**Opinion issued January 13, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00026-CR**

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**ANTHONY DEWAYNE LESTER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 56th Judicial District Court**
**Galveston County, Texas**
**Trial Court Case No. 08CR0840**

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## MEMORANDUM OPINION

A jury found appellant, Anthony Dewayne Lester, guilty of the offense of intoxication manslaughter[1] with a deadly weapon and assessed his punishment at confinement for twelve years and a fine of $10,000. In five points of error,

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[1] *See* TEX. PENAL CODE ANN. § 49.08 (Vernon Supp. 2010).

appellant contends that the evidence is factually insufficient to support his conviction and the trial court erred in restricting his voir dire examination, admitting evidence regarding a blood sample taken from him, violating "the Rule,"[2] and denying his new-trial motion, in which he asserted his trial counsel had provided him ineffective assistance.

We affirm.

## Background

Kyle Zunker testified that at approximately 11:00 p.m. on August 15, 2007, he, while driving his car east on Highway 646, noticed a silver Honda traveling east "normally down the road" in front of him. After he explained that 646 is a two-lane road, which is not divided by a center lane or median, Zunker noted that he saw a white Lexus traveling west in the lane of oncoming traffic. "[R]ight before the white Lexus was about to pass the silver Honda, it crossed over into the lane that the silver Honda was in," and collided with the Honda. Zunker described the movement of the Lexus as "very sudden," "a sudden jolt," and it entered the lane of oncoming traffic "at the last possible second." After Zunker stopped his car and called for emergency assistance, he approached the Lexus from a distance. He believed that the driver was unconscious, but he did not get close enough to look inside the car at the driver.

[2] *See* TEX. R. EVID. 614.

Houston Police Officer S. Antley testified that on August 15, 2007, he was dispatched to the scene of the collision. When he arrived, Antley saw a gray Honda, "stationary in the middle of the road" facing northeast, and appellant's car, a white Lexus, "on the grassy part off the roadway facing north." The Honda was in "pretty bad" condition, as the "front end had been pushed all the way in" to the passenger compartment. The complainant, Donna Banduch-Lawson, was "pinned in by the engine," and Antley was unable to remove her from the car. Antley then approached the Lexus where he saw appellant "slumped over in the driver's seat" and vomit "splattered all across the front windshield." He detected a "very strong odor of alcoholic beverage" and noted that appellant was "conscious, but not alert," and he "kept trying to move" and "mumble something." An emergency medical technician, who inserted a breathing tube for appellant, informed Antley that he could "smell the alcoholic beverage coming out of the tube." Antley then interviewed Zunker about his observation of the collision. Based on the "position of the vehicles" and what Zunker had told him, Antley explained that "a combination of things" led him to believe that appellant had "lost the normal use of his mental and physical faculties" and this caused the collision.

Later that night, Officer Antley picked up a blood sample kit from a police station and went to Memorial Hermann Hospital, where emergency services personnel had taken appellant. Although appellant was unconscious and unable to

respond to his request, Antley read to appellant the statutory warnings that peace officers are required to read to all persons arrested for driving while intoxicated[3] and he requested a specimen of appellant's blood. Antley noted on the appropriate form that, "Subject refused to allow the taking of a specimen and further refused to sign below as requested by this officer." Antley then requested that a nurse draw appellant's blood, and, after obtaining the specimen, Antley sealed it in a container, signed the container, and transported it to the police station for submission to a crime lab for analysis.

Claire Flosi, a registered nurse at Memorial Hermann Hospital, testified that on August 16, 2007, she was the nurse on record for appellant. She explained that, as a matter of routine, she drew blood from appellant for a preliminary examination, and although she drew the blood, she did not provide any test results to Officer Antley because that is "clearly" a violation of the Health Insurance Portability and Accountability Act ("HIPAA").[4] Officer Antley presented paperwork to Flosi for a "mandatory blood draw for law enforcement purposes," and she drew the blood in a "sanitary" place and gave a vial of blood to Antley.

Robert Prince, a Texas Department of Public Safety forensic scientist, testified that he received the vial containing appellant's blood, performed an

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[3] *See* TEX. CODE CRIM. PROC. ANN. art. 49.02 (Vernon 2006).

[4] *See* 29 U.S.C. § 1181.

analysis on the blood sample, and determined that appellant's blood-alcohol concentration was 0.21. The trial court instructed the jury that the results of Prince's test were "for the limited purpose of showing that the individual who was tested had ingested alcohol only at some point before the time of the test."

**Sufficiency of the Evidence**

In his fifth point of error, appellant argues that the evidence is factually insufficient to support his conviction because the "trial is replete with inconsistencies and errors on behalf of the police investigation and falls short" of proof beyond a reasonable doubt.

We now review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency. *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] November 10, 2010, no pet. h.) (citing *Brooks v. State*, 323 S.W.3d 893, 901 (Tex. Crim. App. 2010)). Under this standard, we are to examine "the evidence in the light most favorable to the prosecution" and determine whether "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 442 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979). Evidence is insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982).

A person commits the offense of intoxication manslaughter if the person: (1) operates a motor vehicle in a public place; (2) is intoxicated; and (3) by reason of that intoxication causes the death of another by accident or mistake. TEX. PENAL CODE ANN. § 49.08 (Vernon Supp. 2010).

In support of his sufficiency challenge, appellant emphasizes the evidence contrary to the verdict. He notes that Zunker did not testify as to the smell of alcohol from appellant's car, nor did he testify as to "anything that would lead him to believe that alcohol was involved in the accident." Appellant further notes that another officer at the scene did not detect any odor of alcohol coming from appellant's car. He points to the fact that the "black box" in his car was never retrieved, even though it could record data immediately prior to a crash. Appellant asserts that another officer made a clerical error when he noted that the "road-way was dry when Officer Antley had indicated it was wet." And he asserts that the evidence, "taken as a whole," is "replete with inconsistencies and errors on behalf of the police investigation and falls short" of proof beyond a reasonable doubt.

However, we are to now only to examine "the evidence in the light most favorable to the prosecution." *Ervin*, 2010 WL 4619329, at *2. Here, Zunker testified that he saw appellant's car cross over into the lane of oncoming traffic "at the last possible second" and the complainant's car was driving normally. Officer Antley and the emergency medical technician both observed the smell of alcohol

coming from appellant. Antley explained that "a combination of things" led him to believe that appellant had "lost the normal use of his mental and physical faculties" and this caused the collision. Further, Antley explained the process of obtaining a blood sample from appellant and the results of a blood test indicated that appellant was intoxicated at the time of the collision.

After reviewing all of the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense of intoxication manslaughter beyond a reasonable doubt. *See Ervin*, 2010 WL 4619329, at *2. Accordingly, we hold that the evidence is sufficient to support the jury's finding of guilt.

We overrule appellant's fifth point of error.

**Voir Dire Examination**

In his first point of error, appellant argues that the trial court erred in denying him "sufficient time" to "adequately voir dire the [j]ury" on the State's burden of proof because it "placed an undue constraint" on his ability to "intelligently exercise his preemptory challenges thereby denying him his right to a trial by a truly fair and impartial jury."

Texas trial courts have broad discretion over the jury-selection process. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). A trial court may impose reasonable restrictions on the exercise of voir dire examination, including

reasonable limits on the amount of time each party may question a venire panel. *Wappler v. State*, 183 S.W.3d 765, 772 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). We review a trial court's restriction of voir dire examination for an abuse of discretion. *Barajas*, 93 S.W.3d at 38. Absent an abuse of discretion, we will not reverse the trial court's refusal to allow defense counsel additional time to question the venire panel. *McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992); *Smiley v. State*, 129 S.W.3d 690, 696 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

A trial court may not prohibit defense counsel from asking proper voir dire questions. *Rhoades v. State*, 934 S.W.2d 113, 118 (Tex. Crim. App. 1996). When a defendant complains that he was not allowed to question the venire collectively, we determine whether (1) he attempted to prolong the voir dire by asking questions that were irrelevant, immaterial, or unnecessarily repetitious and (2) the questions he was not permitted to ask were proper voir dire questions. *McCarter*, 837 S.W.2d at 119. When a defendant's voir dire examination was terminated as he attempted to question venire members individually, we determine whether he was prevented from examining a prospective juror who actually served on the jury. *Id.*; *Ratliff*, 690 S.W.2d at 600.

Here, the trial court began voir dire by instructing the jury on the State's burden of proof. Appellant's trial counsel was then given the opportunity to

discuss, at length, the various burdens of proof, and he explained that "beyond a reasonable doubt" is the highest burden. He asked the venire panel if anyone on it had "any concerns with [his] explanation for what beyond a reasonable doubt" means. After examining the venire panel for one hour and three minutes, counsel informed the court that he was "wrapping up," but he continued questioning the panel. He then attempted to return to the issue of the State's burden of proof as follows:

> [Trial Counsel]: Second concept that I didn't do a good enough job teaching y'all was the burden of proof. Who has the burden of proof, me or the prosecutor? Okay. So if you define those two concepts, okay, and no evidence has been shown to you whatsoever, zero, No. 1, how would you —
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> [Venire Member]: Not guilty.
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> [Trial Court]: We need to move along. We've asked these questions a couple of times. So, unless you have a new question.
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> [Trial Counsel]: I don't have a new question, but I do feel that the jury members as a whole demonstrated that they didn't understand the concepts based upon their answers. So, I'm requesting a little bit of time to clarify.
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> [Trial Court]: No, Sir.
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> [Trial Counsel]: That's all I have. But the concepts are —

[Trial Court]: No, Sir.

[Trial Counsel]: [Appellant] as he sits before you right now here today is not guilty. Thank you.

Immediately thereafter, the State and appellant's trial counsel approached the bench in order to make their strikes for cause. Trial counsel did not make a bill of exception and did not make any objections after the jury was selected.

In order to preserve his complaint for our review, appellant must show that the trial court prevented him from asking *particular* proper questions. *Sells v. State*, 121 S.W.3d 748, 755–66 (Tex. Crim. App. 2003); *Mohammed v. State*, 127 S.W.3d 163, 170 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). That the trial court generally disapproved of an area of inquiry from which proper questions could have been formulated is not enough for us to determine error because the trial court might have allowed a proper question had it been submitted for the court's consideration. *Id.*; *see* TEX. R. APP. P. 33.1(a)(1)(A). To preserve error for review, an appellant must make the trial court aware of any objections or complaints at a time when there is an opportunity for the trial court to cure or respond to the complaints. *Loredo v. State*, 159 S.W.3d 920, 923 (Tex. Crim. App. 2004). Here, although appellant requested more time to "clarify" the State's burden of proof, he did not inform the trial court of any questions he wanted to ask. *See Dhillon v. State*, 138 S.W.3d 583, 590 (Tex. App.—Houston [14th Dist.] 2004,

no pet.). Accordingly, we hold that appellant failed to preserve his complaint for review. *See Mohammed*, 127 S.W.3d at 170.

We overrule appellant's first point of error.

**Admission of Blood Sample**

In his second point of error, appellant argues that the trial court erred in admitting evidence regarding his blood sample because Nurse Flosi did not provide specific evidence about the "sanitary area" in which she drew appellant's blood and the "blood draw" was illegal due to a "lack of probable cause and violation of HIPAA."

The State argues that appellant has waived any review of the trial court's admission of evidence regarding appellant's blood test on the ground that there is no proof that the test was conducted in a "sanitary" area. To preserve error for appellate review, a timely and reasonably specific objection is required. TEX. R. APP. P. 33.1(a); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). The argument made on appeal must correspond with the objection made to the trial court; an appellant cannot object based on one legal theory at trial and use this objection to support another legal theory on appeal. *Broxton*, 909 S.W.2d at 918; *see also Hailey v. State*, 87 S.W.3d 118, 122 (Tex. Crim. App. 2002) (holding that violation of "ordinary notions of procedural default" occurs when court of appeals reverses trial court's decision based on error raised for first time on appeal).

During trial, appellant argued that evidence regarding his blood sample should have been suppressed because "Officer Antley did not have probable cause for the request." Appellant's argument on appeal that the State did not prove that his sample was taken in a "sanitary" area bears no resemblance to the ground he presented to the trial court. *See Hailey*, 87 S.W.3d 120. Accordingly, appellant has waived any error on the ground that his blood was not drawn in a sanitary area. *See id.*

In regard to his argument that the trial court erred in denying his motion to suppress evidence on the ground that Officer Antley did not have "probable cause for the request," appellant asserts that Antley, prior to the blood draw, obtained information from someone at Memorial Hermann Hospital about his blood-alcohol concentration "in violation of the HIPAA laws" and "this illegally obtained information . . . formed part of the basis" for the probable cause needed in order to draw blood.

The appropriate standard for reviewing a trial court's ruling on a motion to suppress evidence is bifurcated; we give almost total deference to a trial court's determination of historical facts and review *de novo* the court's application of the law. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). In reviewing a ruling on a question of the application of law to facts, we review the evidence in the light most favorable to the trial court's ruling. *Guzman v. State*, 955 S.W.2d

85, 89 (Tex. Crim. App. 1997). However, we review *de novo* the trial court's determination of reasonable suspicion and probable cause. *Id.* at 87. We note that at a suppression hearing, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility. *Maxwell*, 73 S.W.3d at 281. Accordingly, the trial court may choose to believe or to disbelieve all or any part of a witness's testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

A peace officer may obtain a blood specimen from an individual involuntarily if: (1) there was a life-threatening accident; (2) the defendant was arrested for an intoxication offense under Chapter 49 of the Texas Penal Code[5]; and (3) the arresting officer reasonably believed that the accident occurred as a result of the offense. TEX. TRANSP. CODE ANN. § 724.012(b) (Vernon Supp. 2010); *Badgett v. State*, 42 S.W.3d 136, 138 (Tex. Crim. App. 2001). Moreover, a blood specimen may be obtained from a person who is dead, unconscious, or otherwise incapable of refusal. *Id.* § 724.014 (Vernon 1999). An arresting officer's belief must be based upon specific and articulable facts regarding causation. *Badgett*, 42 S.W.3d at 139. Such an articulable belief may result from any number of factors, including but not limited to, witness interviews, conclusions drawn from experience in combination with observation of an accident scene, or determinations made by an accident reconstruction team. *Id.*

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[5] Chapter 49 includes the offense of intoxication manslaughter. *See* TEX. PENAL CODE ANN. § 49.08.

In his motion to suppress evidence, appellant asserted that Officer Antley "indicated that he had no basis to believe that [appellant] had loss of normal use of his mental faculties[,] he had no basis to believe that [appellant] had lost normal use of his physical faculties," and "he had no basis to believe that the accident was caused in any way, shape or form in part by intoxication." In support of this argument appellant relies on *Badgett*.

In *Badgett*, the Texas Court of Criminal Appeals reversed a court of appeals holding that section 724.012(b) "did not require law enforcement personnel to possess specific evidence that an intoxicated defendant was at fault in causing an accident before a blood specimen can be taken involuntary, but that merely an accident involving an intoxicated driver is sufficient." *Id.* at 137. The officer performed a field sobriety test on the defendant, and, believing he was intoxicated, placed him under arrest. *Id.* The officer testified that, based on his experience, he believed that the defendant could have been at fault for the accident because he was intoxicated. *Id.* At the time the defendant was arrested, the accident reconstruction team had not yet determined that the defendant was at fault. *Id.* The officer did not speak to any witnesses about the accident, and he had little knowledge about the facts surrounding the accident. *See id.* The Texas Court of Criminal Appeals concluded that something more than the "bare occurrence of an

accident and an intoxication-offense arrest" is required before the State may make a "seizure as intrusive as the involuntary drawing of blood." *Id.* at 140.

Here, in contrast, there is evidence that appellant was intoxicated at the time of the collision. Officer Antley and the emergency medical technician noticed the strong odor of alcohol coming from appellant's breath, a witness testified to appellant's erratic driving, and vomit was present in appellant's car. Zunker, an eyewitness to the collision, informed Officer Antley that he saw appellant drive his car into the lane of oncoming traffic "at the last possible second." He described the movement of appellant's car as "very sudden," and noted that the complainant did not swerve from her lane. Officer Antley opined that the collision was caused by appellant's intoxication at the time he requested the blood draw based on Zunker's description of the collision, the "odor of alcohol" coming from appellant, the vomit on the windshield of appellant's car, the emergency medical technician's confirmation that he smelled alcohol on appellant's breath, and the position of the vehicles. Accordingly, appellant's reliance on *Badgett* is misplaced.

Appellant further asserts that "Officer Antley in his attempt to secure a legal blood draw got information illegally from the nurse prior to securing the blood." However, Antley testified that he made his decision to obtain a blood sample "based solely on the information that [he] had at the time," and Nurse Flosi testified that she did not provide appellant's medical information to Officer Antley

prior to the blood draw because it is "clearly" a HIPAA violation. The trial court was the sole fact finder, and it was free to choose to believe Antley and Flosi's testimony. *See Ross*, 32 S.W.3d at 855. Accordingly, we hold that the trial court did not err in denying appellant's motion to suppress evidence and in admitting evidence regarding his blood sample.

We overrule appellant's second point of error.

**The Rule**

In his third point of error, appellant argues that the trial court erred in "allowing" Lawson, the husband of the complainant, to "remain in the courtroom" after testifying, "with the understanding . . . that the State was going to re-call him during the punishment phase of the trial" because "the Rule" had been invoked. *See* TEX. R. EVID. 614.

The purpose of rule 614 is to prevent the testimony of one witness from influencing the testimony of another. *Russell v. State*, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005); *Phillips v. State*, 64 S.W.3d 458, 459 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Once the rule is invoked, witnesses are instructed by the trial court that they cannot converse with one another or with any other person about the case, except by permission from the court. TEX. CODE. CRIM. PROC. ANN. art. 36.06 (Vernon 2007); *Russell*, 155 S.W.3d at 180. Further, the trial court must exclude witnesses from the courtroom during the testimony of other witnesses.

TEX. R. EVID. 614. However, if a witness violates this rule, the trial court still has discretion to allow testimony from the witness. *Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996). On appeal, the trial court's decision to admit testimony will not be disturbed absent an abuse of that discretion. *Id.*

In reviewing the trial court's decision to allow testimony, we determine whether a defendant was harmed or prejudiced by the witness's violation. *Id.* Harm is established by showing that (1) the witness actually conferred with or heard testimony of other witnesses and (2) the witness's testimony contradicted the testimony of a witness from the opposing side or corroborated testimony of a witness she had conferred with or heard. *Id.*

Appellant invoked the rule prior to any witness testimony. As the State's first witness, Lawson testified that he was married to the complainant on the day of her death, and he identified a photograph of the complainant. After the conclusion of Lawson's testimony, appellant objected to Lawson remaining in the courtroom because the rule had been invoked and Lawson did not fall within any exception. The judge overruled the objection and allowed Lawson to remain in the courtroom. Trial counsel later re-urged the objection and moved to exclude Lawson, noting that trial counsel "noticed that [] Lawson was in the witness waiting room sitting with one of the officers who [he] believe[s] has already testified" but could not say that Lawson was having a conversation with the officer or not. Appellant's

position was that Lawson could have been re-called or called to testify during the punishment stage, and, therefore, he should not have been allowed to listen to the testimony of the other witnesses. The trial court denied appellant's motion and instructed the State to ensure that Lawson did not "talk[] to the other witnesses."

Neither party re-called Lawson during the guilt phase of the trial nor did they call him during the punishment phase. Lawson did not testify as to the events and had no personal knowledge of the details of the collision. Appellant has failed to show that Lawson's testimony contradicted the testimony of a witness from the opposing side or corroborated testimony of a witness he had conferred with or heard. *See id.* Lawson simply testified as to the identity of the complainant. Accordingly, we hold that the trial court did not abuse its discretion in allowing Lawson to remain in the courtroom.

We overrule appellant's third point of error.

**Ineffective Assistance of Counsel**

In his fourth point of error, appellant argues that the trial court erred in denying his new-trial motion because his trial counsel did not adequately inform him of the "legal consequences of certain findings."

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Strickland* generally requires a two-step analysis in which an

appellant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's unprofessional error, there is a reasonable probability that the result of the proceedings would have been different. *Id.* at 687–94, 104 S. Ct. 2064–2068; *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that his performance falls within the wide range of reasonable professional assistance or trial strategy. *Thompson*, 9 S.W.3d at 813. The record must affirmatively support the alleged ineffectiveness. *Id.*

Generally, we review a trial court's denial of a motion for a new trial under an abuse of discretion standard. *Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001). However, the United States Supreme Court has explicitly held that "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698, 104 S. Ct. at 2070; *see also Williams v. Taylor*, 529 U.S. 362, 419, 120 S. Ct. 1495, 1526 (2000) (Rehnquist, C.J., concurring) ("While the determination of 'prejudice' in the legal sense may be a question of law, the subsidiary inquiries are heavily factbound."). Accordingly, "where the trial court 'is not in an appreciably better position' than

the appellate court to decide the issue, the appellate court may independently determine the issue while affording deference to the trial court's findings on subsidiary factual questions." *Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996) (McCormick, P.J., concurring) (citing *Miller v. Fenton*, 474 U.S. 104, 110–17, 106 S. Ct. 445, 450–53 (1985)); *see Kober v. State*, 988 S.W.2d 230, 233 (Tex. Crim. App. 1999). Yet, the trial court remains in the best position to "evaluate the credibility" of the witnesses and resolve such conflicts. *Kober*, 988 S.W.2d at 233; *see Strickland*, 466 U.S. at 698, 104 S. Ct. at 2070. The trial court can choose to believe or disbelieve all or any part of the witnesses' testimony. *See Johnson*, 169 S.W.3d 223, 239–40 (Tex. Crim. App. 2005); *Kober*, 988 S.W.2d at 233.

After trial, appellant filed his new-trial motion, in which he argued that his trial counsel had provided him ineffective assistance because counsel had failed to explain the consequences of the jury's affirmative finding that he had used a deadly weapon in committing the offense. At the hearing on his motion, the trial court received as evidence appellant's testimony and the affidavit of his trial counsel. Appellant testified that "only after the jury sent a note back to the court concerning a deadly weapon did [trial counsel] say to [appellant] that 'this is just a formality, it doesn't mean anything.'" Appellant explained that had he known the consequences of a deadly weapon finding he "could have made a more informed

decision" and he would have accepted the District Attorney's plea bargain offer of confinement for eight years.

In his affidavit, appellant's trial counsel testified that appellant "repeatedly declined to consider or request the case be negotiated to any term of imprisonment" and that appellant "consistently indicated he would only agree to a plea of guilty without trial if the agreed punishment provided community supervision." He further explained that he reviewed the indictment with appellant, advised him that a finding that a deadly weapon had been used during the commission of the offense would make him ineligible for consideration of parole until he served at least one-half of his sentence in prison, and advised him that without an affirmative finding of deadly weapon, he would be eligible for parole when he served twenty-five percent of his sentence. Counsel further advised appellant that if found guilty of intoxication manslaughter by a jury, the jury would almost certainly make an affirmative finding that a deadly weapon had been used during the commission of the offense. Counsel also stated that the State had offered appellant a plea offer of confinement for eight years and appellant "quickly rejected this offer."

A failure by trial counsel to advise a criminal defendant about legal concepts that may affect his decision to accept or reject a plea offer can constitute deficient performance. *See Ex parte Battle*, 817 S.W.2d 81, 84 (Tex. Crim. App. 1991); *Ex*

*parte Gallegos*, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974). Here, however, the testimony of appellant and his trial counsel conflict regarding counsel's discussions with appellant about the consequences of a deadly weapon finding and why appellant rejected the State's plea offer of confinement for eight years. The trial court, as fact finder, was the sole judge of the credibility of the testimony of appellant and his trial counsel and the weight to be given to their testimony, and it could have rejected appellant's testimony and accepted that of counsel. *See Johnson*, 169 S.W.3d at 239–40; *Kober*, 988 S.W.2d at 233. Consequently, the trial court could have concluded that trial counsel did discuss with appellant the consequences of an affirmative finding of a deadly weapon. The trial court could have further concluded that appellant was not willing to take a plea offer involving any term of imprisonment. In sum, the trial court could have reasonably concluded that appellant rejected the State's plea offer, not because trial counsel failed to adequately explain pertinent legal concepts to him, but because the State did not offer community supervision. Accordingly, we hold that appellant did not establish that his trial counsel's performance fell below an objective standard of reasonableness and the trial court did not err in denying appellant's new-trial motion. *See Strickland*, 466 U.S. at 687–94, 104 S. Ct. 2064–2068; *Thompson*, 9 S.W.3d at 813.

We overrule appellant's fourth point of error.

## Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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