Opinion issued September 15, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00223-CR

KEVIN CASTELLON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1532085

MEMORANDUM OPINION

A jury convicted Kevin Castellon of the felony offense of failure to stop and render aid. *See* TEX. TRANSP. CODE § 550.021. Pursuant to a plea bargain on punishment, the trial court assessed Castellon's punishment at 10 years' imprisonment in the Institutional Division of the Texas Department of Criminal

Justice but probated the sentence by placing him on 10 years' community supervision, with 75 days' confinement in the Harris County Jail as a condition of probation. The trial court also ordered him to pay $10,000 in restitution. Castellon appeals, contending that (1) the evidence legally cannot support his conviction, and (2) he received ineffective assistance of counsel because his attorney failed to object to the State's closing arguments and request defensive instructions and a charge on a lesser-included offense. We affirm.

Background

One fall morning, the complainant, A. Garza, Jr., and his wife went to a sporting goods store a few miles away from their home. Garza was driving his SUV southbound on Normandy Street in Harris County, Texas. As he was driving, Garza "saw a car coming up through [his] side mirror" traveling at a "high speed." He then felt somebody hit his SUV on the "rear right side." Garza lost control of his SUV, struck the top of it, and blacked out. The impact caused Garza's SUV to wrap around a tree. Emergency personnel transported Garza and his wife to Memorial Hermann Hospital. Garza sustained serious injuries including paralysis of his legs and memory loss .

J. Dennis saw the accident. While he was driving on Normandy Street, Dennis saw a "red car coming behind [him] pretty fast." The red car switched lanes, sped in front of him, veered into another lane, and then crashed into the

SUV. The SUV flipped in the air and hit a tree. The red car "flew off into the bayou." Dennis parked his car and checked on the passengers in the SUV. Next, he went to check on the driver of the red car. Dennis saw Castellon in the median as he was jogging to the other side of the street. Dennis caught up to Castellon and asked him if he was okay. Castellon did not respond. When Castellon kept jogging away from the scene, Dennis grabbed Castellon's shirt and threw him to the ground because he "felt like he was trying to escape." Castellon began crying and told Dennis that he was sorry. Dennis remained with Castellon until another bystander arrived to detain him while he went to check on the passengers in the SUV.

M. Nnajiofor was another eyewitness to the accident. He heard a speeding car "coming up from behind" him as he was driving southbound on Normandy Street. The driver of the speeding car was later identified as Castellon. Nnajiofor observed Castellon's car "weave in and out of lanes." He then saw Castellon's car strike an SUV, causing it to pick up into the air and flip a couple of times before it was stopped by a tree. Nnajiofor also saw Castellon's car go into some bushes on the side of the road. After checking on Garza and his wife, Nnajiofor went to the bushes to check for Castellon.

Nnajiofor witnessed Castellon emerge from the bushes, "look[] at the crime scene," and walk away before bystanders "intercepted" and "wrestled" him to the

ground. According to Nnajiofor, Castellon was not cooperative. Nnajiofor tried to talk to Castellon, but Castellon did not respond. He and other bystanders detained Castellon and directed traffic while waiting for the police. Five minutes later, Castellon was "fleeing the scene" until bystanders caught up to him, stopped him, and returned him to the scene. Nnajiofor held Castellon's hand, and Castellon made no further attempts to get away. Officers arrived about two minutes later.

Houston Police Department officers and other emergency responders arrived "20 to 30 minutes" after the accident. Sergeant D. Cheek-McNeal, an accident investigator with the Harris County Sheriff's Office, noticed an SUV wrapped around a tree and concluded that the accident likely caused serious bodily injury based on the "the severity of the impact" and the "contact damage" to the SUV. During the investigation, Cheek-McNeal spoke with a fire captain to verify the well-being of the drivers involved in the accident. She learned that the passengers of the SUV were transported to the hospital after firefighters had cut off the roof to remove them from their vehicle. As she investigated the accident, Cheek-McNeal approached "a path" where a red car "had traveled off into the woods." Because the car was inoperable, Cheek-McNeal determined that the driver had not tried to drive away from the accident.

Cheek-McNeal tried to speak to Castellon while he was sitting in the back of an HPD patrol car, but he did not respond to her questions. Castellon looked at

Cheek-McNeal with a "blank stare" and "shrugged his shoulders" when she asked him if he remembered anything from the accident. As Cheek-McNeal was walking to the other side of the patrol car, Castellon pushed his way out of the car and ran southbound, making it "about 25 feet" before several officers tackled and detained him. Cheek-McNeal testified that Castellon remained on the scene from the time she arrived until the moment officers detained him.

The State charged Castellon with the third-degree felony offense of failure to stop and render aid. *See* TEX. TRANSP. CODE § 550.021. A jury convicted him. Following a plea bargain on punishment, the trial court assessed Castellon's punishment at 10 years' imprisonment but probated the sentence by placing him on 10 years' community supervision, with 75 days' confinement in the Harris County Jail. The trial court also ordered him to pay $10,000 in restitution.

On appeal, Castellon contends that the evidence is legally insufficient to support his conviction, and he received ineffective assistance of counsel.

Sufficiency of the Evidence

In his first issue, Castellon argues that his conviction is unsupported by sufficient evidence because the State did not prove that he ever left the scene considering that his vehicle was inoperable and that bystanders physically detained him and prevented him from leaving. In response, the State argues that the evidence was legally sufficient to support Castellon's conviction because he failed

to remain at the scene and comply with the requirements of Sections 550.021(4) and 550.023 of the Transportation Code.

A. Standard of review

We review Castellon's challenge to the sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). In determining whether the evidence is legally sufficient, we consider all the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Cuevas v. State*, 576 S.W.3d 398, 399 (Tex. Crim. App. 2019).

The jury is the sole judge of the credibility of witnesses and the weight to give testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses, disbelieve any or all the evidence or testimony proffered, and weigh the evidence as it sees fit. *Galvan-Cerna v. State*, 509 S.W.3d 398, 403 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Every fact need not point directly and independently to the defendant's guilt. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). "On review, this Court determines whether the necessary inferences made by the trier of fact are reasonable, based upon the cumulative force of all of the evidence." *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim.

App. 2011). We resolve inconsistencies in the evidence in favor of the verdict. *See Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). This standard applies equally to circumstantial and direct evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

B. Applicable law

Under the failure-to-stop-and-render-aid statute, a driver involved in an accident must perform certain statutory duties:

> (1) immediately stop the vehicle at the scene of the accident or as close to the scene as possible;
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> (2) immediately return to the scene of the accident if the vehicle is not stopped at the scene of the accident;
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> (3) immediately determine whether a person is involved in the accident, and if a person is involved in the accident, whether that person requires aid; and
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> (4) remain at the scene of the accident until the operator complies with the requirements of [Transportation Code] Section 550.023.[1]

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[1] Section 550.023 requires a driver involved in an accident resulting in the injury or death to

> (1) give the operator's name and address, the registration number of the vehicle the operator was driving, and the name of the operator's motor vehicle liability insurer to any person injured or the operator or occupant of or person attending a vehicle involved in the collision;
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> (2) if requested and available, show the operator's driver's license to a person described by Subdivision (1); and
>
> (3) provide any person injured in the accident reasonable assistance, including transporting or making arrangements for transporting the

TEX. TRANSP. CODE § 550.021(a). To convict a defendant of failure to stop and render aid, the State must prove beyond a reasonable doubt that the defendant is a driver of a vehicle involved in an accident resulting in injury or death of any person and the driver intentionally and knowingly fails to stop and render reasonable assistance. *McGuire v. State*, 493 S.W.3d 177, 205 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Because Castellon does not contest that he was the driver or that he was involved in an accident causing an injury to Garza, the only issue is whether Castellon intentionally and knowingly failed to stop and render reasonable assistance.

C. The evidence was legally sufficient to show that Castellon did not remain at the scene and did not perform his other statutory duties under Section 550.023

Castellon does not argue there was insufficient evidence that he failed to present his contact information, vehicle information, and vehicle insurance to the complainant. Castellon was required, but failed, to provide Garza (or his wife) with his name and address, the registration number of his vehicle, and the name and address of his liability insurer. *See* TEX. TRANSP. CODE §§ 550.021(a)(4), 550.023(1). Both eyewitnesses testified that Castellon immediately jogged or

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> person to a physician or hospital for medical treatment if it is apparent that treatment is necessary, or if the injured person requests the transportation.

TEX. TRANSP. CODE § 550.023.

walked away from the scene multiple times. They also testified that Castellon did not respond to them when they talked to him. Based on this evidence, the jury could have reasonably inferred that Castellon did not fulfill his statutory duties under Section 550.023 by providing his information to Garza.

Because Castellon needed to stop at the scene *and* provide the requisite information, his failure to fulfill the latter obligation supports his conviction.[2] *See Birdwell v. State*, 10 S.W.3d 74, 79–80 & n.7 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) ("Appellant was required by law to *both* stop *and* provide information and was charged with the failure to do both. It was not necessary for the State to prove that he failed to do *each*."); *see also St. Clair v. State*, 26 S.W.3d 89, 98–99 (Tex. App.—Waco 2000, pet. ref'd) (overruling sufficiency challenge to conviction for failure to stop and render aid under Section 550.021(a) where appellant failed to challenge both alleged ways to commit the offense).

Viewing the evidence in the light most favorable to the verdict, a jury could have found beyond a reasonable doubt that Castellon failed to provide his name and address and the name and address of his liability insurer to Garza, supporting his conviction for failure to stop and render aid. *See Birdwell*, 10 S.W.3d at 79–80.

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[2] Based upon our resolution here, we need not address whether Castellon rendered reasonable assistance. *See* TEX. R. APP. P. 47.1.

Castellon also contends that Cheek-McNeal gave conflicting testimony about whether he left the scene because she first testified that she saw Castellon run southbound for about 25 feet after breaking away from the bystanders' barrier, but then she later testified that he remained on the scene from the time she arrived until the time officers detained him. He does not, however, argue that a conflict exists about his first two departures before Cheek-McNeal's arrival, as witnessed by Dennis and Nnajiofor.[3] Instead, he contends that Cheek-McNeal gave conflicting testimony about whether he left the scene a *third* time, after she had arrived at the scene.

It is within the province of the jury to resolve those conflicts over Castellon's third departure. We must defer to the inferences drawn by the jury on whether Castellon remained on the scene after Cheek-McNeal had arrived. *See Galvan-Cerna*, 509 S.W.3d at 403. Because the jury convicted Castellon for the failure to stop and render aid, we must resolve all inconsistencies in the evidence about whether Castellon remained on the scene in favor of the jury's guilty verdict. *See Curry*, 30 S.W.3d at 406. But we note that it is unnecessary for the State to prove that Castellon left the scene after Cheek-McNeal's arrival to support

[3] Castellon's first departure occurred when Dennis saw Castellon jog across the street, away from the area where his car landed. When he noticed that Castellon was trying to get away, Dennis wrestled him to the ground and detained him until another bystander arrived. Per Nnajiofor, Castellon's second departure occurred when Castellon walked away from the bystanders' barrier until bystanders caught up to him, returned him to the scene, and placed him in a car until officers arrived.

Castellon's conviction because there is legally sufficient evidence of two uncontested departures. *Cf.* TEX. TRANSP. CODE § 550.021 (not requiring proof of multiple departures to sustain a conviction for the offense). We therefore overrule Castellon's first issue.

Ineffective Assistance of Counsel

In his second issue, Castellon argues that he received ineffective assistance of counsel because his attorney failed to object to the State's description of "the scene of the accident" during the State's closing arguments, request defensive instructions in the jury charge, and request a charge on the lesser-included offense of attempted failure to stop and render aid.

A. Standard of review

To prevail on a claim of ineffective assistance of counsel, an appellant must show that his trial counsel's performance was deficient and that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). An appellant bears the burden of establishing both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998) (per curiam). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

For the first prong, our review of counsel's representation is highly deferential, and we "indulge in a strong presumption that counsel's conduct was *not* deficient." *Nava*, 415 S.W.3d at 307–08 (citing *Strickland*, 466 U.S. at 689). To overcome this presumption, claims of ineffective assistance of counsel must be firmly founded in the record and demonstrate the alleged ineffectiveness. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). Appellate courts are rarely able to "fairly evaluate the merits of an ineffective assistance claim" on direct appeal because the trial record is usually "undeveloped" and inadequate to "reflect the motives behind trial counsel's actions." *See id*. (citations omitted). Due to the seriousness of an ineffective-assistance-of-counsel allegation, appellate courts have recognized that trial counsel should have a chance to explain his or her actions before being found ineffective. *See Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003) (en banc). When, as here, trial counsel is not given a chance to explain his actions, "the appellate court should not find deficient performance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

The second prong requires the appellant to prove that he was prejudiced by counsel's deficient performance. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex.

Crim. App. 1999). The appellant must show a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "In order for trial counsel's failure to object to the State's . . . argument to have been ineffective assistance, appellant must demonstrate that if he had objected, the trial judge would have committed error in refusing to sustain his objection." *Vaughn v. State*, 888 S.W.2d 62, 74 (Tex. App.—Houston [1st Dist.] 1994), *aff'd*, 931 S.W.2d 564 (Tex. Crim. App. 1996).

B. Failure to object to jury argument

Castellon challenges the State's "legal definition" of "scene of the accident" during its closing argument to the jury:

> Ladies and gentlemen, let's define the scene, because, you know, we see it all through—throughout the law in this case that the issue is the scene, what's the scene, what's not. He's got to stop at the scene. If he doesn't, he's got to immediately return and then he's got to remain. The accident took place up near the top of your screen right there (indicating). That's where we had Mr. Nnajiofor testify to first contact of those vehicles. Mr. Garza's vehicle rolls and makes contact with that tree. That is where our paralyzed victim came to rest. And you'll notice in the law that a person has to remain at the scene until they perform a series of duties, whether it's giving their information, making sure they're transported for medical attention. It follows that the scene is our place from where we can take care of those duties. The scene of this accident is the area from the point of collision to where those duties needed to be accomplished at that tree. And Mr. Castellon had a duty to return right there and that is the duty that he failed to respect and that is the duty that was violated when he headed southbound, first of all. When he was brought back there, he didn't do any investigation of the injuries and then fled again. He fails to remain.

Castellon asserts that he received ineffective assistance of counsel because defense counsel did not object to the State's argument describing the parameters of the scene of the accident. He asserts that the State's closing argument improperly limited the legal definition of scene of the accident, "foreclose[ing] the jury from considering the [defensive theory] that he never left the scene." Castellon argues that "the true definition of the scene of any accident must, at a minimum, include within its radius all damaged vehicles and any responding emergency vehicles." He was therefore prejudiced by the State's misstatement of the law. In response, the State contends that Castellon provides no legal authority for his definition of "scene of the accident." The State also argues that it made a proper jury argument because the "[t]he jury was free to define the parameters of the scene for itself, as long as the definition complied with common usage."

Trial counsel must confine their jury arguments to the trial record and avoid improperly referring to facts "that are neither in evidence nor inferable from the evidence." *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). A proper jury argument is generally limited to one of the four areas: (1) summation of the evidence presented at trial; (2) reasonable deduction drawn from that evidence; (3) answer to opposing counsel's argument; and (4) plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011); *Acosta v. State*, 411 S.W.3d 76, 93 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

The State has wide latitude in its jury arguments, and it may draw all reasonable, fair, and legitimate inferences from the evidence. *Allridge v. State*, 762 S.W.2d 146, 156 (Tex. Crim. App. 1988) (en banc). Arguments that exceed the bounds of these areas do not constitute reversible error unless, considering the record as a whole, the argument is extreme or manifestly improper, violates a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (en banc). "The remarks must show a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial." *Id.*

The State's jury argument here was not an improper argument in describing the scene of the accident. Instead, the State's argument was a proper summation of and a reasonable deduction from the evidence, and it did not improperly expand the parameters of the scene of the accident. The State based its argument on record evidence, including the fact that Garza's SUV crashed into a tree. Moreover, the State reasonably deduced from the evidence that the tree was an appropriate part of the scene because Garza and his wife were injured and trapped in their SUV there until emergency responders physically extracted them from it and transported them to the hospital.

Castellon did not establish an ineffective-assistance claim because he did not show that the trial court would have erred in denying defense counsel's objection

to the State's jury argument. *See, e.g.*, *Vaughn*, 888 S.W.2d at 74 (holding that defendant must show that the trial court would have erred in overruling the objection to prove ineffectiveness for failure to object). Because the State's argument was a proper summation of the evidence and asked the jury to make reasonable deductions from the evidence, Castellon did not show prejudice. *See Williams*, 301 S.W.3d at 687. He also did not show deficient performance because defense counsel's decision to object to statements made during closing argument is a matter of trial strategy, and the record is silent on this point. *See Ex parte Scott*, 541 S.W.3d 104, 119–20 (Tex. Crim. App. 2017).

C. Failure to request defensive instructions

Castellon claims that he received ineffective assistance of counsel because his trial counsel did not request defensive instructions. Relying on *Williams v. State*, 102 S.W.2d 212 (Tex. Crim. App. 1937), Castellon contends that his counsel should have requested an instruction that the "defendant's failure to do for the injured party that which was done by others is not criminal." In *Williams*, the court reversed the appellant's conviction because the jury instruction did not allow the jury to determine what assistance the defendant should have given to the injured party considering that someone else was already taking the injured to the hospital for treatment. In response, the State argues that the instruction would have been

futile because it would have been statutorily prohibited as a comment on the weight of the evidence.

To establish his claim that his counsel's performance was deficient for failure to request a defensive instruction on Castellon's duty to render aid, Castellon must show that he was entitled to the instruction. A jury charge must not express any opinion about the weight of the evidence. TEX. CODE CRIM. PROC. art. 36.14. "A charge that assumes the truth of a controverted issue is a comment on the weight of the evidence and is erroneous." *Whaley v. State*, 717 S.W.2d 26, 32 (Tex. Crim. App. 1986) (en banc). As the trier of fact, the jury determines and weighs the evidence:

> Juries may consider and evaluate the evidence in whatever way they consider it relevant to statutory offenses and defenses . . . , [and] special, non-statutory instructions, even when they relate to statutory offenses or defenses, generally have no place in the jury charge.

Walters v. State, 247 S.W.3d 204, 211 (Tex. Crim. App. 2007).

Jury instructions are a matter of trial strategy. When the record is silent on the reasoning behind an alleged deficiency, we will assume that counsel had a strategy if we can imagine any reasonable sound strategic motivation. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see Williams v. State*, 417 S.W.3d 162, 181 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). Even if defense counsel had requested the instruction, it would not have been unreasonable for the trial court to deny the request because the instruction tracks the language of

common law and it was not enacted by the Legislature. *See Walters*, 247 S.W.3d at 212 (when common law jury instructions have not been enacted by the legislature, including these instructions would "constitute a comment on the weight of the evidence" and "courts may conclude that [the legislature] intended this silence in the law and in the jury instructions").

Castellon has not shown by a preponderance of the evidence that the proposed jury instruction would have led to a different outcome because Castellon was required to fulfill all of his statutory obligations under Section 550.021(a)(4), which he failed to do. *Birdwell*, 10 S.W.3d at 79–80 & n.7. An attorney is not deficient for failing to request a futile jury instruction. *Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) ("[A] reasonably competent counsel need not perform a useless or futile act, such as requesting a jury instruction to which the defendant is not legally entitled or for which the defendant has not offered legally sufficient evidence to establish.").

For these reasons, Castellon has not established by a preponderance of the evidence that trial counsel's representation fell below the objective standard of reasonableness by not requesting an instruction. *See Strickland*, 466 U.S. at 689.

D. Failure to request a charge on lesser-included offense

Finally, Castellon argues that his defense counsel should have requested an instruction on the lesser-included offense of attempted failure to stop and render aid and that his failure to do so was ineffective assistance of counsel.

To establish his claim that defense counsel's performance was deficient for failing to request an instruction on the lesser-included offense of attempted failure to stop and render aid, Castellon must show that he was entitled to the instruction. *Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999). A defendant is entitled to an instruction on a lesser-included offense when the proof for the offense charged includes the proof necessary to establish the lesser-included offense, and there is evidence in the record that would permit a jury to find that the defendant is only guilty of the lesser included offense. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994) (en banc) (citing *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993) (en banc)). An attempt to commit the charged offense is a lesser-included offense. TEX. CODE CRIM. PROC. art. 37.09(4).

Whether to request a lesser-included instruction is a strategic decision that we do not resolve where defense counsel's reasoning is absent from the record. This kind of record is best developed in a hearing on a motion for new trial or an application for a writ of habeas corpus. *See Perez v. State*, 56 S.W.3d 727, 731 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (citing *Jackson*, 973 S.W.2d at

957). Defense counsel may go for broke, hope for an outright acquittal, and argue not guilty rather than request a lesser-included-offense instruction. *See Bowen v. State*, 374 S.W.3d 427, 429–30 (Tex. Crim. App. 2012). The record here cannot dispel this possibility. Even though defense counsel's trial strategy did not succeed here, the failure to request an instruction, without more, does not show that counsel's performance was deficient. Castellon has not carried his burden of showing by a preponderance of the evidence that his trial counsel provided constitutionally deficient assistance. We therefore overrule his second issue.

Conclusion

We affirm the trial court's judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

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