Opinion issued June 29, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00954-CR

DANIEL MORIS SANDERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1438488

MEMORANDUM OPINION

Daniel Moris Sanders was convicted of sexual assault of a child.[1] His conviction was enhanced by two prior felony convictions. He was sentenced to 65 years' confinement. In two issues, Sanders contends that he received ineffective

---

1 TEX. PENAL CODE § 22.011(a)(2).

assistance of counsel during the punishment stage of trial and that the State made improper comments to the jury during closing argument. We affirm.

Factual and Procedural Background

Sanders was indicted and tried for sexually assaulting a child under 17 years of age, his daughter, who we pseudonymously refer to as Tara. The jury found Sanders guilty, and the trial court held a hearing to assess punishment. At the hearing, Sanders pleaded "true" to two prior felony convictions and stipulated that he had eight misdemeanor convictions as well. He did not present any mitigating evidence. At the end of the hearing, the trial court found the enhancement paragraphs true and sentenced Sanders to 65 years' confinement.

After sentencing, the trial court permitted Sanders's trial counsel to withdraw and appointed a public defender to represent Sanders on appeal. Sanders then moved for a new trial, alleging that he received ineffective assistance of counsel during the punishment stage of trial. The trial court denied the motion, and Sanders appealed.

Sanders sexually assaults Tara

Tara's mother is Daphne White.[2] Her father is Sanders. White and Sanders were dating when Tara was born and separated when Tara was almost one year old. Growing up, Tara mostly lived with her maternal grandmother, Emeorle

[2] Like Tara, we refer to Tara's mother by a pseudonym.

Jenkins, and occasionally lived with her mother. Tara never lived with Sanders and did not have a close relationship with him.

At the beginning of Tara's freshman year of high school, Sanders and White reunited and began living together. Tara remained living with her grandmother, but she visited her parents during the weekends and holidays, including Christmas break of 2013. During this visit, Sanders sexually assaulted Tara twice, once before Christmas and once between Christmas and New Year's.

At the end of the break, Tara returned to her grandmother and eventually told her what had happened. Tara's grandmother took her to the police station, where Tara provided a statement, and then to the Children's Assessment Center, where Tara received a medical examination from Dr. Marcella Donaruma, a child-abuse pediatrician. Dr. Donaruma found that Tara's hymen had been "broken" and "torn" and that Tara's injury was "consistent" with her account of the assault because the injury indicated that there had been "blunt force penetrating trauma to her vagina."

Sanders is indicted, tried, convicted, and sentenced

Sanders was charged by indictment with sexual assault of a child, enhanced by two prior felony convictions. At the end of the guilt-innocence stage of trial, the jury found Sanders guilty. Sanders elected to have the trial court assess punishment.

At the punishment hearing, Sanders pleaded "true" to two prior felony convictions, one for burglary of a habitation and one for violation of a protective order. Sanders stipulated that he had been convicted of eight other offenses as well. The State presented the testimony of Sanders's ex-wife, Tiffany Merchants, who testified that Sanders emotionally and physically abused her during their marriage, causing her to develop PTSD. Merchants further testified that she obtained a protective order against Sanders, which he violated by continuing to contact her. Sanders did not present any evidence of his own. At the end of the hearing, the trial court found the allegations in the enhancement paragraphs true and sentenced Sanders to 65 years' confinement.

After Sanders was sentenced, trial counsel filed a motion to withdraw. The trial court granted the motion and appointed a public defender to represent Sanders on appeal.

Sanders moves for a new trial, alleging ineffective assistance of counsel

Through his newly-appointed counsel, Sanders moved for a new trial, alleging that he received ineffective assistance of counsel during the punishment stage of trial. Sanders argued that trial counsel performed deficiently because he failed to (1) investigate Sanders's mental-health history despite being aware that Sanders was a patient of Mental Health Mental Retardation Authority of Harris County and (2) call any character witnesses even though he knew numerous people

were willing to testify on Sanders's behalf. Sanders supported his motion with his own affidavit, which was attached as an exhibit.[3]

The trial court hears and denies Sanders's motion

The trial court held an evidentiary hearing on Sanders's motion for new trial. At the hearing, in addition to his own affidavit, Sanders offered into evidence affidavits from four other witnesses: (1) Sanders's girlfriend (and Tara's mother) Daphne White; (2) Sanders's nephew, Damarcus Griffin; (3) Sanders's family friend, Terrance Mays; and (4) Sander's mother, Octavia Sanders.

In her affidavit, White stated that she gave trial counsel the names of witnesses who wanted to testify on Sanders's behalf, including Griffin and Mays, but that trial counsel never contacted any of them.

In their affidavits, Griffin and Mays likewise stated that they were willing to testify as character witnesses but were never contacted by trial counsel. Griffin and Mays also stated what their testimony would have been had they been called as character witnesses. Griffin stated that he would have testified that, "even though [Sanders] has had problems in the past, he is a good man." He would have further

---

[3] In his affidavit, Sanders stated: "During the punishment phase my attorney did not call any witnesses or present any evidence on my behalf. He did not provide evidence that I am a MHMRA patient even though he knew I was. I have been diagnosed with Schizoaffective Disorder and Bipolar Disorder. He did not introduce my mental health records. He also did not contact witnesses who could have testified regarding my good character."

testified that the sexual-assault allegations are inconsistent with "the type of person [he] know[s] [Sanders] to be" and that Sanders has been a "positive male role model in [his] life." Mays stated that he would have testified that Sanders had been "doing well" since being released from prison and had been "a responsible father and husband." He would have further testified that he never observed Sanders acting inappropriately around his own daughters or other young women.

In her affidavit, Sanders's mother, Octavia, also stated what she would have said had she been called as a character witness. Octavia stated she would have testified about Sanders's mental-health history, including that he had been "labeled" as schizophrenic and bipolar. She would have testified that Sanders was involved in a work-related accident that rendered him epileptic and disabled. Unlike Griffin and Mays, however, Octavia did not state whether trial counsel had ever contacted her.

In addition to the affidavits, Sanders offered into evidence medical records confirming that he suffers from a variety of mental health issues.

The clerk's record contains no evidence that either the affidavits of White, Griffin, Mays, and Octavia or Sanders's medical records were filed with the trial

court or otherwise provided to the State before the hearing on Sanders's motion for new trial.[4]

After hearing the evidence and arguments of both sides, the trial court denied Sanders's motion for new trial. Sanders appeals.

Ineffective Assistance of Counsel

In his first issue, Sanders contends that the trial court erred in denying his motion for new trial, in which Sanders alleged that he received ineffective assistance of counsel. According to Sanders, had trial counsel investigated his mental-health history and contacted two prospective character witnesses, Griffin and Mays, he would have developed mitigation evidence, the presentation of which would have resulted in a lesser sentence.

A. Applicable law and standard of review

We review a trial court's denial of a motion for new trial for an abuse of discretion. *Cotton v. State*, 480 S.W.3d 754, 756 (Tex. App.—Houston [1st Dist.] 2015, no pet.). When the motion alleges ineffective assistance of counsel, we review the totality of circumstances of the representation to determine whether the trial court's ruling was "so clearly wrong as to lie outside the zone of reasonable disagreement." *Id.* (internal quotations and citation omitted).

---

[4] The transcript from the motion-for-new-trial hearing contains statements from Sanders's appellate counsel suggesting that hard copies of the affidavits and medical records may have been filed with the trial court the day before the hearing.

To prevail on a claim for ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Under the first prong, "the defendant must show that counsel's performance was deficient." *Id.* at 687, 104 S. Ct. at 2064. This requires the defendant to prove "that counsel's performance fell below an objective standard of reasonableness, considering the facts of the particular case and judged at the time of counsel's conduct." *Ex parte Gonzales*, 204 S.W.3d 391, 393 (Tex. Crim. App. 2006).

Under the second prong, "the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. This requires the defendant to prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

In reviewing a claim for ineffective assistance of counsel, we are "highly deferential" to trial counsel. *Taylor v. State*, 461 S.W.3d 223, 228 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). We indulge a "strong presumption" that trial counsel's performance "fell within the wide range of reasonable professional assistance." *Ex parte LaHood*, 401 S.W.3d 45, 50 (Tex. Crim. App. 2013). To

prove that counsel's performance was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Blackwell v. State*, 193 S.W.3d 1, 21 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

"Any allegation of ineffectiveness must be firmly founded in the record, which must demonstrate affirmatively the alleged ineffectiveness." *Id.* And "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Thus, if the record does not contain affirmative evidence of counsel's reasoning or strategy, we normally presume that counsel's performance was not deficient. *Blackwell*, 193 S.W.3d at 21. "In rare cases, however, the record can be sufficient to prove that counsel's performance was deficient, despite the absence of affirmative evidence of counsel's reasoning or strategy." *Id.*

B. Failure to investigate Sanders's mental-health history

Sanders first argues that trial counsel performed deficiently during the punishment stage of trial because he did not investigate Sanders's mental-health history, a potential source of mitigating evidence. The State responds that Sanders has failed to satisfy the second prong of the *Strickland* test because he did not demonstrate how this potential mitigating evidence would have changed the trial's outcome.

In support of his contention that trial counsel should have investigated and presented evidence of his mental health issues, Sanders submitted his own affidavit and the affidavit of his mother, Octavia. In their affidavits, Sanders and Octavia stated that Sanders had been diagnosed as schizophrenic and bipolar; that he had been hospitalized for mental health issues; and that he had been involved in a work-related accident, which left him epileptic and disabled. They further stated that trial counsel failed to present any evidence of such issues at trial.

In addition to the affidavits, Sanders submitted various medical records, which corroborated his and his mother's statements about his mental-health history and showed that he had been hospitalized and attempted suicide on several occasions.

Finally, Sanders relied on trial counsel's affidavit, which was submitted by the State in response to Sanders's ineffective-assistance claim. In his affidavit, trial counsel did not explicitly state whether he had investigated Sanders's mental health or whether he had been told or was otherwise aware that Sanders had been diagnosed as schizophrenic and bipolar. Instead, trial counsel stated that he had met with Sanders "many times" and that Sanders never exhibited any sign of a mental disorder or behavior that would have advanced his defense at trial. He further stated that he did not recall ever being told about any of Sanders's suicide attempts or work-related injuries.

This evidence shows that Sanders has a long history of mental-health issues, which trial counsel may have not investigated thoroughly. This evidence does not, however, show that trial counsel had any particular reason to investigate Sanders's mental health or that Sanders's mental health was in any way related to his sexual assault of Tara or should have somehow mitigated his punishment. Sanders has made no effort to explain why or demonstrate how his sentence would have been any different had trial counsel presented any of this evidence at the punishment hearing.

During the motion-for-new-trial hearing, the trial court stated that it was "well aware" of Sanders's mental-health issues. But, the trial court continued, "there was absolutely no evidence that [Sanders's] mental health issues were related to the actual offense . . . ." Given that the trial court was aware of Sanders's mental-health history and still denied his motion for new trial, it is unlikely Sanders would have benefitted from trial counsel presenting mental-health evidence at a new punishment hearing—especially in the absence of evidence of some sort of causal nexus between Sanders's mental health and his assault of Tara.[5] *See Hernandez v. State*, No. 01-13-00245-CR, 2014 WL 3607849, at *5

[5] In fact, emphasizing Sanders's mental health might have resulted in a longer sentence. We have recognized that "evidence of a defendant's mental illness can be either a mitigating factor *or an aggravating factor* for the trial court to consider when assessing punishment . . . ." *Powell v. State*, No. 01-11-01035-CR, 2013 WL 4507943, at *9 (Tex. App.—Houston [1st Dist.] Aug. 22, 2013, no pet.) (mem.

(Tex. App.—Houston [1st Dist.] July 22, 2014, no pet.) (mem. op., not designated for publication) ("We cannot conclude that this additional testimony would have lessened his punishment, particularly considering that the trial judge who sentenced him was the same judge who considered and denied his motion for new trial on the exact issue of un-elicited mitigating testimony.").

We hold that Sanders has failed to show that trial counsel's failure to present evidence of his mental health history during the punishment stage of trial prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

C. Failure to interview character witnesses

Sanders next argues that trial counsel performed deficiently during the punishment stage of trial because he failed to contact two potential character witnesses, Griffin and Mays. The State responds that Sanders has failed to meet his burden because the record shows that trial counsel was never afforded the opportunity to explain whether he contacted (or attempted to contact) Griffin and Mays, and because it would have been objectively reasonable for trial counsel to decide not to present Griffin and Mays as character witnesses.

---

op., not designated for publication); *see Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996) (evidence of mental retardation "could have a mitigating or aggravating effect"). And as the trial court noted during the hearing, Sanders's medical records—which showed a history of antisocial behavior and illicit drug use—"cut two ways[,]" constituting "a two-edged sword for the Defense." Had trial counsel presented evidence of Sanders's mental health, the trial court may have found it to be aggravating—tending to show Sanders would remain dangerous in the future. *Bell*, 938 S.W.2d at 48–49.

At the hearing on his motion for new trial, Sanders submitted an affidavit from White. In her affidavit, White stated that she told trial counsel that Griffin and Mays wanted to testify on Sanders's behalf, but that trial counsel never contacted them. Sanders also submitted affidavits from Griffin and Mays. In their affidavits, Griffin and Mays stated that they were willing to testify as character witnesses for Sanders but were never contacted by trial counsel.

Sanders contends that the statements from these affidavits, coupled with trial counsel's failure to state whether he contacted Griffin and Mays in his own affidavit, prove that trial counsel never contacted these two witnesses, which, in turn, proves that Sanders received ineffective assistance of counsel. We disagree.

The record contains no evidence that trial counsel was afforded the opportunity to respond to the specific allegation that he never contacted Griffin and Mays even though White had told him that they wanted to testify as character witnesses. In his motion for new trial, Sanders generally alleged that trial counsel "did not call any witnesses" during the punishment stage of trial; he made no mention of either Griffin or Mays (or any other particular witness). In response to Sanders's motion for new trial, the State submitted an affidavit from trial counsel in which he stated that he spoke to Sanders's witnesses "well before his case was tried" and listed three of the specific witnesses with whom he spoke. The list did

not include Griffin or Mays. But when trial counsel executed the affidavit, Sanders had not yet raised any complaint relating to these two particular witnesses.

The affidavits of White, Griffin, and Mays were the only affidavits that specifically alleged that trial counsel never contacted Griffin and Mays. The record does not indicate whether these affidavits were provided to the State before the hearing on Sanders's motion for new trial.[6] Thus, there is no evidence that trial counsel—who did not attend the evidentiary hearing—was ever afforded the opportunity to respond to the allegation that he failed to contact these two potential character witnesses. *Rylander*, 101 S.W.3d at 111 ("[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.").

Assuming trial counsel never contacted (or attempted to contact) Griffin and Mays, the record contains no evidence of the reasoning or strategy behind this decision—that is, the record contains no evidence indicating *why* trial counsel decided not to contact Griffin and Mays.

Even if trial counsel was aware that Griffin and Mays wished to testify as character witnesses, it still could have been objectively reasonable to forgo presenting their testimony. Trial counsel may "legitimately consider the impact an

---

[6] The transcript from the motion-for-new-trial hearing contains statements from Sanders's appellate counsel indicating that hard copies of the affidavits may have been filed with the trial court the day before the hearing.

argument would have on [the factfinder] in assessing whether to proffer it." *Rivera v. State*, 317 S.W.3d 480, 483 (Tex. App.—Amarillo 2010, no pet.). Trial counsel could have reasonably concluded that it would have been counterproductive and ill-advised to present Griffin and Mays—witnesses willing to say Sanders can be a "good guy" when he is not sexually assaulting his biological daughter, emotionally and physically abusing his ex-wife, or engaging in the variety of other misconduct for which he has received ten prior convictions, two of which were felonies. *Id.* In the absence of evidence indicating *why* trial counsel decided not to contact, interview, and present testimony from Griffin and Mays, we must presume that his decision "'might be considered sound trial strategy.'" *Blackwell*, 193 S.W.3d at 21.

We hold that Sanders has failed to show that he received ineffective assistance of counsel by trial counsel's failure to contact potential character witnesses Griffin and Mays. Accordingly, we overrule Sanders's first issue.

Improper Jury Argument

In his second issue, Sanders contends that the trial court abused its discretion in overruling his objection to an improper comment made by the State during closing argument and in sustaining his objection to but failing to instruct the jury to disregard another such improper comment. Specifically, Sanders contends that the State argued outside the record by (1) mischaracterizing the testimony of the pediatrician who examined Tara after Sanders assaulted her and (2) accusing

Tara's mother, who testified for Sanders, of attempting to hide the fact that she once lost custody of Tara and her other three children. The State responds that both comments were proper because they were both supported by the record.

A. Applicable law and standard of review

Under Texas criminal law, proper jury argument is generally limited to (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to opposing counsel's arguments, and (4) pleas for law enforcement. *Gallo v. State*, 239 S.W.3d 757, 767 (Tex. Crim. App. 2007); *Dukes v. State*, 486 S.W.3d 170, 183 (Tex. App.—Houston [1st Dist.] 2016, no pet.). "The trial court has broad discretion in controlling the scope of closing argument." *Nickerson v. State*, 478 S.W.3d 744, 761 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

During closing argument, the State enjoys "wide latitude in drawing inferences from the evidence as long as they are reasonable, fair, legitimate, and offered in good faith." *Id.* at 762–63. However, the State may not refer "'to facts that are neither in evidence nor inferable from the evidence . . . .'" *Id.* at 763 (quoting *Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011)). Thus, if an argument refers to evidence that is outside the record and prejudicial to the defendant, the argument is improper. *Dukes*, 486 S.W.3d at 183.

We review the trial court's ruling on an objection to the State's jury argument for an abuse of discretion. *Vasquez v. State*, 484 S.W.3d 526, 531 (Tex. App.—Houston [1st Dist.] 2016, no pet.). In reviewing the trial court's ruling, we first determine whether the argument was improper. *Nickerson*, 478 S.W.3d at 761. If we determine that it was, then we consider harm. *Id*.

As non-constitutional error, improper jury argument is harmful only if it affects the defendant's substantial rights. *See* TEX. R. APP. P. 44.2(b) (non-constitutional error "that does not affect substantial rights must be disregarded"); *Nickerson*, 478 S.W.3d at 761. To determine whether the defendant's substantial rights were affected by improper jury argument, we consider three factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and, (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Gallo*, 239 S.W.3d at 767; *Nickerson*, 478 S.W.3d at 761.

B. Comments about the pediatrician's testimony

Sanders first contends that the State argued outside the record by mischaracterizing the testimony of Dr. Donaruma, the pediatrician who examined Tara three-to-four weeks after the sexual assault. During closing argument, the

State argued that Dr. Donaruma's testimony corroborated the State's theory of when the assault occurred:

> You know that [Tara] is telling the truth because there is medical evidence. Dr. Donaruma told you that is rare in these cases. And she explained to you, after she drew the diagram and she drew the hymen, that the hymen was torn in two. She said that on cross-examination by the Defense attorney. She told you that it was *corroborative* of what this defendant did to [Tara], of blunt force penetrating trauma, *that it occurred three weeks to a month before*.

Sanders objected, claiming that the argument mischaracterized Dr. Donaruma's testimony:

> Judge, I'm going [to] object to that. That was clearly not the statement of the doctor. She said she had no way of knowing when the blunt force occurred. And I would ask that you instruct the jury to disregard her statement.

The trial court overruled Sanders's objection.

Sanders argues that the trial court erred in overruling his objection because the State's characterization of Dr. Donaruma's testimony was not supported by the record. We disagree; the State's comment was supported by Dr. Donaruma's testimony on direct examination.

During its direct examination of Dr. Donaruma, the prosecutor asked the following question:

> But when [Tara] said that her father attempted to penetrate her on December 21, 2013, and then did penetrate her on December 28, 2013, knowing that you examined her at the end of January of 2014, on January 21st, is the fact that you can see blunt force trauma to the hymen *corroborative* of what she told you her father did to her?

Dr. Donaruma responded:

> Yes, absolutely. That's completely *consistent* with her history of penile-vaginal contact.

Although Dr. Donaruma did not explicitly testify that Tara's hymen injury occurred three-to-four weeks before her examination of Tara, she did testify that the injury was "consistent" with Tara's claim of when the assault of occurred. And if an injury is consistent with a claim, the injury corroborates the claim—that is, it strengthens the claim,[7] even if it does not prove the claim.

Later, on cross-examination, Dr. Donaruma admitted that she could not determine from observation alone when Tara's injury occurred. Sanders contends that Dr. Donaruma's admission shows that Tara's injury was not corroborative of the date of the assault. We disagree.

Dr. Donaruma's admission did not completely contradict her earlier testimony. It did not show that Tara's injury did not corroborate Tara's claim; rather, it showed that Tara's injury did not strongly corroborate Tara's claim. Moreover, we see no reason why the State could not use closing argument to emphasize one part of Dr. Donaruma's testimony (her testimony on direct) while

---

[7] *Corroborate*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 281 (11th ed. 2003) ("to support with evidence or authority" or "make more certain); *Corroborate*, BLACK'S LAW DICTIONARY 397 (9th ed. 2014) ("To strengthen or confirm; to make more certain.").

ignoring another (her testimony on cross). *See Nickerson*, 478 S.W.3d at 762–63 (State enjoys "wide latitude in drawing inferences from the evidence"); *cf. Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (jury "may accept or reject all or any part of any witness's testimony"). Because Dr. Donaruma testified that the injury to Tara's hymen was consistent with Tara's account of when the assault occurred, we hold that the trial court did not abuse its discretion in overruling Sanders's objection that the State mischaracterized Dr. Donaruma's testimony. *Vasquez*, 484 S.W.3d at 531.

In any event, we further hold that any exaggeration by the State of Dr. Donaruma's testimony was harmless. Although the trial court did not sustain Sanders's objection and therefore did not take any measures to cure the alleged error, the prejudicial effect of any mischaracterization was not severe. *Gallo*, 239 S.W.3d at 767; *Nickerson*, 478 S.W.3d at 761. The State's argument was founded on the record, as Dr. Donaruma testified that Tara's injury was "consistent" with Tara's account of when the assault occurred. Thus, the State's argument was at worst an exaggeration of Dr. Donaruma's testimony, not an outright misrepresentation. *See Nickerson*, 478 S.W.3d at 762–63. The State did not emphasize its argument that the hymen injury indicated the date of the assault; the prosecutor made her point and moved along with the rest of her argument, which summarized the rest of Dr. Donaruma's testimony and the other evidence

supporting conviction, including the testimony of Tara and Tara's maternal grandmother, Emeorle Jenkins, who testified that she observed Sanders inappropriately touching Tara shortly before the assault and that Tara's behavior and personality changed after.

C. Comments about Tara's mother's testimony

Sanders next contends that the State argued outside the record by accusing Tara's mother (and Sanders's girlfriend), Daphne White, of attempting to hide the fact that she once lost custody of Tara and her other three children.

At trial, White was a witness for the defense. She testified that Sanders could not have committed the first assault because on that night she gave Sanders his medications. White explained that Sanders's medications cause him to quickly fall asleep and to remain asleep all night.

During closing argument, the State made the following comments about White and her credibility:

> And then we have [Tara's] mother, who can't even tell you the truth about the fact that she didn't raise [Tara], trying to hide from you that her kids were taken away from her for years through CPS.

Sanders objected to the comment. The trial court sustained Sanders's objection, but denied his request for an instruction to disregard.

Sanders argues that the trial court erred in denying his request for an instruction to disregard because the State's comment went outside the record.

Sanders claims that "[t]here is nothing in the record indicating [White] tried to hide the fact she had a CPS case." According to Sanders, "[t]he only reference to CPS in the presence of the jury was when [White] testified on cross-examination" that Tara "lived with her cousin for two years as a result of a 'CPS case.'" We disagree with Sanders's characterization of White's testimony.

During cross-examination, White testified that she and Sanders were Tara's biological parents and that they had separated when Tara was almost one year old. The prosecutor then asked White whether Tara had been living with White's mother, Jenkins, when she and Sanders separated, and White responded that Tara was living with her at that time and that Tara did not live with Jenkins until June 2013:

> State: And [Tara] was living with your mom at that time [when you and Sanders separated], right?
>
> White: No. She was staying with me. [Tara] never stayed with my mom until June of 2013.
>
> State: Really?
>
> White: Really.

After that exchange, the prosecutor continued examining White about Tara's living arrangements over the years:

> State: Okay. So, you're saying that [Tara] lived her whole [life] with you until—

White: Yes. I have school records and everything right here. Yes. Right here.

State: Isn't it true that she lived with Shonda Lewis for a significant period of time when she was—

White: For two years. When I had a CPS case, my cousin did step up and had custody of all four of my kids. And after that they came back home. And it shows on the school record I enrolled them back in school when they was returned home.

The record reflects that White interrupted the prosecutor before she finished asking whether Tara had lived with White her entire life. But, from the context of the question and White's quick response indicating that she understood what was being asked, the record further reflects that White was testifying that Tara had lived with her until June 2013—the date White had just indicated that Tara left to live with White's mother.

By answering the question as she did, White represented that Tara lived only with her until Tara moved into her grandmother's home in 2013. However, in response to specific questioning about the cousin who kept Tara for two years, White admitted that Tara actually lived with that cousin when White "had a CPS case . . . ." In other words, White initially indicated that Tara lived only with her until she moved in with her grandmother in 2013 but then admitted that Tara had also lived with a cousin while White's CPS case was pending. Thus, the record supports the inference underlying the State's argument that White attempted to

hide the fact that she once lost custody of her children. *Gallo*, 239 S.W.3d at 767; *Dukes*, 486 S.W.3d at 183.

We hold that the trial court did not err in refusing to instruct the jurors to disregard the comment. Accordingly, we overrule Sanders's second issue.

Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.

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