**Affirm and Memorandum Opinion filed January 21, 2010.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-08-00661-CR**

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**ALEXANDER MICHAEL HATCHER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 185th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1134413**

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## MEMORANDUM OPINION

Appellant, Alexander Hatcher, was charged by indictment with the felony offense of assault on a public officer and entered a plea of not guilty. The jury found him guilty as charged. Appellant raises the following issues on appeal: (1) the trial court erred in excluding testimony about appellant's psychiatric hospitalization; (2) the court erred in submitting a jury charge that failed to adequately define the phrases "beyond a reasonable doubt" and "preponderance of the evidence"; (3) there was legally and factually insufficient evidence that he had the requisite intent or knowledge to commit the offense; (4) he received ineffective assistance of counsel; (5) section 8.01 of the Texas Penal Code

violates the due process clause of United States Constitution and the Texas Constitution; and (6) his sentence violates constitutional guarantees against cruel and usual punishment. We affirm.

## I. BACKGROUND

On September 23, 2007, appellant was confined in a single lockdown cell in the Harris County Jail. After appellant proceeded to clog his toilet and flood several jail cells, Officers W. J. Strong and Edgar O. Melchor approached his cell to remedy the problem. Consistent with department policy, they ordered appellant to place his hands through the cell's pan hole to be handcuffed. He refused and was ordered to sit down on the bunk in his cell. Although he complied with that instruction, he immediately lunged at Officer Strong after the door to his cell was opened. Appellant wrapped himself around Officer Strong and refused to let go. He also scratched Officer Strong on the head and chest, and likewise scratched and bit Officer Melchor, who had entered the cell to assist. Officers Isai Longoria and Roger L. Leverette were summoned to assist Officers Strong and Melchor. Appellant similarly scratched Officer Longoria on the arm and ripped his shirt, and scratched Officer Leverette on the forehead.

A jury convicted appellant of intentionally and knowingly assaulting a public servant, a third degree felony with a sentencing range of two to ten years. *See* Tex. Penal Code Ann. §§ 12.34, 22.01(a)(1), (b)(1) (Vernon Supp. 2009). Because appellant was a repeat offender, his sentencing range was increased to twenty-five to ninety-nine years' confinement in the Institutional Division of the Texas Department of Criminal Justice. *See id.* § 12.42(d) (Vernon Supp. 2009). The jury sentenced him to fifty-three years' confinement. Appellant timely appealed.

## II. DISCUSSION

### A. EXCLUSION OF EVIDENCE

On appeal, appellant contends the trial court erred in excluding testimony from Dr. Peraino, a licensed clinical psychologist who evaluated appellant on two different occasions. However, appellant has waived this complaint because he failed to make an offer of proof.

To adequately preserve error on a ruling that excludes evidence, appellant must prove he made known to the court the substance of the evidence being excluded. *See* Tex. R. Evid. 103; Tex. R. App. P. 33.1(a); *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). The offer of proof must show the nature of the evidence with enough specificity that the reviewing court can determine its admissibility. *N.R.C.*, 94 S.W.3d at 806. Further, the offer of proof must describe the actual content of the testimony appellant sought to elicit, not merely the reasons appellant sought to introduce the evidence. *See Love v. State*, 861 S.W.2d 899, 901 (Tex. Crim. App. 1993); *N.R.C.*, 94 S.W.3d at 806. Absent a showing of what the testimony would have been had he been permitted to elicit it, a party presents nothing for review. *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999); *Toler v. State*, 546 S.W.2d 290, 295 (Tex. Crim. App. 1977).

When the State objected to Dr. Peraino's testimony, appellant argued the potential testimony would be relevant to explain why he went to Rusk Mental Hospital and the duration of Dr. Peraino's treatment. However, appellant did not disclose the specific nature of the testimony he sought to introduce, only his reasons for wanting to offer it. *See Love*, 861 S.W.2d at 901. Therefore, appellant failed to preserve his complaint for our review. *See Guidry*, 9 S.W.3d at 153; *Toler*, 546 S.W.2d at 295. Accordingly, we overrule this issue.

**B. INEFFECTIVE ASSISTANCE OF COUNSEL**

In a related issue, appellant contends he received ineffective assistance of counsel by counsel's failure to argue that the State had opened the door to evidence of certain mental health treatment that was otherwise excluded. Both the federal and state constitutions guarantee an accused the right to the reasonably effective assistance of counsel. *See* U.S. Const. Amend. VI; Tex. Const. art. I, § 10; *Strickland v. Washington*, 466 U.S. at 668, 686 (1984). In reviewing claims of ineffective assistance, we apply a two-prong test. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687–88). Appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation was deficient in that it fell below the standard of prevailing professional norms and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Id.* (citing *Strickland*, 466 U.S. at 687–88). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

We look to the totality of the representation and the particular circumstances of each case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We begin with the strong presumption that counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Salinas*, 163 S.W.3d at 740; *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). To overcome the presumption, a defendant's allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d 814. When the record is silent as to the reasons for counsel's conduct, a finding that counsel was ineffective would call for impermissible speculation by the appellate court. *Stults*, 23 S.W.3d at 208. Therefore, it is critical for an accused relying on an ineffective-assistance claim to make the necessary record in the trial court. *Id.* However, when no reasonable trial strategy could justify counsel's

conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects counsel's strategy. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). When determining the validity of an ineffective-assistance claim, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).

Because appellant did not move for a new trial, the record contains no testimony from counsel explaining his trial strategy. Additionally, we cannot say no reasonable trial strategy could justify counsel's conduct. Moreover, appellant did not offer proof as to the nature of the testimony that was excluded, and he therefore cannot show the admission of this evidence would have produced a different outcome at trial. Thus, he has not met either prong of *Strickland*. *See Strickland*, 466 U.S. at 687–88. Accordingly, we overrule appellant's ineffective-assistance-of-counsel claim.

**C. JURY CHARGE**

In his next issue, appellant argues the trial court erred by submitting a jury charge that failed to define the phrases "beyond a reasonable doubt" and "preponderance of the evidence" at the guilt-innocence stage.[1] Because he did not object to the jury charge at trial, he must show the error was so egregious and created such harm that he did not have a fair and impartial trial. *Almanza v. State*, 724 S.W.2d 805, 806 (Tex. Crim. App. 1986). Appellant has not made this requisite showing.

Instead, the record reveals the charge appropriately defined "preponderance of the evidence" as the "greater weight and degree of the credible evidence in the case." *See Rickels v. State*, 202 S.W.3d 759, 763–64 (Tex. Crim. App. 2006). In addition, while the charge did not contain a thorough definition of the phrase "beyond a reasonable doubt," it

1 We will liberally construe appellant's claim that the court "abused its discretion" as one arguing egregious harm, the proper standard for an unobjected-to jury-charge error *See Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006); *Almanza v. State*, 724 S.W.2d 805, 806 (Tex. Crim. App. 1986).

stated, "[i]t is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt." A trial court need not specifically define "reasonable doubt" as long as it otherwise provides instruction to the jury on the need for the State to prove the defendant guilty beyond a reasonable doubt. *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000) (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994)). Accordingly, under current Texas law, the trial court's instruction was adequate. *See id.* Therefore, we overrule this issue.

**D. LEGAL AND FACTUAL SUFFICIENCY**

Appellant challenges the legal and factual sufficiency of the evidence showing he had the requisite intent or knowledge to commit the offense. We hold the evidence sufficiently supports the verdict and, therefore, overrule both issues.

In a legal sufficiency review, we consider all of the evidence in the light most favorable to the verdict and decide whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Reed v. State*, 158 S.W.3d 44, 46 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). We may not substitute our judgment for the jury's, and will not engage in a reexamination of the weight and credibility of the evidence. *Id.*; *Brochu v. State*, 927 S.W.2d 745, 750 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

By contrast, we review the evidence in a neutral light when conducting a factual sufficiency review. *Reed*, 158 S.W.3d at 46. We must set aside the verdict if (1) the proof of guilt is so obviously weak that the verdict must be clearly wrong and manifestly unjust, or (2) the proof of guilt, although legally sufficient, is greatly outweighed by contrary proof. *See Vodochodsky v. State*, 158 S.W.3d 502, 510 (Tex. Crim. App. 2005). However, because the jury is in the best position to evaluate the credibility of the witnesses, we must afford appropriate deference to its conclusions. *Pena v. State*, 251

S.W.3d 601, 609 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). We may infer a defendant's intent from his actions, words, and conduct. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995).

Here, there is sufficient evidence from which to infer appellant's intent to assault the officers. He drew their attention to him by intentionally stopping up his commode and flooding his own cell and those on the tier below. His intent to assault Officer Strong may be inferred from his refusal to allow the officers to handcuff him prior to entering his cell. Once Officer Strong opened the door, appellant immediately lunged at him "in a cat-like motion."

The evidence on appellant's sanity was conflicting. Although Dr. Peraino testified appellant suffered from a severe mental defect and was not sane at the time of the offense, he admitted his written psychiatric evaluation, which he used as the basis for his testimony, made no causal connection between the mental defect and the offense. By contrast, the State offered the testimony of Dr. Leddy, a clinical psychologist with the Mental Health Mental Retardation Center of Harris County. He testified that clogging a toilet is a common attention-seeking, goal-directed behavior often used by inmates to coerce some desired action from jail officials. Dr. Leddy further opined that appellant demonstrated his capacity for logical, clearly thought-out behavior when he clogged a toilet and then suddenly re-grouped, sat down, and waited for the jailers to open the cell door.

Reviewing the evidence in the light most favorable to the verdict, the jury, having heard the above testimony, reasonably could have found appellant had the requisite intent to commit the crime charged. *See Reed*, 158 S.W.3d at 46. Therefore, we hold the evidence showing appellant had the requisite intent or knowledge to commit the offense was legally sufficient. *See id.* Reviewing the evidence in a neutral light, we cannot conclude the proof of guilt is so obviously weak that the verdict must be clearly wrong and manifestly unjust or that the proof of guilt is greatly outweighed by contrary proof.

*See Vodochodsky*, 158 S.W.3d at 510. Thus, we hold the evidence showing appellant had the requisite intent or knowledge to commit the offense was factually sufficient. Accordingly, we overrule appellant's legal- and factual-insufficiency claims.

**E. INSANITY DEFENSE**

Appellant argues section 8.01 of the Texas Penal Code, the statutory provision referencing what is commonly referred to as the "insanity defense," violates the due process clause of the Fourteenth Amendment of the United States Constitution and article one, sections ten and fifteen of the Texas Constitution because it (1) provides no guidelines as to what constitutes "severe mental illness" and (2) makes no provisions for persons with mental deficiencies. *See* U.S. Const. Amend. VI; Tex. Const. art. I, §§ 10, 15; Tex. Penal Code Ann. § 8.01 (Vernon 2003). However, he has not adequately briefed this issue for our review.

In a facial challenge to a statute, we begin with the presumption the statute is valid. *See Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992); *Ex Parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978). The burden rests upon the individual challenging the act to establish its unconstitutionality. *Id.*

Briefly, appellant suggests section 8.01 is unconstitutional because no set of circumstances exists under which the statute is valid. *See* § 8.01; *Santikos*, 836 S.W.2d at 633. However, appellant makes no effort to apply the appropriate test to the facts in his case. "[A] brief must state concisely … the facts pertinent to the issues or points presented." Tex. R. App. P. 38.1(g). Additionally, apart from stating the general test, appellant cites no other authority to support his conclusory statement that the statute is unconstitutional. Therefore, these issues have been waived on appeal.

To adequately brief a constitutional issue, one cannot simply invoke the general constitutional doctrine. *Bell v. State*, 90 S.W.3d 301, 305 (Tex. Crim. App. 2002); *Rhodes v. State*, 934 S.W.2d 113, 119 (Tex. Crim. App. 1996). *Id.* Rather, he must

present specific arguments and authorities supporting his contentions that the statute is unconstitutional. Because appellant has not done so, he presents nothing for review. Accordingly, we overrule appellant's claim that the insanity defense is unconstitutional.

**F. CRUEL AND UNUSUAL PUNISHMENT**

Finally, appellant argues his sentence of fifty three years' confinement in the Texas Department of Criminal Justice Institutional Division constitutes cruel and unusual punishment as prohibited by the United States Constitution and the Texas Constitution because (1) he suffers from severe mental illness and (2) the sentence is grossly disproportionate to the offense in question. *See* U.S. Const. Amend. VIII; Tex. Const. art. I, § 13.

We begin by noting the sentence was within the statutory guidelines in light of appellant's status as a repeat offender. The jury convicted appellant of intentionally and knowingly assaulting a public servant, a third degree felony with punishment ordinarily ranging from two to ten years for first-time offenders. *See* Tex. Penal Code Ann. §§ 12.34, 22.01(a)(1), (b)(1). At the sentencing phase, it was shown that appellant was previously convicted of the felony offenses of (1) tampering with physical evidence, (2) burglary of a building, (3) possession of a controlled substance, and (4) burglary of a habitation. Because the jury found appellant was a four-time repeat offender, it was required to sentence him to confinement for at least twenty-five years but not more than ninety-nine years. *See id.* § 12.42(d).

The jury selected a sentence in the middle of the statutory punishment ranges. When punishment assessed by a judge or jury is within the statutory guidelines, it is presumptively constitutional, and Appellant has not shown otherwise. *See* Tex. Penal Code Ann. § 12.42(d); *McNew v. State*, 608 S.W.2d 166, 174 (Tex. Crim. App. 1978); *Benjamin v. State*, 874 S.W.2d 132, 135 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

To the extent that appellant's argument can be construed as one challenging the constitutionality of the statutory guidelines, he has not preserved that complaint for appellate review. A defendant must object to his sentence during the sentencing phase or in a post-trial motion to preserve error for appeal; otherwise, he waives his right to appeal his sentence. *See Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995); *Cruz v. State*, 838 S.W.2d 682, 687 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). Here, appellant did not object at the sentencing phase, and he did not raise his objection to his sentence in a post-trial motion. Thus, he has not preserved error for our review. Accordingly, we overrule appellant's cruel and unusual punishment claim.

## CONCLUSION

Having overruled all of appellant's issues, we affirm the judgment of the trial court.

/s/ Kent C. Sullivan
Justice

Panel consists of Chief Justice Hedges, Justice Sullivan, and Senior Justice Hudson. *
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* Senior Justice J. Harvey Hudson sitting by assignment.