *Andrews*, 159 S.W.3d at 101. We review the effectiveness of counsel in light of the totality of the representation and particular circumstances of each case. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Under the second prong, "[a] defendant

suffers prejudice if there is a reasonable probability that, absent the deficient performance, the outcome would have been different." *Nava*, 415 S.W.3d at 308. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

Counsel should ordinarily be accorded an opportunity to explain his actions "before being condemned as unprofessional and incompetent." *Bone*, 77 S.W.3d at 836. Where no post-trial hearing has been held to afford trial counsel the opportunity to explain the reasons for his conduct, "we will not find [counsel] to be deficient unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Nava*, 415 S.W.3d at 308 (quoting *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)). But in a "rare case," the record on direct appeal may be sufficient to conclude that both prongs of the *Strickland* case are met. *See Andrews*, 159 S.W.3d at 103 ("This is a rare case. This is a case in which the appellant has raised a claim of ineffective assistance of counsel on direct appeal *and* the record is sufficient for us to make a decision on the merits.").

ANALYSIS

No post-trial hearing was held to afford counsel for appellant an opportunity to explain his actions. But counsel's questioning of appellant outside the presence of the jury indicates that the defense's "trial strategy will be, among other things, to discuss [appellant's] criminal history." And to the jury, appellant testified about the circumstances leading up to his service as a police informant, including prior convictions for possession of methamphetamine.

Counsel's first questions to appellant established that appellant had decided to testify despite the possibility of incriminating himself. In this way, counsel's strategy could have been to highlight appellant's willingness to tell the jury the whole truth despite the possible negative consequences. Equally important, evidence of appellant's prior criminal history supported his contention that he was a valuable police informant, a key point in his defense. Appellant's

version of events was that police arrested him and planted a packet of drugs in his boot in response to his decision to stop acting as a police informant. For these reasons, a reasonable attorney could have concluded that introduction of appellant's criminal history was a sound trial strategy, and that it was equally sound strategy to obtain appellant's acknowledgement at the outset that the evidence could be incriminating.

Appellant relies on four cases in which courts concluded there was no sound trial strategy that would have supported counsel's actions. In *Stone v. State*, 17 S.W.3d 348, 352 (Tex. App.—Corpus Christi 2000, pet. ref'd), the court of appeals held that, under the facts of the case, no reasonable attorney would have introduced evidence of the appellant's prior murder conviction. *Id.* The court stated, "[w]e are convinced that nothing trial counsel could say would make this court believe that it was sound trial strategy to offer the prior conviction under the circumstances here." *Id.* Further, the error was prejudicial because "(1) it diminished [defendant's] credibility when credibility was critical—his presentation of his alibi defense; and (2) it gave substance to his threats to kill the prosecution witnesses." *Id.* at 353.

In *Robertson v. State*, 187 S.W.3d 475, 484 (Tex. Crim. App. 2006), also cited by appellant, the court held defense counsel's performance to be ineffective where counsel purposefully elicited testimony that the defendant was already incarcerated on two previous convictions that were pending on appeal. Given that the evidence would not have been admissible if offered by the State, the court reasoned that its admission "could serve no strategic value including demonstrating that appellant is not a liar," where appellant's self-defense claim "rested almost entirely on his credibility." *Id.* at 484.

Appellant also relies on *Ex Parte Skelton*, 434 S.W.3d 709, 721 (Tex. App.—San Antonio 2014, pet. ref'd), a habeas corpus proceeding. In *Skelton*, defense counsel offered inconsistent explanations regarding why he failed to object to evidence regarding defendant's

invocation of her right to counsel. In addition, the evidence admitted without objection contradicted the defendant's position that she had been open and cooperative with police officers. The court concluded that under the circumstances, there was no strategic value in not objecting to admission of the evidence. *Id.* at 724.

In *Ex Parte Menchaca*, 854 S.W.2d 128, 129 (Tex. Crim. App. 1993), another case cited by appellant, the defendant testified at trial and was questioned on cross-examination about a prior rape conviction. His counsel did not object, and had failed to file a motion in limine prior to trial. *Id.* In a post-conviction application for writ of habeas corpus, trial counsel testified to his reasons for failing to object, including that he did not know what objection to make. *Id.* at 131. The court concluded, "[w]hen viewed in the context of the entire record, counsel's deficient performance undermined applicant's credibility which was at the very heart of his defense." *Id.* at 133.

In each of these cases, the courts concluded that there was no sound trial strategy to support counsel's actions. In each case, the evidence admitted undermined the appellant's defense. Here, in contrast, appellant's testimony to his version of events, including his past criminal history, was integral to the main theory of the defense. *See Barfield v. State*, 464 S.W.3d 67, 74 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (no ineffective assistance where defense counsel offered evidence of appellant's invocation of right to counsel "to support two of the defense's main theories"). We conclude that appellant has failed to meet his burden to prove that his counsel's representation fell below an objective standard of reasonableness. *See Andrews*, 159 S.W.3d at 101. Nor has appellant shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 102 (quoting *Strickland*, 466 U.S. at 694). We decide appellant's sole issue against him.

CONCLUSION

We affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

161503F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NICHOLAS RYAN RIGGS, Appellant	On Appeal from the 397th Judicial District Court, Grayson County, Texas
No. 05-16-01503-CR V.	Trial Court Cause No. 066591.
	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 8th day of November, 2017.