Opinion issued November 30, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00889-CR

THURSTON T. MITCHELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1113267

MEMORANDUM OPINION

Appellant, Thurston Mitchell, was convicted by a jury of the third-degree felony offense of assault on a peace officer[1] and, finding the felony enhancement

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[1] TEX. PENAL CODE ANN. § 22. 01(a)(1), (b)(1) (Vernon Supp. 2010).

paragraph as true, the jury assessed Mitchell's punishment at two years confinement.[2] By eight points of error, we are asked to determine the legal and factual sufficiency of the evidence and whether Mitchell was deprived of his right to effective assistance of counsel because:

(1) trial counsel failed to request jury instructions on the defenses of self-defense, and defense of a third person, as well as on lesser-included offenses;

(2) trial counsel failed to object to certain statements and request a corresponding limiting jury instruction; and

(3) Mitchell was denied counsel during the period of time to file a motion for new trial.

We affirm.

Facts

When members of the Spring Volunteer Fire Department were dispatched to a house fire in a residential area, Donnie Guedry,[3] the district chief for that sector, was approached by a highly agitated man concerned that his house was going to burn down. Guedry told the man, appellant Mitchell, who lived next door to the burning home, that he needed to return to his own front yard or Guedry would call the police. Mitchell directed a racial epithet at Guedry and accused Guedry of not caring because Mitchell was black. Guedry responded that he did "not have time

[2] *See* TEX. PENAL CODE ANN. § 12.42(a)(3)(Vernon Supp. 2010) (providing for second-degree felony punishment for a third-degree felony offense when it is shown at trial that defendant had been previously convicted of a felony).

[3] All names are spelled as they appear in the court reporter's record.

for that," and repeated his directive to leave the yard or be arrested. In Guedry's opinion, Mitchell was interfering with the scene and was in a zone that needed to be cleared for the safety of the firefighters and nearby citizens. Mitchell did not move until the first fire truck pulled up and he then tried to pull a hose off of it. When Guedry ordered Mitchell not to touch anything on the truck or be arrested, Mitchell walked off, screaming and swearing, and throwing his hands up in the air.

Guedry thereafter did call for police to control the crowd and because Mitchell was still being loud and walking between the trucks. Guedry wanted everyone but firefighters removed from the area and a safe perimeter created. In addition to firefighters and police officers, there were approximately 20 to 25 people on the scene, located across the street from the house that was burning. Guedry assigned a crew with a hose to protect Mitchell's house and to ensure Mitchell did not come back to Guedry. Although the fire was controlled and did not spread to any other house, the heat did cause three or four pieces of Mitchell's siding to melt.

Deputy Christopher Lawrence with the Harris County Precinct 4 Constable's Office arrived at the fire scene with Corporal Steve Romero in response to the fire department's request for assistance and to secure the scene. The fire had just been

put out[4] upon their arrival and Deputy Terrence Richardson advised them of the fire chief's request for a safety perimeter in order to finish working on the fire. Patrol cars were parked to form the security perimeter and civilians were not to pass in front of them. Residents who lived within the safety perimeter were allowed home if they lived on the West side of the street, but residents from the East side of the street, where the fire department was working, were to wait on the West side until the fire department was finished.

Lawrence and Deputy Constable Randall Adams were assigned to the northern end of Briar Creek. A woman, later identified as Mitchell's wife, attempted to breach the safety perimeter and the officers on point explained to her that she could not be allowed pass the perimeter. Asked for her identification showing her address, she refused and became extremely irate stating: She needed no "[expletive] ID," it was her "[expletive] house," and she would "go down there if [she] [expletive] wanted to." Adams called a supervisor at her request.

Mr. Mitchell came running up from behind the officers,[5] took hold of Mrs. Mitchell, and told the officers that she was his "[expletive] wife," that "y'all [expletives] have to let her pass," that "that is our [expletive] house," and that the officers could not stop them from going to their own house. Lawrence told him

[4] At trial, Guedry also testified that the confrontation had occurred around 10:30 at night, after the fire was extinguished.

[5] At trial, Lawrence and Adams' testimony conflicted as to whether Mitchell had not been in or outside the safety perimeter.

that if he had identification, he would be allowed to pass. Adams tried to explain the situation to Mrs. Mitchell, while Mr. Mitchell was running back and forth on the "fire line," yelling, screaming, and cursing. Adams attempted to explain to both Mitchells the officers' duty to keep them from going toward the burning house and that they could not let them pass for their own safety.

Mr. Mitchell then repeatedly attempted to walk around the officers but Lawrence stepped in front of him each time and blocked him. A neighbor eventually confirmed that the Mitchells lived on the street, and Lawrence then permitted Mr. Mitchell to pass but directed him to remain on the West side of the road. Mr. Mitchell did so. When Lawrence advised Adams to allow Mrs. Mitchell through, she began yelling "what you say, what you say" repeatedly. It was explained to her that she could cross the perimeter, but was to remain on the West side of the street and was not permitted to go to her house, as it was next door to the fire. All non-emergency personnel were on the West side of the street.

Mrs. Mitchell did not move. Lawrence testified that Mr. Mitchell then returned and attempted to "get in" Lawrence's face and "chest-butted" him, telling Lawrence that he could "not talk to [Mitchell's] [expletive] wife that way." Lawrence pushed Mr. Mitchell back[6] and told him to step away. Mr. Mitchell and Lawrence had been within inches of each other. Adams, who had been two to three

[6] to achieve a "safety distance"

feet away speaking to Mrs. Mitchell, testified that Mr. Mitchell, a few seconds thereafter, pushed Lawrence, stepped back and clenched both his fists as if he were going to strike someone. Adams then grabbed Mr. Mitchell's right arm at the wrist, and Lawrence unsuccessfully tried to grab Mitchell's left arm but Mitchell swung and struck Adams' right eye. Adams then "bear-hugged" Mitchell to prevent further blows while Lawrence secured Mitchell's left arm, and Deputy Richardson pushed everyone to the ground.

Meanwhile, Mrs. Mitchell was yelling profanities, screaming about police brutality, taking pictures with her camera phone, and promising that she was going to call Quanell X. In her complaint to Corporal Romero, the supervisor, she referred to Lawrence in profane terms, saying that he had been rude and aggressive toward Mr. Mitchell. Mrs. Mitchell also cursed at Guedry, telling him to move his "[expletive] truck."

Lawrence and Adams transported Mitchell to the police station in the back of Adams's patrol car. The officers testified that they asked him no questions en route but that Mr. Mitchell repeatedly noted his regret that he had hit Adams and that he had meant to hit the other [expletive], all the while looking and nodding toward Lawrence. At the station, both Mitchell and Adams were examined by emergency medical staff[7] but, absent any signs of injury, no medical care was

[7] Mitchell claimed to have been burned by the fire.

necessary for Mitchell.[8] Adams's right eye "stung a bit" and was painful, red, and swollen that night, but the paramedics found no concussion and applied an ice pack to his face to reduce the swelling. The area under the right eye was bruised and sore the next morning. Adams also received a cut on his left hand.[9]

In addition to Lawrence, Adams and the Mitchells, other witnesses were deputy fire chief Guedry, and deputy constables Richardson, Guajardo, and Romero, all of whom testified they saw Mitchell arguing with Lawrence, shoving Lawrence, swinging his arm, Adams trying to grab Mitchell's arm, and Mitchell and the officers going down. Richardson's and Guajardo's testimony was that they witnessed Mitchell strike Adams. Guedry, although one to one and a quarter lots away (estimated at 45 feet) from the fray, was able to see them because the fire trucks' many bright lights illuminated the scene "almost like daylight." Although 20 to 25 feet away when he first heard the yelling, Richardson started walking towards them. Romero, too, some 20–30 feet away, started toward Lawrence and Mitchell when he noticed something afoot. Guajardo was alerted by a firefighter.

Mitchell's subsequent indictment for assault on a peace officer alleged that he had caused bodily injury to Adams,

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[8] Mitchell's booking photograph, which exhibited no injuries, was admitted into evidence at trial.

[9] Photographs of Adams, taken about an hour and a half after Mitchell was taken into custody, were admitted at trial.

> "a person [Mitchell] knew was a public servant[,] while [Adams] was lawfully discharging an official duty, to wit: TRYING TO KEEP [Mitchell] FROM APPROACHING A BURNING BUILDING by STRIKING [Adams] WITH HIS HAND."
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> (Capitalization in original).

At trial, Mitchell's defense was that he had never hit Adams. Mitchell told the jury, "I'm innocent. I am not guilty. I didn't hit that man. I am not guilty. Didn't hit him."

Mitchell's Testimony

Mr. Mitchell's testimony was that, after the fire began, his wife took the children down the street to her father's home, and he awaited her return in his neighbor's driveway two houses north of his, where his work van was parked. When at the scene of the fire and Deputy Constable Lawrence asked him to identify his wife, he had done so without moving from that position. Lawrence had then asked him to come to where the officers were to confirm that she was his wife, and he complied. Lawrence had then asked for identification to prove that she was his wife and Mr. Mitchell had told the officer that he had none as they lived next to the house that had caught on fire. When Mr. Mitchell had then reached out to take hold of his wife's hand, Lawrence pushed him. Mrs. Mitchell then called 911. Eventually, after walking about five houses down and encountering a neighbor who was able to identify Mr. Mitchell as living in the perimeter, Lawrence confirmed the Mitchells' residence, and Mr. Mitchell crossed

the street to get his wife.

According to Mr. Mitchell, Lawrence became angry after the Mitchells' residence was confirmed and had used profanity in his directives to Mr. Mitchell and to officer Adams to allow Mrs. Mitchell to clear the perimeter.

Mr. Mitchell had then urged his wife, "Let's go," but before doing so, they asked the officers for their badge numbers. Lawrence then yelled at Mrs. Mitchell, and lunged at her. Mr. Mitchell response was to tell Lawrence that he was acting unprofessionally. The Mitchells had interlocked their arms while Lawrence was yelling at them to go to their house. Just as Mr. Mitchell was trying to bring his wife through to the side he was on and to pass by, Lawrence pushed him. Mr. Mitchell had then asked Lawrence why he had put his hands on him, and had told Lawrence that he was going to file charges on him. Lawrence had then violently pushed him, Mr. Mitchell fell back, and Adams "jumped" him from behind. Lawrence had tried to hit him and Mitchell ducked and they all fell to the ground, with Mr. Mitchell on top of Lawrence. Mr. Mitchell explained that his left hand had gotten stuck in his pocket because the pocket was small and his hand was wrapped around a cell phone, not that he placed his hands inside his pockets to avoid getting arrested. Mr. Mitchell described himself as being able to "do nothing" while on top of Lawrence because Adams was on his back and he was "sitting [t]here" wondering what the police were doing when Lawrence started to

choke him and Richardson started telling other officers to get Mr. Mitchell's hand out of his pocket. After wresting Mr. Mitchell's hands from his pockets, Richardson handcuffed him and placed him in the back of the patrol unit. Adams then came over and said something unpleasant to him, and Mitchell called his wife on his cell phone. The officers then came and took Mr. Mitchell's cell phone away. Mr. Mitchell denied having had any conversation with the officers while being transported and denied having apologized to Adams.

Mr. Mitchell testified that he had not struck Adams or any of the other officers and had not resisted arrest. When asked about Adams's black eye, Mr. Mitchell stated that he had not seen a black eye on Adams on the way to the station. Mr. Mitchell denied being hostile with the firefighters that night, using profanity toward Lawrence, being rude to an officer, or hitting an officer.

Mrs. Mitchell likewise testified that Lawrence had lunged at her and sworn at her; Mitchell had stepped in front of her and been pushed by Lawrence twice, causing Mr. Mitchell to fall down; and Adams had then grabbed Mr. Mitchell by the neck and all three fell to the ground. Adams had been on Mr. Mitchell's back, other officers had then come over, and one had yelled to get Mr. Mitchell's hand. Five officers had assisted in the assault on her husband, ending up on top of him.

According to Mrs. Mitchell, Lawrence had pushed Mr. Mitchell earlier that evening when Mr. Mitchell was inside the perimeter and Lawrence had asked Mr.

Mitchells for identification. After the three went down, she called 911 because Lawrence had assaulted her husband twice and she asked for a sergeant to be sent out. Mrs. Mitchell stated that Mr. Mitchell never touched Lawrence or Adams and had not yelled or cursed unless he was yelled at by the officers. Mrs. Mitchell testified that she had yelled and cursed at the scene.

Mr. Mitchell's minor son also testified at trial, but only about the start of the fire. He was not present at the time of the confrontation.

The jury found Mr. Mitchell guilty of aggravated assault on a peace officer and assessed punishment at two years in prison. No motion for new trial was filed.

Sufficiency Challenges

In his seventh and eight points of error, Mitchell contends that the evidence at trial did not establish that Adams was lawfully discharging an official duty at the time of the assault. Mitchell argues that there was conflicting evidence about whether, at the time of the incident, the building was *still burning* and whether Mitchell was attempting to *approach* the building at the time of the incident, and asserts that these conflicts make the evidence factually and legally insufficient to support his conviction. In support of his argument, Mitchell relies on cases citing the well-established legal and factual sufficiency standards as set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) and *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006).

A. Discussion

The elements for assault on a public servant are (1) a person (2) intentionally, knowingly, or recklessly (3) causes bodily injury (4) to a person the actor knows is a public servant (5) while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant. TEX. PENAL CODE ANN. § 22.01(a)(1), (b)(1) (Vernon Supp. 2010).

Mitchell challenges the legal and factual sufficiency of the evidence to prove that Adams was lawfully discharging an official duty at the time of this assault because the State failed to prove that Adams was "trying to keep [Mitchell] from approaching a burning building." Mitchell argues that there was conflicting evidence at trial as to whether the building was still burning and whether Mitchell was trying to approach the building. Mitchell suggests that the State failed to prove, beyond a reasonable doubt, the portion of the indictment and charge that reads, "trying to keep [Mitchell] from approaching a burning building."

Mitchell's arguments implicate the state law sufficiency standard as set forth under *Malik v. State*. 953 S.W.2d 234, 239–40 (Tex. Crim. App. 1997). Under state law, in determining both the legal and the factual sufficiency of the evidence, we measure the evidentiary sufficiency by the elements of the offense as defined by the hypothetically correct jury charge for the case. *See Vega v. State*, 267

S.W.3d 912, 915 (Tex. Crim. App. 2008) (citing *Wooley v. State*, 273 S.W.3d 260, 268 (Tex. Crim. App. 2008)) (factual sufficiency); *Malik*, 953 S.W.2d at 239–40 (legal sufficiency). Under this standard, where there is a contention that the evidence is insufficient because of a variance between the indictment and proof, "[a]llegations giving rise to immaterial variances may be disregarded in the hypothetically correct jury charge, but allegations giving rise to material variances must be included." *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001). A variance is fatal only when it is material and prejudices a defendant's substantive rights. *Id.*

In his brief, Mitchell does not cite to any authorities setting out the state law evidentiary sufficiency standard, nor does he discuss such standard or how the evidence proffered at trial should be reviewed under that standard.

1. The application of *Malik* to *Jackson v. Virginia* evidentiary claims

"*Malik's* evidentiary sufficiency standard [is] a purely state law standard that is 'foreign to federal constitutional norms' . . . [and so] does not apply to [federal constitutional] evidentiary sufficiency claims." *See Fuller v. State*, 73 S.W.3d 250, 252 (Tex. Crim. App. 2002). Thus, where a defendant contends that the evidence is insufficient under the federal constitutional sufficiency standard of *Jackson*, we review his legal sufficiency claims under that standard, not the state evidentiary standard of *Malik*. *Id.* (noting that *Malik* standard of sufficiency is "clearly not the

same" as *Jackson v. Virginia* standard, and thus not applicable to *Jackson v. Virginia* sufficiency claim).

Under the federal constitutional standard of *Jackson*, the issue before us is whether the phrase "trying to keep [Mitchell] from approaching a burning building," is a substantive element of the assault on a peace officer as defined by state law. *See id.* at 252–53. If not, then, under the *Jackson v. Virginia* standard, the failure of the State to prove such a phrase would not make the evidence legally insufficient. *See id*. at 253. An "element of the offense" is defined, in relevant part, as the forbidden conduct with the required culpability. *See* TEX. PENAL CODE ANN. §§ 1.07(a)(22)(A),(B) (Vernon Supp. 2010); *Fuller*, 73 S.W.3d at 252–53. Section 22.01(b)(1) of the Penal Code further defines assault on a public servant as assault on a person the actor knows to be a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant. TEX. PENAL CODE ANN. § 22.01(b)(1). It does not define the specific description of the official duty, in this case "trying to keep [Mitchell] from approaching a burning building" as a substantive element of the offense. *See Fuller*, 73 S.W.3d at 253 (holding that victim's name was not substantive element of offense of injury to an elderly individual, noting that state law did not define the offense as "injury to an elderly individual named [victim's name in case]."). Under federal constitutional

standards, even if the State failed to specifically prove that Adams was trying to keep Mitchell from *approaching* a *burning* building, such failure would not make the evidence insufficient to support Mitchell's conviction under federal constitutional standards. *See id*.

2. Sufficiency under state evidentiary standards

Under the state evidentiary standard, both legal and factual sufficiency claims are measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. *See Vega*, 267 S.W.3d at 915; *Malik*, 953 S.W.2d at 239–40. A hypothetically correct jury charge "sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240. This standard ensures that a judgment of acquittal, or a reversal for a new trial in the case of factual insufficiency, is "reserved for those situations in which there is an actual failure in the State's proof of the crime rather than a mere error in the jury charge submitted." *See id.*; *Wooley*, 273 S.W.3d at 267–68 (holding that remedy of new trial "sweeps too broadly" and is "inappropriate remedy" to be granted because defendant received windfall in jury instruction).

Applying such standard to the present case, a hypothetically correct jury

charge for a felony offense of assault would not include the phrase "TRYING TO KEEP [Mitchell] FROM APPROACHING A BURNING BUILDING" because that phrase is not a statutory element of the offense charged or an "integral part of an essential element of the offense." *See* TEX. PENAL CODE ANN. § 22.01(a)(1), (b)(1); *Gharbi v. State*, 131 S.W.3d 481, 482–83 (Tex. Crim. App. 2003) (holding that when challenged allegation was not a statutory element or an "integral part of an essential element" of charged offense, it need not be included in hypothetically correct jury charge); *Fuller*, 73 S.W.3d at 254 (holding that victim's name did not have to be included in hypothetically correct jury charge). Thus, the State was not required to prove the phrase "TRYING TO KEEP [Mitchell] FROM APPROACHING A BURNING BUILDING" beyond a reasonable doubt in order for the evidence to be legally or factually sufficient to support Mitchell's convictions under the state evidentiary sufficiency standard. *See Gharbi*, 131 S.W.3d at 483; *Fuller*, 73 S.W.3d at 254; *Gollihar*, 46 S.W.3d at 255–57.

Moreover, the variance between the indictment and the proof at trial was not material. *See Gollihar*, 46 S.W.3d at 257 (holding that material variance is one that (1) fails to inform defendant of charge against him sufficiently to allow him to prepare an adequate defense at trial or (2) does not describe offense clearly enough to protect defendant from being subjected to risk of later prosecution for same crime). The record here is devoid of any suggestion that Mitchell was not informed

of the offense with which he was charged or that his ability to prepare an adequate defense was impaired. Mitchell's defense was that he did not hit the officer. This defense was not affected by whether the Mitchell was approaching or moving away from a building or whether it was burning or merely smoldering. Variance on those details between the indictment and the proof at trial poses no hindrance to preparation of an adequate defense. *See Flenteroy v. State*, 187 S.W.3d 406, 411 (Tex. Crim. App. 2005) (holding that when indictment alleged appellant used "screwdriver" in commission of crime, and proof at trial was that "hard metal-like object" was used, variance was immaterial because appellant's defense [that he had not used a weapon] did not depend on whether particular type of weapon was used; indictment sufficiently informed him of charge against him to allow him to adequately present defense). Nor would any such variance have subjected Mitchell to another prosecution for the same offense. Accordingly, any variance between the evidence at trial and the phrase "TRYING TO KEEP [Mitchell] FROM APPROACHING A BURNING BUILDING" as used in the indictment was immaterial and would not render the evidence legally or factually insufficient to support Mitchell's conviction. *See Flenteroy*, 187 S.W.3d at 411; *Gharbi*, 131 S.W.3d at 483; *Fuller*, 73 S.W.3d at 252–56; *Gollihar v. State*, 46 S.W.3d at 255–57.

We overrule Mitchell's seventh and eight points of error.

Ineffective Assistance of Counsel Challenges

In issues one through six,[10] Mitchell argues that his defense counsel rendered ineffective assistance by (1) failing to request jury instructions on self-defense, defense of a third person, and on lesser-included offenses of simple assault and resisting arrest, (2) failing to object to certain testimony as hearsay and extraneous criminal conduct under Rule of Evidence 404(b) and to request a limiting instruction thereon, and (3) failing to file a motion for new trial.

A. Standard of review for contentions of ineffective assistance of counsel

The United States Constitution, the Texas Constitution, and a Texas statute guarantee an accused the right to reasonably effective assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.051 (Vernon Supp. 2010); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, an appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's

[10] Mitchell makes his contentions regarding ineffective assistance of counsel under a listed "point of error one-six," but does not list his specific arguments discretely nor refer to them by a specific issue or point number. Accordingly, it is not clear from Mitchell's brief which argument is meant to be point of error one, two, three, four, five, or six, respectively. We have been able to identify four discrete arguments and so we address those arguments.

deficient performance. *See Strickland*, 466 U.S. at 687–95, 104 S. Ct. at 2064–69; *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (applying *Strickland* test to review of claim of ineffective assistance of counsel under Texas statutes and constitutional provisions). Under *Strickland*, the appellant "must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). The appellant must also show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 833.

Judicial scrutiny of counsel's performance must be highly deferential, and the defendant must overcome the presumption that, under the circumstances of the case, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. We apply a strong presumption that trial counsel was competent and presume that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

B. Contentions of ineffective assistance

1. Failure to request instructions on self-defense, defense of a third-person and lesser-included offense of simple assault and resisting arrest

Mitchell asserts that his counsel rendered ineffective assistance by failing to

request jury instructions on self-defense, defense of a third person, and lesser-included offenses of misdemeanor assault and resisting arrest. However, as the record affirmatively demonstrates, Mitchell was not entitled to these instructions and trial counsel's failure to request them was not ineffective.

Self-defense and defense of a third person are "justification" defenses and to be entitled to an instruction on either, a defendant must admit to committing the conduct that, but for that justification, would otherwise be considered a crime. *See* TEX. PENAL CODE ANN. §9.31 (Vernon 2003) (self-defense), § 9.33 (defense of third person) (Vernon Supp. 2010) (both providing that "a person is justified in using force" "against another" under certain circumstances); *see discussion in Ex Parte Nailor*, 149 S.W.3d 125, 133 & n.33 (Tex. Crim. App. 2004) (discussing statutory legal defenses and holding that in order to raise justification defense, defendant was required to admit committing offense, then offer defense as justification); *Ford v. State*, 112 S.W.3d 788, 794 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding that self-defense is inconsistent with denial of commission of offense; to raise self-defense, defendant must admit committing offense and then offer self-defense as justification; and holding that where defendant did not admit offense and then offer self-defense as justification, he was not entitled to jury instruction on self-defense). Here, therefore, to be entitled to a jury instruction on either self-defense or defense of a third person, Mitchell would

have had to admit to striking Adams, but with the legal justification of self-defense or defense of a third person. *See Ex Parte Nailor*, 149 S.W.3d at 133; *Ford*, 112 S.W.3d at 794. As Mitchell's denial of striking Adams was unequivocal, he was not entitled to either jury instruction. *See Ex Parte Nailor*, 149 S.W.3d at 133; *Ford*, 112 S.W.3d at 794.

Similarly, in order to be entitled to an instruction on a lesser-included offense (1) the lesser-included offense must be included within the proof necessary to establish the offense charged, and (2) some evidence must exist in the record that would permit a jury rationally to find that the defendant is guilty only of the lesser-included offense. *Lofton v. State*, 45 S.W.3d 649, 651 (Tex. Crim. App. 2001).

The State asserts that resisting arrest is not a lesser-included offense of assault on a public servant under the facts of this case. We agree. *See id.* at 652 (holding that jury instruction on resisting arrest was properly denied when evidence that defendant struck officer). Therefore, Mitchell was not entitled to a jury instruction on resisting arrest and trial counsel was not ineffective in not requesting such a jury instruction.

The State does not contend that misdemeanor assault is not a lesser-included offense of assault on a public servant, so as to that offense, we turn directly to considering the second requirement—whether there is some evidence that would

permit a jury rationally to find that Mitchell is guilty only of misdemeanour assault. *See id.* at 651. Mitchell contends that his own testimony—that Lawrence and Adams were not lawfully discharging an official duty at the time of the alleged assault by Mitchell, but rather were unlawfully assaulting him—was some evidence in the record that, if believed, showed that if Mitchell was guilty, he was guilty only of misdemeanor assault for striking Adams while Adams was *not* lawfully discharging an official duty. But Mitchell's testimony, if believed, does not raise evidence that he was guilty only of misdemeanor assault. Rather, if believed, his testimony calls for an acquittal as he denied striking Adams at all.[11]

The court of criminal appeals has held that a defendant's own testimony that he committed no offense, or testimony which otherwise shows that no offense occurred at all, is not adequate to raise the issue of a lesser-included offense. *Id.* at 652. In *Lofton*, as in the present case, the defendant was charged with assault on a public servant for striking an officer in the face. *Id.* at 649, 651. The defendant testified in his own defense and denied touching any officers, stating that he had done nothing wrong. *Id.* at 651. On appeal, the defendant complained that the trial court erred in not submitting an instruction to the jury on a lesser-included offense of resisting arrest. *Id.* The court of criminal appeals rejected this argument, noting that the evidence must establish that, if the defendant was guilty, he was guilty

[11] Mitchell also denied resisting arrest.

only of a lesser-included offense, and that a charge on a lesser-included offense was not required when a defendant denied committing any offense and there was no other evidence that, if guilty, he was guilty *only* of the lesser-included offense. *Id.* The court of criminal appeals observed that, under the facts as presented in that case, resisting arrest was not a rational alternative to assault on a public servant because if Mitchell's testimony was believed, there was no offense committed at all. *Id.* at 652.

Similarly, if Mitchell's (or his wife's) testimony was believed by the jury, the proper verdict would have been acquittal. Mitchell's testimony (and his wife's) did not, if believed, establish that he was guilty only of a lesser-included offense. In fact, both denied the existence of necessary elements of either resisting arrest (preventing or obstructing officer and using force against the officer) or misdemeanor assault (causing bodily injury). If believed, their testimony established the existence of no offense at all. Accordingly, the trial court would not have been required to provide an instruction to the jury on either misdemeanor assault or resisting arrest. *See id.*; *Martin v. State*, 246 S.W.3d 246, 267 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (concluding that, in capital murder case, charge on lesser-included offense of injury to a child was not required when defense was that defendant committed no acts of violence against child). As trial counsel's failure to request jury charges to which Mitchell was not entitled did not

fall below an objective standard of reasonableness, based on prevailing professional norms, it does not meet the first prong of *Strickland*.

2. Failure to object to certain statements and evidence and to request a limiting instruction

Mitchell further complains that his trial counsel was ineffective by not objecting to:

(1) testimony from Guedry that Mrs. Mitchell was screaming and cursing at the time of the confrontation;

(2) testimony that Mrs. Mitchell had filed a complaint against the deputies alleging that the deputies had beat her husband or wrongfully taken him to jail;

(3) a question by the State to one of the deputies, asking the witness if he was aware of a complaint being filed by Mrs. Mitchell against him and other deputies; and

(4) testimony from Lawrence and Adams that Mrs. Mitchell was using profane language when attempting to get by them and to her house.

Mitchell argues that these statements and question were inadmissible hearsay, evidence of extraneous criminal conduct inadmissible under Rule 404(b), and irrelevant, or, if relevant, their probative value was substantially outweighed by the danger of unfair prejudice. Mitchell argues that the failure to object to this testimony and question on those grounds, and to request a limiting instruction for "extraneous conduct," constitutes ineffective assistance of counsel.

We first note that the statements in question, in light of the record, were

neither inadmissible hearsay nor (apart from Mrs. Mitchell's screaming and cursing) extraneous conduct precluded under Rule 404(b). Neither the description of Mrs. Mitchell's screams and curses nor her allegations in her complaint against the deputies were hearsay as none were offered for the truth of the matter asserted—which the deputies denied—but rather simply to show her actions, allegations, and complaints against the deputies. *See* TEX. R. EVID. 801(d) (defining hearsay as out-of-court statement "offered in evidence to prove the truth of the matter asserted"). The *question* posed to the deputy by the State was likewise not hearsay. *Id.* Similarly, the *question* asked and the testimony that a complaint was filed was not "extraneous conduct" *offered to prove that Mitchell acted in conformity with such conduct* on the occasion of the assault, and therefore were not governed by the provisions of Rule 404(b). *See* TEX. R. EVID. 404(b) (providing that evidence of other crimes, wrongs or acts is "not admissible to prove the character of a person in order to show action in conformity therewith.") (emphasis added). While Mrs. Mitchell's cursing and yelling could be considered extraneous conduct under Rule 404(b), *see Castlado v. State*, 78 S.W.3d 345, 349 (Tex. Crim. App. 2002) (holding that scope of 404(b) extended to acts by third party offered to prove defendant's propensity to act in conformity with acts of third party), here such evidence was not offered to show that Mr. Mitchell acted in conformity with his wife's cursing and yelling, but to show the context of the

crime. *See Mann v. State*, 718 S.W.2d 741, 744 (Tex. Crim. App. 1986) (holding that extraneous offenses which are evidence of context of charged offense are almost always admissible because offenses do not occur in a vacuum). Such evidence was relevant here to describe the scene and context of the alleged offense and its probative value was not substantially outweighed by its prejudicial effect, particularly considering the substantial evidence of Mr. Mitchell's own yelling and use of profanities.

Similarly, the evidence of Mrs. Mitchell's complaints against the deputies was relevant, particularly to the *defense*, who was asserting that the deputies committed misconduct and that the Mitchells were the victims, not Adams. The fact that Mrs. Mitchell had lodged official complaints corroborated the Mitchells' statements that they believed that they had been mistreated by the deputies and had complained about the mistreatment from the night of the confrontation forward, was not prejudicial to Mr. Mitchell; indeed it was a component of his trial defense. The deputies were questioned in some detail about reprimands recommended or received by them resulting from the investigation into Mrs. Mitchell's complaints (for failing to use recorders at the scene in violation of departmental policy and ethics manual). Mr. Mitchell used this evidence at trial, ultimately suggesting to the jury in closing argument that the deputies' testimony was not credible because officers had either purposefully failed to turn on any audio or video recorders, or

had turned them on but claimed they had not because the recordings would have been harmful to the deputies. Finally, while Mitchell does not specify the limiting instruction that he asserts should have been requested at trial, he presumably refers to the traditional "404(b)" limiting instruction that the jury must believe that the extraneous conduct occurred beyond a reasonable doubt before using it against Mitchell. However, as none of the statements or questions complained of was limited by Rule 404(b), no such instruction was warranted.[12]

This record does not support Mitchell's contentions that his counsel's failure to object to these statements, questions, or request instructions was conduct that fell below an objective standard of reasonableness, based on prevailing professional norms.

3. Deprivation of counsel at critical stage of proceedings

Mitchell also argues that he was deprived of counsel during the critical period of time in which a motion for new trial could have been filed and argues that his appeal should be abated and the case remanded to the trial court to restart appellate timetables. *See Ward v. State*, 740 S.W.2d 794, 800 (Tex Crim. App. 1987) (en banc) (holding that when defendant is deprived of effective counsel during period for filing motion for new trial, remedy is to abate appeal and reset appellate guidelines).

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[12] We further note that Mrs. Mitchell admitted to "yelling and cussing", thus negating any dispute as to its occurrence.

Mitchell acknowledges that a presumption exists that he was represented by counsel during that time period and that counsel acted effectively[13], but argues that he has overcome the presumption by the fact that no motion for new trial was filed and based on counsel's affidavit[14] attached to post-trial motions filed with this Court to abate and extend appellate timetables pursuant to Texas Rule of Appellate Procedure 2(b). Mitchell alleges that, although his retained trial counsel did not actually withdraw from his representation in the trial court, he was effectively abandoned by his trial counsel, causing him to be deprived of effective counsel during the period in which a motion for new trial could have been filed. Mitchell does not assert any specific claims that he would have raised in a motion for new trial, but suggests that a motion for new trial would have aided him in developing a record which would allow him to raise additional contentions on appeal.

We note first that we may not abate this appeal pursuant to Rule 2(b). *Oldham*, 977 S.W.2d at 359–60 (prohibiting use of Rule 2(b) to abate appeal and allow out-of-time motion for new trial). We further observe, that, like the

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[13] *See Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998) (holding that rebuttable presumption exists that, when trial counsel does not withdraw and is not replaced by new counsel after sentencing, defendant continues to be represented by trial counsel during the period within which motion for new trial could have been filed and that counsel acted effectively).

[14] In the affidavit, trial counsel stated that he advised Mitchell that he would file a notice of appeal for him and Mitchell could hire an appellate lawyer to file a motion for new trial who would have up to 30 days to do so. Mitchell also attached other affidavits by family members in a similar vein to motions in this Court.

appellant in *Oldham*, Mitchell has failed to direct us to any specific grounds that he alleges that he could not raise on appeal because he did not first file a motion for new trial, though he notes, in general, that motions for new trial "have been used primarily" for claims of newly discovered evidence or jury misconduct and are "helpful for developing evidence" of ineffective assistance of counsel.

The record indicates that Mitchell's retained trial counsel filed two notices of appeal, the second, filed during the 30-day time period in which a motion for new trial could have been filed, recites trial counsel's assurance to the trial court that "he will continue to represent the defendant on appeal." There was no request for the appointment of counsel on appeal. Under *Oldham*, neither the appellate record nor the post-trial affidavits before us fails to overcome the presumption that Mitchell was effectively represented by counsel during that period.[15] *See id.* at 363; *See also Green v. State*, 264 S.W.3d 63, 71 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *Benson v. State*, 224 S.W.3d 485, 497–98 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

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[15] Mitchell's trial counsel's affidavit specifically suggests that he gave erroneous advice to Mitchell that he could still file a motion for new trial and that, by filing Mitchell's notice of appeal, he somehow deprived Mitchell of the opportunity to file a motion for new trial. However, trial counsel advised Mitchell correctly, and counsel's filing of the notice of appeal did not deprive Mitchell of his right to file a motion for new trial within 30 days as trial counsel had advised Mitchell that he could do. *See McIntire v. State*, 698 S.W.2d 652, 657 (Tex. Crim. App. 1985) (holding that notice of appeal filed prior to filing of timely motion for new trial does not deprive trial court of jurisdiction to rule on timely filed motion for new trial).

Furthermore, even if Mitchell was deprived of counsel in this critical period, he has failed to establish harm by presenting "facially plausible claims" to the appellate court that could have been presented in the motion for new trial. *See Cooks v. State*, 240 S.W.3d 906, 911–12 (Tex. Crim. App. 2007). Conclusory allegations as to trial counsel's ineffectiveness in general ways (such as failing to call a material witness or failing to conduct a proper investigation) are insufficient to establish the necessary evidence or information that counsel would have presented at the motion for new trial that reasonably could have changed the results of the case. *Id.* Here, Mitchell has not, in either his brief or his Motion to Abate,[16] urged any specific claim or evidence that he would have presented at a motion for new trial, or how such evidence would have caused the outcome of the case to be different (i.e., resulted in an acquittal or lesser sentence) or would have permitted him to raise, and us to consider, specific issues which could not otherwise be raised or considered on appeal. Accordingly, appellant failed to meet his burden to establish harm. *See id.*; *Thomas v. State*, 286 S.W.3d 109, 115 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (holding that defendant must show harm from gap in representation in critical phase and where appellant offers no explanation of how harmed, for example, by showing what arguments he would have made on

[16] In his brief, as noted, appellant mentions no specific evidence that he would have presented at a motion for new trial. In his motion to abate, appellant likewise does not specify the evidence that he would have put on the record in a motion for new trial nor explained how that would have changed the outcome of the case.

appeal that he was prohibited from making as a result of failure to file motion for new trial, any error in deprivation of counsel was harmless); *Mashburn v. State*, 272 S.W.3d 1, 5 (Tex. App.—Fort Worth 2008, pet. ref'd) (holding that, when appellant did not say what issues he would have raised on appeal that were not preserved by motion for new trial, and no issues in brief were barred from consideration by failure to be properly raised in motion for new trial, appellant was not entitled to abatement of case for purpose of filing motion for new trial).

We overrule appellant's issues one through six.

Conclusion

We affirm the judgment of the trial court. All pending motions are denied as moot.

Jim Sharp
Justice

Panel consists of Justices Jennings, Higley, and Sharp.

Justice Jennings, concurring in judgment only.

Do not publish. TEX. R. APP. P. 47.2(b).