Opinion issued August 10, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00986-CR

ERIC DENZEL LATIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Case No. 18,392

MEMORANDUM OPINION

A jury found appellant, Eric Denzel Latin, guilty of the felony offense of aggravated robbery,[1] and the trial court assessed his punishment at confinement for

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1 *See* TEX. PENAL CODE ANN. § 29.03(a)(3)(A).

twenty-five years. In his sole issue, appellant contends that his trial counsel provided him with ineffective assistance of counsel.

We modify the trial court's judgment and affirm as modified.

Background

Evelyn Nitsch, the complainant, testified that she was born in 1928 and at the time of trial she was ninety years old. On Sunday, April 29, 2018, she prepared to attend church and left home at 7:30 a.m. to attend the 8:00 a.m. service. When the service was over, sometime between 9:00 a.m. and 9:15 a.m., she "passed [the] Prairie Lea Cemetery," stopped "for a little while at [her] husband's grave," and then "went on to [a] Walmart" store in Brenham, Washington County, Texas to "do some shopping."

She parked her Buick sport utility vehicle ("SUV") "[n]ear the entrance" of the Walmart store in a parking space perpendicular to the store that was reserved for people with disabilities. She was not sure how long she was in the store that day, but "many times it t[ook] [her] about an hour" to do her shopping. She "checked out," hung her purse on her left forearm, and left the store. When she reached her SUV, she opened the rear hatch, set her purse down inside, and moved her purchases from the shopping cart into the back of the SUV. She then retrieved her purse, closed the hatch, and moved her keys to her left hand as she walked around the SUV to the driver's side.

As she was walking, she saw a man get out of a faded red car and run toward her. He reached her "before [she] knew it" and "pulled the purse off [her] arm." He pulled the purse so hard that "some of [her] skin went with it." "[I]t tore the whole skin off [her] little finger." She "lost [her] balance" and "landed on the concrete" on her left side, injuring her elbow and her left knee. She saw the man "r[u]n off," and the faded red car "dr[o]ve away."

The complainant said, "He got my purse. He got my purse." (Internal quotations omitted.) And three men noticed her lying on the pavement and came over to help her. She exclaimed, "I have to tell someone. I have to tell someone about this." (Internal quotations omitted.) The men helped her up and "walked into [the] Walmart [store] with [her]." They went up to the customer service desk and "ask[ed] for [tissues] because there was blood dripping" from the complainant's hand and arm. The complainant was in pain from her injuries. At that point, a law enforcement officer "came up and asked [her] a few questions," but she could not "remember what he said."

Emergency medical service ("EMS") professionals arrived and began treating the complainant. While she was being placed in an ambulance, she was told that law enforcement officers "had [her] purse" and had arrested "the man" who had taken her purse.

EMS professionals took the complainant to a hospital emergency room. While she was there, a law enforcement officer brought her purse to her. Her wallet was not in the purse, but a law enforcement officer brought the wallet to her later that evening when she was at home. The wallet still held her "driver's license, [her] Social Security card," credit cards, her car insurance papers, "and other items." The only thing missing was "[her] medical information."

During the complainant's testimony, the trial court admitted into evidence photographs of the complainant's SUV, which the complainant identified as showing the back hatch of her SUV while she was parked in front of the Walmart store on the day of the aggravated robbery. The complainant also identified photographs of her purse in the road and her wallet on the rear seat of what was determined to be appellant's car.

Kristy Taylor testified that she had worked as the Emergency Assistance Operations Manager for Washington County for about seven years. Taylor confirmed that all incoming calls for emergency assistance were digitally recorded, and she identified a compact disc ("CD") that she had prepared. She stated that she had copied the audio recording of a call for emergency assistance onto the CD and had written on the CD that the "call incident type" was a "robbery at the location of Walmart, the date of April 29, 2018, at 11:03 a.m." The trial court admitted into evidence the CD containing the audio recording of the call for emergency assistance.

On the audio recording, the emergency-assistance caller reported that someone had assaulted an elderly woman in the Walmart store parking lot in Brenham, knocking her down and stealing her purse. That person got into a red Chrysler PT Cruiser. The caller followed the car, which left the Walmart store parking lot and drove on the Highway 290 access road headed toward Houston, Texas. The caller gave the emergency-assistance operator the car's license plate number, and the caller continued to follow the car as it drove on the highway, telling the operator the car's location and observing that the car's passenger—who was the person who had taken the complainant's purse—threw something white out of the passenger-side car window. The caller continued observing the car as she exited the highway into Chappell Hill, Texas where she saw law enforcement officers surround the car. She gave the emergency-assistance operator her name and Texas driver's license number before the call ended.

Cindy Garnica, the emergency-assistance caller, testified that she went to the Walmart store in Brenham on the morning of April 29, 2018, with her husband, daughter, mother, and father. The family had stopped at the store to run an errand on their way to church. Garnica was driving in the parking lot "looking for a parking spot." She drove to "the market side" of the "double doors" in front of the store and stopped behind a "red-orange" Chrysler PT Cruiser that she thought "was waiting

for pedestrians to walk through." She "wait[ed] for th[e] car to move so that [she] could go into the lane and park."

As she waited, she saw a man get out of the passenger's side of the car. He left the door open, "went around the car" to where the complainant was standing, "snatched" the complainant's purse, and ran back to the open car door. He got into the passenger's side of the car, and the car "took off immediately." Garnica's mother and father urged Garnica to "follow" the car, assuring her that other people in the parking lot would help the complainant. "And as scared as [she] was, [she] follow[ed]" the car.

Before leaving the parking lot, Garnica's husband called for emergency assistance. He then gave the cellular telephone to Garnica. Garnica told the emergency-assistance operator what was happening as she was driving so that law enforcement officers could locate the car involved in the aggravated robbery. She followed the car onto the Highway 290 access road, where it took the entrance ramp onto the highway heading east toward Houston. She drove close to the car so that she could see the license plate number and tell it to the operator. She believed that the car's driver and passenger knew she was following them because the driver of the car attempted to make a U-turn but then returned to the highway. During that maneuver, Garnica slowed down to about twenty miles per hour. She passed the car but kept driving slowly enough so that she stayed close to it. Garnica could see the

car in her rear-view mirror and her family also kept track of its movements. She noticed something light-colored being thrown out of the car's passenger-side window, which she later learned was the complainant's purse. She told the emergency-assistance operator about what she saw.

As Garnica and the driver of the car approached a traffic signal in Chappell Hill, the emergency-assistance operator told Garnica that a law enforcement officer was in a patrol car behind her, and Garnica saw other patrol cars approaching. When she saw the officers next to the car involved in the aggravated robbery, she went through the intersection and made a U-turn. On her way back to Brenham, she saw a law enforcement officer holding an object, stopped, and told him "[t]hat's what was thrown out of the [car]."

Garnica confirmed that the audio recording on the CD admitted into evidence during Taylor's testimony was her call with the emergency-assistance operator during her pursuit of the car involved in the aggravated robbery. During her testimony, she identified a photograph of the car that she had followed from the Walmart store parking lot that day.

Brenham Police Department ("BPD") Sergeant S. Eilert testified that on April 29, 2018, he responded to a call about "a[n] [aggravated] robbery that occurred at approximately 11:04 [a.m.]" at the Walmart store in Brenham. Eilert was informed that "there was a[n] [emergency-assistance] caller [driving] behind" the car involved

in the aggravated robbery, which was later determined to be appellant's "red-colored [Chrysler] PT Cruiser." The emergency-assistance caller and appellant's car were entering Highway 290. Based on that information, he instructed BPD Sergeant J. Snowden to go to the Walmart store to interview the complainant. Meanwhile, Eilert "and [BPD] Corporal [T.] Curry . . . began traveling down [Highway] 290 . . . to locate" appellant's car. Sheriff's Office Deputy Perez, who heard about the aggravated robbery report, told Eilert that he would also "assist [in] locating" appellant's car. And Texas Department of Public Safety ("TDPS") Trooper Reeves also assisted. A BPD dispatch operator provided the law enforcement officers with information given by the emergency-assistance caller to help officers locate appellant's car.

According to Sergeant Eilert, Corporal Curry was the first law enforcement officer to see appellant's car. Eilert "was a few hundred yards behind him" at the time. They stopped appellant's car on "[Highway] 290 . . . near the Washington County line" in Chappell Hill. Eilert, Trooper Reeves, Curry, and Deputy Perez were all involved in making the traffic stop. Eilert "began giving loud verbal commands," and directed the car's driver, appellant, and the car's passenger, Joshua Fant-Clark,[2] to "show [him] their hands." Both appellant and Fant-Clark complied

[2] Testimony at trial revealed that appellant was the driver of the red Chrysler PT Cruiser and Fant-Clark was the passenger.

by extending their hands out of the open car windows. The officers removed appellant from the car, placed him on the ground, and secured him with handcuffs. The officers then did the same with Fant-Clark. While searching appellant's car, Eilert found a silver clutch wallet on the floorboard that contained the complainant's "driver's license, Social Security card, and other identifying information." The officers also found a firearm, some "marijuana residue," multiple cellular telephones, and clothing. During his testimony, Eilert identified the car that he stopped on the day of the aggravated robbery in certain photographs that were admitted as evidence by the trial court.

Sergeant Eilert explained that during the investigation of the aggravated robbery, he "collected information" from Sergeant Snowden, who had gone to the Walmart store where the aggravated robbery occurred and viewed the store's surveillance videotaped recording. Snowden also spoke with the complainant. Eilert learned that the complainant's purse had been taken from her. And the dispatch operator told him that the emergency-assistance caller had seen the passenger in the car throw a purse out of the car's passenger-side window. Eilert also was given a description of the person who had robbed the complainant, which matched Fant-Clark.

TDPS Trooper Q. Smith testified that he responded to a call about an aggravated robbery that had occurred at the Walmart store in Brenham. The

aggravated robbery involved an elderly woman who had been knocked down and had her purse taken, and the car involved in the robbery was seen driving onto Highway 290 toward Chappell Hill. He headed toward the location of the emergency-assistance caller who was following the car. On the way, the dispatch operator relayed a message that the emergency-assistance caller had seen something being thrown out of the car near William B. Travis Road. Smith went to the area and found a white and tan purse lying near the center median with its contents strewn out over the ground.

Trooper Smith took photographs of the purse as he found it in the road, which the trial court admitted into evidence. After taking the photographs, Smith picked up the purse, put the strewn items back in the purse, put the purse in his patrol car, and drove to the hospital where BPD law enforcement officers were meeting with the complainant. When he arrived, he gave the purse to a BPD officer.

Sergeant Snowden testified that on the day of the aggravated robbery, he was dispatched to the Walmart store in Brenham at about 11:04 a.m. Sergeant Eilert instructed Snowden to find the complainant at the Walmart store and speak with her. He encountered the complainant at the customer service desk. He noticed that "she had a large laceration on her right forearm, blood on her left arm and hand, and . . . a laceration on her right hand and arm and blood also on her right hand and arm." The largest laceration was on the complainant's left arm. He took photographs of the

complainant's injuries, which the trial court admitted into evidence. He began interviewing the complainant but stopped when she told him "that she was feeling like she was about to pass out." EMS professionals placed her on a gurney, moved her into the ambulance, and drove her to a hospital.

Sergeant Snowden then continued his investigation at the Walmart store. He spoke with Rhonda Wellbrock, the Loss Prevention Manager at the Walmart store, who gave him the surveillance videotaped recordings of the aggravated robbery which had been recorded by the parking lot security cameras.

Sergeant Snowden viewed the surveillance videotaped recordings, which the trial court admitted into evidence, during his testimony. The recording from the first security camera showed appellant's car enter the parking lot from the Highway 290 access road. Snowden explained that appellant's car "initially drove past [the complainant]" while she was loading her groceries into her SUV. It then "circled the parking lot" and "drove back around." As the car came close to where the complainant was standing, the passenger door of appellant's car started to open. A man ran up to the complainant, grabbed her purse, yanked it from her arm, threw her to the ground, and returned to the car's front-passenger's side. Appellant's car "took off" before the man had closed the passenger-side door. The recording from the second security camera showed appellant's car leaving the parking lot, heading back

toward the Highway 290 access road, running through a stop sign, and turning eastbound.

According to Sergeant Snowden, after he viewed the surveillance videotaped recordings at the Walmart store, he contacted Sergeant Eilert to give him a description of the passenger who had taken the complainant's purse. He also told Eilert what had been taken from the complainant and what he had seen on the surveillance videotaped recordings. Snowden then went to the hospital to visit with the complainant. Trooper Smith met him there and gave him the complainant's purse. He brought the purse to the complainant and asked her to go through it to see if anything was missing. She told him that her wallet was missing, so Snowden called Eilert to have him look for the wallet. The wallet was retrieved from the back seat of appellant's car.

BPD Sergeant J. Merkley testified that Sergeant Eilert instructed him to go to the Walmart store in Brenham to investigate the aggravated robbery. At the store, he met with Sergeant Snowden and learned that the complainant had been taken to the emergency room at a hospital, so he went there to meet with her. When he arrived, the complainant "was being treated by some medical staff." "She had torn skin on her arms," and Merkley took pictures of her injuries. The photographs that Merkley had taken were admitted into evidence by the trial court. While viewing the photographs during his testimony, Merkley stated that on the complainant's left

arm, "[s]he ha[d] torn skin" that was "laid open" showing "the meat underneath the skin." The complainant also "ha[d] torn skin above her ring finger," which was discolored and bruised. On the complainant's right hand, she had "torn skin above her ring finger and a small abrasion on her wrist and bruising and discoloration of her skin."

After leaving the hospital, Sergeant Merkley went to the Washington County jail to interview appellant and Fant-Clark. Merkley first interviewed Fant-Clark and then appellant, speaking with each of them separately. The trial court admitted into evidence a videotaped recording of appellant's interview with Merkley.

After the State rested its case in chief, outside the presence of the jury, appellant's trial counsel brought appellant to the stand and questioned him about whether he wanted to call Fant-Clark to testify for the defense. Appellant confirmed that he and his counsel had previously discussed whether to call Fant-Clark to testify, and appellant acknowledged that Fant-Clark made an initial statement to law enforcement officers after the aggravated robbery and then made another statement to the district attorney that was contrary to his initial statement. Appellant also confirmed that his trial counsel had previously informed him that he thought it was "too risky" to call Fant-Clark to testify. Appellant's trial counsel stated, though, that he was "going to leave that decision up to [appellant]." He then asked appellant,

"[f]or the record, do you want me to call him or not?" Appellant answered, "I mean, I don't know." The discussion continued:

Appellant's trial counsel:	You have to make the call, because I don't want you to come back saying I wanted this guy called and you didn't call him.
Appellant:	Man, I don't know. I don't know what's best. I told you I don't really know.
Appellant's trial counsel:	Okay. So then you are going to go with my judgment not to call him?
Appellant:	I mean, I guess so. I don't know. I guess so.
Appellant's trial counsel:	Okay. That "I guess so" bothers me.
Appellant:	I don't really know.
Appellant's trial counsel:	One question: Do you want me to call him or not? You know what he is going to say both ways. Do you want me to call him or not? I've explained both sides of it. You tell me, do you want me to call him or not?
Appellant:	I mean—
Appellant's trial counsel:	If you say yes, I'll call him.
Appellant:	I mean, I guess so. I don't know. I don't really know. Man, I told you it's—I ain't had time to think about it.
Appellant's trial counsel:	We've had lots of time.

Appellant:	I mean, I ain't—I thought he was coming. That's what I'm saying. That's all I've been thinking about. So I don't know. If you're not going—
Appellant's trial counsel:	Okay. So you want me to call him?
Appellant:	—to call him, you're not going to call him.
Appellant's trial counsel:	Then you want me to call him?
Appellant:	Whatever you feel is best, that's what we can do. I mean—
Appellant's trial counsel:	Okay.

After this exchange, appellant and his trial counsel had a brief private conference, then returned to the courtroom. Appellant's trial counsel informed the trial court that appellant wanted Fant-Clark "brought over" from the jail and that the bailiff "had conversations with the jail about bringing him over," but Fant-Clark had said that "he [didn't] want to . . . come testify, and so they are trying to get him ready to see if he w[ould] come." Appellant's trial counsel confirmed to the trial court that he had discussed with appellant the possibility that even if Fant-Clark was brought to court to testify, he might refuse to answer any questions. The State informed the trial court that Fant-Clark had sent a letter to the State about "why he didn't want to testify" at appellant's trial. Fant-Clark said that he wanted "a deal [from the State] to reduce his sentence" before he testified, and if the State did not agree, he would not testify during appellant's trial.

Fant-Clark was brought before the trial court, outside the presence of the jury. He confirmed that he was incarcerated and was serving his sentence after he had pleaded guilty to the offense of robbery in accordance with a plea agreement from the State. Fant-Clark stated that he would not testify at appellant's trial without an additional "deal" from the State. Appellant's trial counsel questioned Fant-Clark as follows:

Appellant's trial counsel:	Mr. Fant-Clark, I brought you back to testify and you . . . indicated to me that you're not going to testify unless you have a deal with the State?
Fant-Clark:	Yeah, that's all it—that's all I'm doing, man, or y'all can send me back, man.

Appellant's trial counsel informed the trial court that he was "not going to call [Fant-Clark] if he says he's not going to testify." The trial court then questioned Fant-Clark:

The court:	So it's your intention not to answer questions on behalf of the defense; is that correct?
Fant-Clark:	Yes, ma'am.
The court:	. . . I just want to be real clear that you are choosing to not testify; is that correct?
Fant-Clark:	Yeah, I'm not saying nothing.
The court:	It's a "yes" or "no."

Fant-Clark:	No, I'm not testifying.
The court:	All right. Y'all can take him back. Thank you. You're excused.

Appellant's trial counsel then moved to have the videotaped recording of Fant-Clark's interview with Sergeant Merkley admitted into evidence at trial, citing Fant-Clark's unavailability.[3] The State objected to the admission of the videotaped recording because the interview constituted hearsay, and the trial court denied the motion.

In the presence of the jury, appellant then testified that he lived in "north Houston" and had known Fant-Clark since the ninth grade. At about 1:00 p.m. on April 28, 2018, he picked up Fant-Clark at his girlfriend's apartment to take him to get his car, which had been impounded. Fant-Clark also wanted appellant to take him to "a mental hospital" where Fant-Clark's girlfriend was being treated so Fant-Clark could bring her some clothes.

According to appellant, the impound lot would not release the car to Fant-Clark, so they went back to the apartment while Fant-Clark called various hospitals trying to locate his girlfriend. They located her about 7:00 p.m. that day and brought her the clothes. Later, they left the apartment again and "went to a club"

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[3] *See generally* TEX. R. EVID. 804 ("Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness").

for "an hour or two." From there, they went to their friend Chuck's house, where they spent time "chilling" and watching television.

Throughout the day, appellant had been communicating with Latoya Johnson, a woman he had met "two or three weeks" before, on Facebook Messenger.[4] She was in Brenham and told appellant that she wanted him to go to "a Blue Bell convention" in Brenham with her. So, shortly after midnight, he decided to go to Brenham, and Fant-Clark agreed to go with him.

Appellant and Fant-Clark arrived in Brenham close to 5:00 a.m. on April 29, 2018. They went to a motel where Johnson was staying. They arrived in Brenham "so late" that when he got to Johnson's room, "she already had a dude in there." Appellant knocked on the door, and Johnson "finally . . . messaged [him]." She asked where he was and then "she came outside" and met him at his car, where they "probably just chilled out . . . for, like, a[n] hour and a half or two." Johnson returned to her room, and appellant fell asleep in his car.

When appellant awakened, he started messaging Johnson, asking her where she was and telling her, "come down, I'm still out here." At some point, appellant

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[4] *See Edwards v. State*, 497 S.W.3d 147, 155 n.8 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) ("Facebook Messenger is a mobile tool that allows users to instantly send chat messages to friends on Facebook." (internal quotations omitted)); *see also Hassan v. Facebook, Inc.*, No. 19-cv-01003-JST, 2019 WL 3302721, at *1 (N.D. Cal. July 23, 2019) (order) (noting plaintiff used Facebook Messenger application to communicate with others via calls and instant messages).

and Fant-Clark left the motel and went to a gas station, he "thought . . . was [a] Shell," but it was not open. So, they "ended up going to" a truck stop "to get gas," and then they went to a Hartz Chicken Buffet restaurant. After going to the restaurant, they went to a Walmart store "because [appellant] didn't even go in [the restaurant] and eat" as the "prices w[ere] high and [Johnson] was in there" and he did not "feel like dealing with her" anymore. Appellant was just going to return to Houston and went to the Walmart store to get "a snack or two, but then he didn't even go in." He drove into the Walmart store's parking lot, but "something just told [him] to go to [his] auntie['s]" house back in Houston, where he was going to "wash [his] clothes and get a haircut." He knew his aunt "had food," and "she would probably be cooking breakfast," so he did not park his car in the parking lot. Instead, he drove to the front doors of the Walmart store because Fant-Clark "was telling [him] he was feeling like he wanted to help the lady with her groceries." So, appellant stopped his car, and Fant-Clark got out. Appellant was not paying attention to where Fant-Clark went because he was busy preparing a marijuana "joint."

Fant-Clark then "jumped" back into the car, and "he was like real frantic, like scared, which really made [appellant] scared because [he] didn't know what was going on." "[T]hat's when [appellant] drove off because [Fant-Clark] was saying, go, go, go, go, go." Appellant thought "something wrong was going on," but he did

not see the complainant and did not know what had happened to her. Appellant did not go to the Walmart store planning to commit an aggravated robbery. He was expecting to receive a $1,500 check from the Internal Revenue Service "a couple" of days later.

As appellant drove out of the parking lot, he noticed a car following him. He asked Fant-Clark, "[W]hat's going on?" But Fant-Clark "crouched down" and did not answer him. After prodding Fant-Clark for a few more minutes, appellant "found out what was going on." Fant-Clark "calmed down . . . and that's when he lifted up . . . the purse." Appellant responded, "[W]hat the hell you doing?" He had "never seen [Fant-Clark] act like that, ever."

Appellant pulled the car over to the side of the road and told Fant-Clark that he was "going to have to get out" of his car "with that," meaning the purse. "But [Fant-Clark] said he wasn't getting out" of the car and that he could not get out because he was not "from out here."

Appellant noticed that the driver of the car that had been following him had also "pulled over" and "slowed down," and when they drove back onto the highway, "she ended up in front of [appellant's car]." He stayed behind her, hoping that doing so would make Fant-Clark want to jump out of the car, but Fant-Clark stayed in the car and "started rifling through [the complainant's] purse." He threw "everything out" of the car's passenger-side window, "but he kept [the] wallet."

Fant-Clark tried to talk appellant into "tak[ing] off." But appellant would not, because he was not "a part" of the aggravated robbery, and Fant-Clark "shouldn't even have snatched [the] purse in the first place." Appellant told Fant-Clark that most likely, the driver of the car that had been following them had their license plate number and law enforcement officers would be coming after them. And appellant knew that if he were "to speed away, [he would] be in more trouble than [he was] even in right [then]."

When appellant reached a traffic signal in Chappell Hill, the car that had been following them was behind his car. Appellant saw a patrol car activate its emergency-overhead lights, and a law enforcement officer directed him to pull his car over. Appellant did so, and he put his hands up out of the window "before [the officers] even got out" of the patrol car.

On cross-examination, appellant admitted that after his arrest, he told Sergeant Merkley, during his interview: "I'm not just going to throw my friend out of the car. It doesn't work that way."

Standard of Review

The Sixth Amendment to the United States Constitution guarantees the right to the reasonably effective assistance of counsel in criminal prosecutions. U.S. CONST. VI; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also* TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05; *Hernandez v. State*,

726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (test for ineffective assistance of counsel same under both federal and state constitutions). To prove a claim of ineffective assistance of counsel, appellant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Appellant has the burden to establish both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). "[A]ppellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Strickland*, 466 U.S. at 697.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In reviewing counsel's performance, 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 or trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006). To rebut that presumption, a claim of ineffective assistance must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. *See*

Menefield v. State, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (internal quotations omitted).

The trial record alone is rarely sufficient to show ineffective assistance. *Williams v. State*, 526 S.W.3d 581, 583 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *see also Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007) (noting "presumption that trial counsel's performance was reasonably based in sound trial strategy"). Thus, because the reasonableness of trial counsel's decision often involves facts that do not appear in the appellate record, the Texas Court of Criminal Appeals has stated that trial counsel should ordinarily be given an opportunity to explain his actions before a court reviews the record and determines that counsel was ineffective. *See Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Where, as here, trial counsel is not given an opportunity 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*, 363 S.W.3d at 593 (internal quotations omitted); *accord Williams*, 526 S.W.3d at 583.

Ineffective Assistance of Counsel

In his sole issue, appellant argues that his trial counsel did not provide him with effective assistance of counsel because he failed to call Fant-Clark as a witness.

The record shows that appellant's trial counsel and the trial court questioned Fant-Clark to determine whether he was willing to testify at appellant's trial, but Fant-Clark stated that he would "not testify[]." But trial counsel did not ask the trial court to compel Fant-Clark's testimony, so Fant-Clark was not "unavailable" to testify. *See* TEX. R. EVID. 804(a)(2) (witness is "unavailable" to testify if he "refuses to testify about the subject matter *despite a court order to do so*" (emphasis added)). Appellant's trial counsel proffered the videotaped recording of Fant-Clark's interview with Sergeant Merkley, which was recorded immediately after the robbery, but the State objected to the admission of the videotaped recording on hearsay grounds. The trial court excluded the videotaped recording of Fant-Clark's interview because it did not fall within a hearsay exception. *See* TEX. R. EVID. 804(b). Accordingly, we consider whether trial counsel's failure to ask the trial court to compel Fant-Clark's testimony constitutes ineffective assistance of counsel.

Under the second prong of *Strickland*, to show prejudice because of trial counsel's failure to call a witness to testify during the guilt-innocence phase of trial, a defendant must demonstrate that the witness was available, he would have benefited from the witness's testimony, and there was a reasonable probability that

the jury would have had a reasonable doubt as to appellant's guilt had the witness appeared at trial. *See Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010); *see also Jenkins v. State*, No. 01-03-00185-CR, 2004 WL 1233996, at *5–6 (Tex. App.—Houston [1st Dist.] June 3, 2004, no pet.) (mem. op., not designated for publication) (noting, in response to defendant's argument that his counsel provided ineffective assistance because she failed to compel defendant's former girlfriend to testify at trial, that defendant must establish former girlfriend was available and that he would have benefited from her testimony).

The videotaped recording of Fant-Clark's interview with Sergeant Merkley is not in the record. The State's List of Disclosures filed in the trial court explains that, in his interview, "Fant-Clark basically sa[id] that he committed the robbery that he eventually plead[ed] guilty to because he was 'hungry' and 'voices in his head' told him 'go, go, go,'" and Fant-Clark, during his interview, "never implicated [appellant] in the [aggravated] robbery." Later, though, when Fant-Clark entered his guilty plea to the offense of robbery, "he told his defense attorney . . . that the [aggravated] robbery was [appellant's] idea and he was the one who drove to [the] Walmart [store] to have Fant-Clark commit the [r]obbery." Fant-Clark stated that appellant "had him rob [the complainant] so they could get money before returning to Houston."

Here, appellant has not established that he would have benefited from Fant-Clark's testimony at trial. Even if appellant's trial counsel had been able to show the videotaped recording of Fant-Clark's interview with Sergeant Merkley to the jury, the State's description of the interview on its List of Disclosures only states that Fant-Clark did not "implicate[]" appellant, not that Fant-Clark exonerated appellant in his interview. *Compare Exonerate*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("exonerate" means "[t]o free from responsibility" and "[t]o clear of all blame; to officially declare (a person) to be free from guilt"), *with Implicate*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("implicate" means "[t]o show (a person) to be involved" and "[t]o bring into play; to involve or affect"). And the State, in response to the admission of the videotaped recording of Fant-Clark's interview, could have offered into evidence the record of Fant-Clark's guilty-plea hearing, in which Fant-Clark describes appellant as the mastermind and instigator of the aggravated robbery, which would rebut any suggestion that Fant-Clark's interview with Merkley exonerated appellant. And likewise, because the record does not show that Fant-Clark's testimony would have exonerated appellant but does show that it could have been detrimental to the defense—painting appellant as the mastermind and instigator of the aggravated robbery—there is no showing that appellant would have benefited from Fant-Clark's testimony had Fant-Clark been compelled to testify. *See Perez*, 310 S.W.3d at 894 ("[T]he failure to call witnesses

at the guilt-innocence . . . stage[] is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony." (internal quotations omitted)); *see, e.g.*, *Bottorff v. State*, No. 03-10-00760-CV, 2012 WL 4477396, at *8–9 (Tex. App.—Austin Sept. 28, 2012, no pet.) (mem. op., not designated for publication) (defendant did not establish that he would have benefited from witness's testimony where evidence "may just have easily been detrimental to the defense"). We conclude that appellant has failed to show that there is a reasonable probability that, but for trial counsel's purported error in failing to compel Fant-Clark's testimony, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687–88; *Lopez*, 343 S.W.3d at 142.

We hold that appellant has not satisfied his burden to establish that his trial counsel provided him with ineffective assistance of counsel.

We overrule appellant's sole issue.

Modification of Judgment

The trial court's written judgment does not accurately comport with the record in this case in that it declares that appellant's "SENTENCE SHALL RUN: CONCURRENTLY." Here, the record does not show that appellant has been convicted or sentenced for any other offense arising out of the aggravated robbery of the complainant. *See, e.g.*, *Pacheco v. State*, No. 01-18-00605-CR, 2020 WL 4299581, at *13 (Tex. App.—Houston [1st Dist.] July 28, 2020, no pet.) (mem. op.,

not designated for publication) ("A trial court may only order two or more sentences to run either concurrently or consecutively, when appellant has been convicted in two or more cases." (emphasis omitted)).

"[A]ppellate court[s] ha[ve] the power to correct and reform a trial court judgment 'to make the record speak the truth when [they] ha[ve] the necessary data and information to do so[] or make any appropriate order as the law and nature of the case may require.'" *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (quoting *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet ref'd)); *see also* TEX. R. APP. P. 43.2(b) (providing court of appeals may modify judgment and affirm as modified). Although neither party addresses the inconsistency between the trial court's written judgment and the record, our authority to correct an incorrect judgment does not depend on a request by the parties. *See French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Dromgoole v. State*, 470 S.W.3d 204, 226 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *see also Asberry*, 813 S.W.2d at 529–30 ("The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court.").

Accordingly, we modify the trial court's judgment to delete the declaration "THIS SENTENCE SHALL RUN: CONCURRENTLY." *See* TEX. R. APP. P. 43.2(b).

Conclusion

We affirm the judgment of the trial court as modified.

Julie Countiss
Justice

Panel consists of Justices Countiss, Rivas-Molloy, and Guerra.

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