Opinion issued November 10, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00217-CR

JULIO CESAR CARRASQUILLO, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case No. 1242807

MEMORANDUM OPINION

A jury convicted Julio Cesar Carrasquillo of the felony offense of unauthorized use of a motor vehicle. *See* TEX. PENAL CODE ANN § 31.07(a) (West 2009). Carrasquillo pleaded true to two enhancements paragraphs, and the trial court assessed punishment at ten years' confinement and a $10,000 fine. On appeal, Carrasquillo

contends that (1) he received ineffective assistance of counsel in violation of his constitutional rights, as recognized in *Strickland v. Washington*; and (2) the evidence is insufficient to support his conviction. We hold that the Carrasquillo failed to meet his *Strickland* burden to demonstrate that his trial counsel performed deficiently and that sufficient evidence supports his conviction. We therefore affirm.

Background

One evening in November of 2009, Alicia Elliott went alone to a club near downtown Houston. She drove her 1999 Chevrolet Tahoe and parked it on a side street. Unsure about whether she was permitted to park there, she confirmed with a bystander that it would not be a problem. Elliott laced her car key through one of her shoelaces and tied it tightly to her shoe. She left her wallet and other valuables inside the car and entered the club. After some time at the club, she decided that she had too much to drink and decided not to drive. Instead, she rode with some acquaintances to their home. Elliott still had her car key attached to her shoe.

The next day, she went to retrieve the Tahoe and discovered it was missing. Elliott saw broken glass where her truck had been. A bystander told Elliott that someone had broken into her truck and that it had been towed. Elliott searched nearby impound lots without success. She did not file a missing vehicle police report.

A few days later, Officer T. Morgan of the Humble Police Department observed a paper fly out of the front passenger-side window of a passing truck. Because he already had someone in custody in his patrol car, Officer Morgan called for another officer to stop the truck and cite the passenger for littering. While waiting for backup, Officer

Morgan ran a search of the truck's license plates through the dashboard computer, and discovered that they were unregistered Kansas plates.

Officer W. Domilos responded to Officer Morgan's call. When Officer Domilos saw a truck meeting Morgan's description, Domilos switched on his emergency lights and dashboard camera. The truck exited the freeway, and the driver pulled into a parking lot of a nearby go-cart track. As Officer Domilos approached the passenger side of the vehicle, the passenger bolted from the truck and ran away. Officer Domilos called for assistance. When Officer Morgan heard the call on his radio, he responded. Officer K. Love also responded to the call. Officer Domilos ran after the passenger, but quickly realized he would not be able to catch him. Officer Domilos turned back toward the truck and yelled for the driver to stay there until he returned. At that point, the driver also fled the truck, running in the opposite direction from the passenger. Officer Domilos began to run after the driver. He saw the driver jump from a fifteen-foot embankment into the bayou. Officer Domilos ran up to the edge of the embankment and saw the driver in the water.

Officer Domilos, still on the radio with Officer Morgan, described the driver's location, the direction he was headed, and his appearance. Based on that information, Officer Morgan went to the other side of the bayou to look for the driver. While Officer Morgan still had Officer Domilos on the radio, some bystanders pointed out a dripping-wet man to Officer Morgan. Officer Morgan noted that the man was breathless and wore clothing that matched Officer Domilos' description. Officer Domilos watched

from the other side of the bayou as Officer Morgan arrested the driver, later identified as Julio Cesar Carrasquillo.

Meanwhile, Officer Domilos returned to the abandoned truck. He saw that the front passenger window had been smashed in, and noticed blood inside. He also noted that the key in the ignition was "completely worn, like it would just fit into . . . any tumbler, and it was not the proper key for the vehicle." Officer Love took fingerprint samples from the truck. He noted that the front passenger window had been smashed and saw a pool of blood on the center console. Office Love also found business cards with Alicia Elliott's name on them. He called Elliott and asked her about the truck. After she responded that she did not know where the truck was, Officer Love reported the events of the day. The police impounded the truck with the worn key still inside, but it was later lost. After Elliott recovered the truck, she discovered that her tools, CD player, and other valuables were missing. Elliott denied knowing Carrasquillo or giving anyone permission to use her vehicle.

Discussion

I. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) his counsel's performance was deficient, and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The first prong requires the defendant to show that counsel's performance fell below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Thus,

the defendant must prove objectively, by a preponderance of the evidence, that his counsel's representation fell below professional standards. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). The second prong requires the defendant to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *see also Thompson*, 9 S.W.3d at 812. In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that the attorney's performance falls within the wide range of reasonable professional assistance or trial strategy. *Thompson*, 9 S.W.3d at 813. Furthermore, a claim of ineffective assistance must be firmly supported in the record. *Id.* Where the record does not offer an explanation for trial counsel's actions, we presume that counsel made all significant decisions in the exercise of reasonable professional judgment. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *Broussard v. State*, 68 S.W.3d 197, 199 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

A. Failure to object to hearsay

Carrasquillo first claims that his trial counsel was deficient in failing to object to Officer Morgan's hearsay testimony. Officer Morgan told the jury that anonymous bystanders verbally had identified Carrasquillo to him as the man fleeing from the bayou. Carrasquillo contends that these bystander identifications are inadmissible hearsay, and it thus was deficient for defense counsel to fail to object to them.

Carrasquillo did not allege ineffective assistance in a motion for new trial, so his trial counsel had no opportunity to explain the complained-of conduct. Although a

motion for new trial is not a prerequisite to a successful ineffective assistance of counsel claim, evidence presented at a motion for new trial hearing may offer insight into defense counsel's motives behind his actions and may rebut the strong presumption of reasonable professional assistance. *Edwards v. State*, 280 S.W.3d 441, 443 (Tex. App.—Fort Worth 2009, pet. ref'd). Trial counsel's closing argument, however, reveals a possible trial strategy. Counsel told the jury that "[n]obody is arguing that Julio Carrasquillo was driving that vehicle," and that he would not "talk down" to them by denying identity, but instead, would focus solely on the issue of whether he had consent to drive it.

The Court of Criminal Appeals has held that an "undoubtedly risky" trial strategy that ultimately does not pay off is not necessarily unacceptable or "wholly unjustified." *See Delrio v. State*, 840 S.W.2d 443, 446–47 (Tex. Crim. App. 1992) (per curiam); *see also Heiman v. State*, 923 S.W.2d 622, 626–27 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (holding that counsel was not ineffective for failing to object to evidence of extraneous offenses because record reflected plausible trial strategy to refrain). Here, trial counsel could have chosen not to contest the issue of identity to lend credit to Carrasquillo's claim of consent. The decision not to object to hearsay evidence that tended to show identity was consistent with this strategy; a challenge to that evidence would have undermined it. Other non-hearsay evidence of identity existed in the Officer Domilos' testimony concerning his radio communication with Officer Morgan, Officer Morgan's first-hand testimony, and in a video of Carrasquillo exiting the driver's seat. Based on the record and the strong presumption that counsel's performance falls within

the wide range of reasonable trial strategy, we hold that Carrasquillo has not satisfied his burden to show that counsel's assistance fell below reasonably professional standards.

B. Confrontation Clause violation

Carrasquillo next complains that he was deprived of his right of confrontation under the United States and Texas Constitutions when his trial counsel failed to object to statements made by unidentified bystanders who saw Carrasquillo's flight and arrest. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. The Federal Confrontation Clause declares: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Crawford v. Washington*, the United States Supreme Court held that the clause bars the admission of testimonial statements made by a witness not present at trial and not subject to cross-examination when the witness is available. 541 U.S. 36, 53–54, 124 S. Ct. 1354, 1365–66 (2004).

The Court has since made clear that this limitation applies only to testimonial statements. *See Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. Whether a statement is testimonial or nontestimonial depends on the surrounding circumstances. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1147 (2011). The determination hinges on the "primary purpose" of the interrogation eliciting the statement. *Id.* The formality with which statements are made and the necessity of those statements to resolve an ongoing

emergency are also significant factors in determining whether a statement is testimonial. *Id.*

Here, the officers were in pursuit of the fleeing driver when Officer Morgan asked the bystanders about whether they had seen a person meeting Carrasquillo's description. They quickly responded to Officer Morgan's question, and he continued his pursuit. The informal nature of their exchanges — à la "Which way did he go?"—suggests that the bystander's responses were necessary to the hot pursuit of a suspect, not a reflective recollection of events to build a court case. *See id.* (holding that dying man's descriptions of shooter and shooter's locations were made to meet an ongoing emergency). We hold that the statements Carrasquillo complains of are not testimonial in nature and thus, their admission did not violate Carrasquillo's rights under the Confrontation Clause. *See id.* at 1167. Counsel's failure to object to them on this ground is not a basis to find ineffective assistance.

C. Failure to investigate or call witnesses

Carrasquillo challenges his trial attorney's failure to locate the bystanders and call them as witnesses. In the context of a claim of ineffective assistance, a criminal defense lawyer has a duty to make an independent investigation of the facts of a case, which includes seeking out and interviewing potential witnesses. *Brennan v. State*, 334 S.W.3d 64, 71 (Tex. App.—Dallas 2009, no pet.). "[A] particular decision by counsel not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 521–22, 123 S. Ct. 2527, 2535 (2003)). A claim of ineffective assistance

of counsel based on counsel's failure to call witnesses fails in the absence of a showing that the witnesses were available to testify and that the defendant would have benefitted from their testimony. *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004).

The record does not reveal whether defense counsel conducted any independent investigation. *See Passmore v. State*, 617 S.W.2d 682, 685 (Tex. Crim. App. [Panel Op.] 1981), *overruled on other grounds by Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988)). Nothing shows that it would have been possible to secure the evidence that Carrasquillo contends could be discovered. *Id.* Nor does the record show whether that evidence would benefit Carrasquillo; the jury saw video footage from the patrol car's dashboard camera showing Carrasquillo exiting the car from the driver's seat. *See Henderson v. State*, 704 S.W.2d 536, 537–38 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd). In light of the reasonable trial strategy of stipulating to identity and focusing solely on the consent issue, counsel may have decided that the bystanders' testimony would not have strengthened the case. The absence of the bystander witnesses, standing alone, does not show ineffective assistance of counsel. *See id.*

D. Improper jury argument

Carrasquillo claims that trial counsel rendered ineffective assistance by failing to object to the prosecutor's improper argument during closing argument. The prosecutor referred to the unnamed witnesses who had identified Carrasquillo as saying, "That's him. That's the guy." In the other, the prosecutor described the key used in the car as "shaved," as opposed to "worn." With respect to the first statement, defense counsel's failure to object was consistent with the reasonable trial strategy of showing consent to

use the vehicle and not to question identity. In contrast, the prosecutor's claim that the key was "shaved," is inconsistent with a consent defense. To show ineffective assistance of counsel for failure to object, however, the defendant also must show that the trial court would have erred in overruling the objection. *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

Proper jury argument generally falls into one of the following areas: (1) summation of the evidence presented at trial; (2) a reasonable deduction drawn from that evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). To determine whether an argument falls into one of these permissible categories, we consider the argument in the context of the entire record. *Klock v. State*, 177 S.W.3d 53, 64 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). Carrasquillo states that the prosecutor, not Officer Domilos, described the key as shaved, and that Officer Domilos described it only as worn. The pertinent testimony follows:

> Q. And you also said something about a shaved key, correct?
>
> A. Yes, the key. Shaved, super worn. Just like our patrol car keys, these fit in all our vehicles because they're cut to a certain way where they'll touch all the tumblers in a sequence to where all our . . . vehicles will open with this. It's also possible to do that with other [non-police] vehicles."
>
> Q. That's not typical for your average civilian vehicle, correct?
>
> A. Correct.

Officer Domilos also testified that the key was not the proper one for the vehicle, and that the average civilian would not possess a key that was worn to the level of the key found in the vehicle.

The trial court would not have abused its discretion in overruling any defense objection to improper argument because the prosecutor fairly summarized Officer Domilos's testimony. Further, Carrasquillo's trial counsel specifically responded to the discrepancy during the defense closing:

> There is a key that is in the ignition. There's a key that the officer says that it was already in the vehicle itself. Now, the prosecution tried to portray it as a shaved key. The officer said "I didn't call it a shaved key. I said that it was a worn key" that could possibly start up any vehicle itself.
>
> . . . .
>
> And if it is so important that this is a shaved key or a worn-down key, isn't it important to have at least photographed the . . . key so that we can have brought that into evidence?

We will not second-guess defense counsel's strategic decision to thoroughly confront the discrepancy in rebuttal instead of objecting during the prosecutor's closing. We hold that Carrasquillo has not met his burden to show that counsel's failure to object to the prosecutor's use of the term "shaved" was unreasonable under *Strickland*.

II. Evidentiary sufficiency

A. Standard of review

This Court reviews legal and factual sufficiency challenges using the same standard of review. *Ervin v. State*, 331 S.W.3d 49, 54 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (construing holding of *Brooks v. State*, 323 S.W.3d 893, 912, 926 (Tex. Crim. App. 2010)); *see also Griego v. State*, 337 S.W.3d 902, 903 (Tex. Crim. App.

2011). Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found each essential element of the charged offense proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750. Additionally, the evidence is insufficient if the acts alleged do not constitute the criminal offense charged. *Williams*, 235 S.W.3d at 750.

An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). We treat direct and circumstantial evidence as equally probative; circumstantial evidence alone can be sufficient to establish guilt. *Id.* An appellate court presumes that the fact finder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778.

An appellate court also defers to the fact finder's evaluation of the evidence's credibility and weight. *See Williams*, 235 S.W.3d at 750.

B. Analysis

A person commits unauthorized use of a motor vehicle if he "intentionally or knowingly operates another's . . . motor-propelled vehicle without the effective consent of the owner." TEX. PENAL CODE ANN. § 31.07(a) (West 2003). An officer's testimony that a defendant exited the driver's side of a vehicle is sufficient to prove intentional or knowing operation. *Duenez v. State*, 735 S.W.2d 563, 566 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd). Evidence that the driver fled from the stopped vehicle supports a reasonable inference of unauthorized use. *See Middlebrook v. State*, 803 S.W.2d 355, 360 (Tex. App.—Fort Worth 1990, pet. ref'd). Further, the complainant's testimony alone is enough to prove lack of consent. *Battise v. State*, 264 S.W.3d 222, 227 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd).

Carrasquillo contends that his possession of the key to Elliott's motor vehicle equates to actual or implied consent to its use. Texas law does not bear out this contention. *See Caro v. State*, 771 S.W.2d 610, 612 (Tex. App.—Dallas 1989, no pet.) (holding that evidence was sufficient to support conviction where defendant possessed keys to vehicle, but complainant testified to lack of consent); *Smith v. State*, 785 S.W.2d 174, 174–75 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (holding that evidence was sufficient to show lack of consent despite keys found in ignition).

Elliott testified that she did not know Carrasquillo and did not give him consent to use her truck. She also testified that when she left the truck, its windows were unbroken

and it had a CD player. The officers testified that when they inspected the truck, the front passenger-side window was broken and it did not have a CD player. They also both testified to finding a "worn" key, broken passenger window, and blood in the car. Officer Domilos testified that the key was worn, that it was "not the proper key for the vehicle," and that it was not a typical civilian key. Carrasquillo and an unidentified passenger both fled from the vehicle after Officer Domilos pulled it over. We hold that this evidence is sufficient to show that Carrasquillo operated the vehicle knowing he lacked its owner's consent. *See Dickson v. State*, 642 S.W.2d 185, 189 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd) (holding that evidence was sufficient to support conviction for unauthorized operation of motor vehicle where defendant was seen exiting vehicle shortly after stopping and owner of vehicle testified that he had not consented to its use).

Conclusion

We hold that Carrasquillo failed to establish that his trial counsel's performance constituted ineffective assistance under *Strickland*. We further hold that the evidence was legally and factually sufficient to uphold Carrasquillo's conviction of unauthorized use of a motor vehicle. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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