Opinion issued August 11, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-01090-CR

JAMELLE ANDREA PETERKIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Case No. 1548100

MEMORANDUM OPINION

Appellant, Jamelle Andrea Peterkin,[1] pleaded guilty to the offense of aggravated assault with a deadly weapon against a family member, and the trial court

[1] Appellant notes that her first name is Janelle and that it is misspelled as "Jamelle" in various court documents, including in the trial court's judgment.

sentenced her to confinement for nine years. *See* TEX. PENAL CODE § 22.02; *see also* TEX. FAM. CODE § 71.003. In her sole issue, appellant contends that the trial court abused its discretion in denying her motion for new trial because she received ineffective assistance of counsel.

We affirm.

Background

On February 25, 2017, appellant took pictures and video of her 11-month-old son with a plastic bag stuffed in his mouth, a plastic bag tied over his head, and an apparent burn mark on his hand, and she sent them to her son's father and his girlfriend. She did so because she was upset with her son's father and wanted to "prove a point" and "get a reaction out of someone." After the girlfriend sent the pictures and video to the police, appellant was arrested and charged with aggravated assault with a deadly weapon against a family member.

On April 19, 2017, the trial court ordered the Harris County Forensic Psychiatric Services to conduct a psychiatric examination of appellant to determine whether she was competent to stand trial. During her competency evaluation, which was conducted by Dr. Barbra Martinez, a licensed psychologist with the Harris Center for Mental Health and Intellectual and Developmental Disabilities (the "Harris Center"), appellant disclosed a history of psychiatric treatment, including treatment for depression and anxiety. Dr. Martinez reported that appellant was

diagnosed with a "Mood Disorder" upon her intake health screening conducted at the county jail. Dr. Martinez noted that appellant exhibited "symptoms associated with Adjustment Disorder with Depressed Mood," but that she possessed "sufficient present ability to consult with the defense attorney with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against her" and, thus, was competent to stand trial.

On August 21, 2018, appellant pleaded guilty to the charge of aggravated assault with a deadly weapon against a family member, without a recommendation from the State as to punishment. The same day, appellant filed a motion requesting that the trial court place her on community supervision. The case was reset to allow for the preparation of a presentence investigation ("PSI") report.

On October 30, 2018, the trial court held a PSI hearing. At the hearing, the State introduced the PSI report, as well as video and photographic evidence of the offense. The PSI report contained a voluntary statement that appellant made to police, as well as appellant's unedited written statement to the presentencing investigator, in which she described the events leading up to the offense and the offense itself. In her written statement, appellant described physical, sexual, and emotional abuse to which she had been subjected by her son's father in the weeks leading up to the offense. She stated that this triggered "a deep depression" in her,

which exasperated the "postpartum psychosis" she was already feeling and resulted in her wanting to kill herself.

The PSI report also documented appellant's mental health history, which included appellant's statements that she was previously diagnosed with bipolar disorder, posttraumatic stress disorder (PTSD) and borderline personality disorder, that she experienced post-partum depression, and that she had attempted suicide on two previous occasions. The PSI report also documented appellant's current outpatient mental health treatment at the Harris Center, which included being prescribed antipsychotic and antidepressant medications, as well as individual counseling sessions at Total Wellness Counseling and Assessment. Appellant also reported to the presentencing investigator that she had had three previous psychiatric hospitalizations since 2013.

Before the PSI hearing, appellant's trial counsel, Clay Conrad, submitted mitigating documentary evidence to the trial court, which included affidavits from appellant, her mother, and her father, detailing her mental health history, as well as statements from other character witnesses. Conrad also submitted appellant's medical records, detailing her mental health history.

The evidence included that, in 2015, Dr. Robert D. Wadsworth of The Meridian Group of Chesterfield, PLC diagnosed appellant with adjustment disorder with mixed disturbance of emotions and conduct, attention-deficient/hyperactivity

disorder, and partner relational problems. Dr. Wadsworth's evaluation also detailed appellant's background and history, including her psychiatric hospitalizations. Conrad also submitted appellant's 2015 and 2017 treatment records from the Harris County Psychiatric Center and Kingwood Pines Hospital, which detail the reasons for appellant's admission for psychiatric hospitalization, the treatment she received, and the recommended course of treatment. In addition, in 2018, Dr. Edward Casanova with the Harris Center diagnosed appellant with bipolar disorder, PTSD, borderline personality disorder, and disorder of the thyroid.

In both a letter to the trial court and at the PSI hearing, Conrad focused heavily on appellant's history of mental health problems and argued that appellant's conduct, while "dangerous," "horrendous," and "foolish," was a product of her mental illness, and not of her character. Conrad requested that appellant be placed on deferred adjudication, rather than receive jail time, with requirements that she stay in treatment, take her medications, and be allowed to work to rebuild her relationship with her son. The trial court refused this request and instead sentenced appellant to nine years' imprisonment. In doing so the trial court focused on the nature of the offense, saying:

> Ms. Peterkin, I saw the video taken of that child, the video that you took. I saw that baby punched. I saw the flame you put to that baby's hand, and I saw those bags stuffed in his mouth while he tried to fight you off while he was locked in a car seat and couldn't get away. I even saw that the baby had been spit on. As hard as your attorney has worked on this case, you are not the victim here, your baby is.

Appellant filed a motion for new trial, alleging that her trial counsel, Conrad, was ineffective for: (1) failing to present an expert witness to testify about how appellant's mental illnesses and history of abuse contributed to her behavior at the time of the offense; (2) failing to provide the trial court with a treatment plan to ensure her success on community supervision; and (3) failing to formally introduce the mitigation documentation into evidence.

At a hearing on the motion for new trial, the trial court admitted into evidence the mitigation documentation that Conrad had previously submitted at the PSI hearing along with an affidavit from Dr. Cassandra Hayes, a clinical psychologist who conducted a psychological interview and mental status examination of appellant on November 25, 2019. Dr. Hayes opined that appellant's "actions on the date [of the offense] appear to have been a function of a combination of her psychiatric and medical concerns." Dr. Hayes further opined that appellant's "psychiatric symptoms played a significant role in her committing the offense in question and this should be strongly considered as a mitigating factor in sentencing."

The trial court also admitted Conrad's affidavit, in which he emphasized that, "[f]rom the beginning of [his] involvement in [appellant's] case, [he] was regularly submitting her mental health records and counseling records to the Court." Conrad stated that he did not hire mental health experts in this case because, although "a testifying expert could have testified as to the effect of [appellant's] illness on her

behavior," he "felt comfortable relying on the treating professionals whose records [he] received (and regularly submitted to the court) from [appellant] and her mother." He also stated that he believed that appellant's sentence should have reflected her mitigating circumstance of mental illness, but that it did not. Conrad stated that the trial court "was clearly aware of how sick [appellant] was . . . [h]e simply did not care."

Conrad did state, however, that there was one area in which he may have rendered ineffective assistance of counsel—which was not raised by appellant in the motion for new trial or argued at the hearing. Conrad stated:

> I believe, however, that in retrospect I should have consulted experts as to whether she was in fact sane at the time she committed the offense. While the method in which she recorded the offense showed deliberation and planning, that is not definitive of whether she was sane. Unfortunately, it is difficult, in retrospect, to definitively prove sanity or lack thereof, but because I am not thoroughly convinced that she was in fact sane at the time, I believe that failure on my part may have constituted ineffective assistance of counsel.

The trial court denied appellant's motion for new trial. This appeal followed.

Ineffective Assistance of Counsel

In one issue, appellant argues her trial counsel rendered ineffective assistance for (1) failing to call a mental health expert to explain how her mental illness and

history of abuse contributed to her actions;[2] (2) failing to call an expert to explain how she would fare on community supervision; and (3) failing to consult an expert regarding her sanity.

A. Standard of Review

The United States Constitution and the Texas Constitution guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). To prevail on his claim of ineffective assistance of counsel, the appellant must prove that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–88.

In reviewing counsel's performance under *Strickland*'s first prong, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance and was motivated by sound trial strategy. *Id.* at 688–89. "Because there are countless ways to provide effective assistance, judicial

[2] In her brief, appellant raises these as two separate arguments in support of her ineffective-assistance claim. But because they are interrelated, we consider them together.

scrutiny of trial counsel's conduct must be highly deferential." *Ex parte Rogers*, 369 S.W.3d 858, 862 (Tex. Crim. App. 2012). "Given the difficulty in evaluating trial counsel's performance, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy." *Id.* To defeat this presumption, any allegation of ineffectiveness must be firmly grounded in the record so that the record affirmatively shows the alleged ineffectiveness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017).

Under *Strickland*'s second prong, in reviewing whether there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. For claims of ineffective assistance during the punishment phase, the appellant must show a reasonable probability that the assessment of punishment would have been less severe in the absence of counsel's deficient performance. *Bazan v. State*, 403 S.W.3d 8, 13 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). It is not enough to show that counsel's errors had some conceivable effect on the outcome of the punishment assessed; rather, the likelihood of a different result must be "substantial." *Id.*

When ineffective assistance claims are raised in a motion for new trial, we analyze the issue on appeal as a challenge to the trial court's denial of her motion for new trial and review it under an abuse-of-discretion standard. *Lopez v. State*, 462

S.W.3d 180, 185 (Tex. App.—Houston [1st Dist.] 2015, no pet.). "Thus, we reverse only if the trial court's decision to deny the motion for new trial was arbitrary or unreasonable, viewing the evidence in the light most favorable to the trial court's ruling." *Id.* "A decision is arbitrary or unreasonable if no reasonable view of the record could support the trial court's ruling." *Id.*

B. Failure to call mental health expert

Appellant argues that her trial counsel was deficient for failing to call a mental health expert who "could have translated medical records into useable mitigation evidence" and explained how the abuse appellant suffered at the hand of her son's father affected her behavior. Appellant contends that, without expert testimony, passing references to her mental illness and abuse amounted to "little more than empty rhetoric" and were "useless to the trial court when determining her sentence." Appellant also argues that trial counsel should have called an expert to provide the trial court with "a concrete plan . . . to ensure [appellant's] success on community supervision."

In support of her argument, appellant relies on *Lopez v. State*, 462 S.W.3d 180, 189 (Tex. App.—Houston [1st Dist.] 2015, no pet.), and *Ex parte Briggs*, 187 S.W.3d 458, 467 (Tex. Crim. App. 2005). In *Lopez*, trial counsel failed to present any mitigating evidence, failed to highlight the information related to the defendant's troubled background and intellectual deficiencies that were contained in the PSI

report, and made only one reference to the defendant's belief that he considered himself to be a good role model. 462 S.W.3d at 189. Under those facts, the court found that trial counsel's statements were made in "an evidentiary vacuum" and were "little more than empty rhetoric." *Id.* In *Briggs*, the Texas Court of Criminal Appeals found that trial counsel was ineffective when he decided not to hire an expert witness based solely on economic reasons. 187 S.W.3d at 467. The court concluded that trial counsel's failure to investigate "was not a 'strategic' decision, [but rather,] an economical one." *Id.* We find these cases distinguishable.

In stark contrast to *Lopez*, the record here demonstrates that trial counsel presented extensive evidence of appellant's mental illness to the trial court, including affidavits from appellant, her mother, and her father, detailing her mental health history, as well as medical records documenting her diagnoses and psychiatric hospitalizations. Moreover, the PSI report documented appellant's mental health history, including her statements that she was previously diagnosed with bipolar disorder, PTSD, and borderline personality disorder, that she experienced post-partum depression, that she had attempted suicide on two previous occasions, and that she had three previous psychiatric hospitalizations. The PSI report also documented appellant's current outpatient mental health treatment at the Harris Center, which included being prescribed antipsychotic and antidepressant medications, as well as individual counseling sessions at Total Wellness Counseling

and Assessment. Trial counsel also urged the trial court to consider the evidence of appellant's mental illness when assessing punishment, focusing his entire argument at the PSI hearing on appellant's history of mental illness and the steps she has taken since the offense to get help.

Further, we do not conclude that trial counsel's reasoning for failing to call a mental health expert was objectively unreasonable. Unlike in *Briggs*, trial counsel's decision not to call an expert was not an economic one. Here, trial counsel stated in his affidavit that, although experts "could have testified as to the effect of [appellant's] illness on her behavior," he "felt comfortable relying on the treating professionals whose records [he] received (and regularly submitted to the court) from [appellant] and her mother." We conclude that, once the issue of appellant's mental illness was fully presented to the trial court, in affidavits from appellant and her family, in her medical records, and in the arguments of trial counsel, Conrad could have reasonably believed that the trial court could consider this evidence without the need for additional expert testimony.

Additionally, when, as here, a defendant challenges an attorney's failure to call a witness, the defendant "must show that the witness had been available to testify and that his testimony would have been of some benefit to the defense." *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007); *Crawford v. State*, 355 S.W.3d 193, 199 (Tex. App.—Houston [1st Dist.] 2011 pet. ref'd). Appellant has

pointed to nothing in the record to show that Dr. Hayes, or any other mental health expert, was available to testify at the PSI hearing. She has also failed to show that any such testimony would have been beneficial to her. As the State points out, evidence of mental illness can either be a mitigating factor or an aggravating factor for the trial court to consider when assessing punishment. *See Powell v. State*, No. 01-11-01035-CR, 2013 WL 4507943, at *9 (Tex. App.—Houston [1st Dist.] Aug. 22, 2013, no pet.) (mem. op., not designated for publication) (citing *Mays v. State*, 318 S.W.3d 368, 393–94 (Tex. Crim. App. 2010)). Thus, even if Dr. Hayes or another mental health expert had been available to testify, there is no evidence that the trial court would have considered Dr. Hayes's testimony to be mitigating or otherwise beneficial to appellant. *Id.*

Finally, appellant has not demonstrated a reasonable probability that she would have received a lesser sentence, even if trial counsel had presented the testimony of a mental health expert or provided the trial court with a concrete treatment plan for community supervision. The trial court made clear, by focusing on the egregious nature of the offense and the vulnerability of the complainant, appellant's one-year old son, that it did not believe that a lesser sentence, or deferred adjudication, was appropriate. Because the record is clear that the trial court received and reviewed extensive evidence documenting appellant's history of mental illness and imposed a sentence of nine years' imprisonment, we conclude that appellant has

not shown a reasonable probability that, but for counsel's failure to present testimony from a mental health expert, the trial court's assessment of punishment would have been less severe. *See Wallace v. State*, No. 14-09-00378-CR, 2010 WL 2649939, at *8 (Tex. App.—Houston [14th Dist.] July 6, 2010, no pet.) (mem. op., not designated for publication) (holding defendant failed to show there was reasonable probability that trial court would have sentenced defendant to deferred adjudication because trial court made clear in citing violent nature of offense that deferred adjudication was not warranted).

Based on the foregoing, we conclude that appellant has failed to satisfy either prong of *Strickland*. Thus, we hold the trial court did not abuse its discretion in denying appellant's motion for new trial on these grounds.

C. Failure to consult expert concerning appellant's sanity

Finally, appellant argues that the trial court abused its discretion by denying her motion for new trial because trial counsel was ineffective for failing to consult an expert regarding her sanity. In support of this argument, appellant cites to trial counsel's affidavit submitted in connection with the motion for new trial, in which he says:

> I believe, however, that in retrospect I should have consulted experts as to whether [appellant] was in fact sane at the time she committed the offense. While the method in which she recorded the offense showed deliberation and planning, that is not definitive of whether she was sane. Unfortunately, it is difficult, in retrospect, to definitely prove sanity or lack thereof, but because I am not thoroughly convinced that she was

> in fact sane at the time, I believe that failure on my part may have constituted ineffective assistance of counsel.

We note that appellant raises this argument in connection with her sole issue on appeal—that the trial court abused its discretion in denying her motion for new trial. Appellant does not phrase her argument as an independent claim for ineffective assistance of counsel raised for the first time on direct appeal. However, appellant did not raise it as a basis for ineffective assistance in her motion for new trial; rather, it was only raised by trial counsel in his affidavit.

The State argues that, by failing to raise this point in her motion for new trial, appellant has waived it on appeal. In support of its waiver argument, the State relies on *Keeter v. State*, 175 S.W.3d 756, 759–60 (Tex. Crim. App. 2005), wherein the court held that the defendant failed to preserve a claim that the trial court erred in denying a motion for new trial on the basis of a *Brady* violation because the defendant failed to raise such argument in the motion for new trial. Although the general rule is that an ineffective assistance of counsel claim will not be foreclosed because of an appellant's inaction at trial, *see Robinson v. State*, 16 S.W.3d 808, 809 (Tex. Crim. App. 2000), we agree with the State that appellant has waived this argument because of the nature in which appellant raises the complaint on appeal. As the court in *Keeter* stated, "[t]he trial court cannot be said to have erred in denying a motion for new trial on a basis that was not presented to it." 175 S.W.3d at 760.

Even were we to construe appellant's argument as one raised for the first time on direct appeal, we conclude that appellant has failed to demonstrate that trial counsel's performance was deficient. Although trial counsel states that his failure to consult an expert regarding appellant's sanity "may have constituted ineffective assistance of counsel," he does not provide any explanation as to his strategy for not doing so. Without an explanation for trial counsel's strategy, we will not engage in speculation. *See Jackson v. State*, No. 14-16-00694-CR, 2018 WL 717040, at *3 (Tex. App.—Houston [14th Dist.] Feb. 6, 2018, no pet.) (mem. op., not designated for publication) ("We do not know what information trial counsel had or how he evaluated the potential benefits and drawbacks of requesting a sanity evaluation or how counsel weighed the various considerations that might have informed the decision. Without an explanation, we only could speculate as to trial counsel's reasons for not requesting a sanity evaluation, and we are not to engage in speculation."); *Stafford v. State*, 101 S.W.3d 611, 613 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that finding counsel ineffective on silent record for failing to request sanity evaluation would call for speculation).

Further, the fact that appellant has a history of mental illness is not enough to raise the issue of her sanity. Texas law excuses a defendant from criminal responsibility if he proves, by a preponderance of the evidence, the affirmative defense of insanity. TEX. PENAL CODE § 8.01; *Ruffin v. State*, 270 S.W.3d 586, 592

(Tex. Crim. App. 2008). "The test for determining insanity is whether, at the time of the conduct charged, the defendant—as a result of a severe mental disease or defect—did not know that his conduct was 'wrong.'" *Ruffin*, 270 S.W.3d at 592. "Mental illness is not synonymous with insanity. *See Williams v. State*, No. 05-00-01690-CR, 2002 WL 47794, at *2 (Tex. App.—Dallas Jan. 15, 2002, no pet.) (not designated for publication) (citing *Craven v. State*, 93 Tex. Crim. 328, 247 S.W. 515, 516–17 (Tex. Crim. App. 1922)). "A person can be both mentally ill and legally responsible for his actions." *Id.*

Here, there is no evidence in the record that appellant did not know that her conduct was wrong or that she was incapable of conforming her conduct to the law. In fact, she stated in her written statement contained in the PSI report that she was "very remorseful." She also stated in her affidavit, which trial counsel submitted at the PSI hearing as part of the mitigating evidence, that the videos of her abusing her son were done "to show his father . . . how badly he'd been treating [appellant]," that "[i]t was wrong of [her] to do that," that she was sorry she did it, and that she "know[s] it was wrong." And, trial counsel's statements at the PSI hearing that appellant was out of control during the commission of the offense are not sufficient to raise the issue of insanity. *See Macri v. State*, No. 04-98-00378-CR, 1999 WL 542587, at * 3 (Tex. App.—San Antonio July 28, 1999, no pet.) (not designated for publication) (holding that counsel was not ineffective for failing to raise insanity

defense because defendant's testimony that he could not remember offense and police officer's testimony that defendant was acting "bizarrely" and "out of control" at time of offense was not enough to raise issue of insanity).

Finally, to the extent that appellant argues that her trial counsel was deficient for failing to present an expert at the PSI hearing to testify as to her sanity, appellant has not demonstrated that such witness would have been available at trial and that the witness's testimony would have been favorable to her. In fact, Dr. Hayes, the expert who provided an affidavit in support of appellant's motion for new trial, provided no opinions as to appellant's sanity at the time of the offense. *See Macri*, 1999 WL 542587, at *2 (holding that defendant failed to meet burden to demonstrate trial counsel was deficient by failing to investigate or obtain expert witness on issue of insanity because there was no evidence as to who expert would have been, whether expert would have been available at trial, or whether testimony would have benefitted defendant).

On this record, we conclude that appellant has not shown that her trial counsel's conduct was so outrageous that no competent attorney would have engaged in it. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (stating that in the face of an undeveloped record, appellate court should find counsel ineffective only if the conduct was "so outrageous that no competent attorney would

have engaged in it"). Accordingly, we hold that the trial court did not abuse its discretion in denying appellant's motion for new trial on this ground.

We overrule appellant's sole issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.

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