Affirmed and Memorandum Opinion filed February 24, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00846-CR

TIMOTHY CRAIG ALLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1170849

M E M O R A N D U M O P I N I O N

A jury convicted appellant, Timothy Craig Alley, of aggravated assault and assessed punishment at five years' confinement. In four issues, appellant contends the evidence is factually insufficient to support the jury's rejection of his self-defense theory, the trial court erred by allowing the State to bolster the complainant's credibility, and trial counsel was ineffective during the punishment phase. We affirm.

I. BACKGROUND

In May 2008, appellant lived in the Lake Shadows subdivision in Crosby, Texas. The subdivision was bordered in part by Lake Houston and had a private boat launch secured by a locked gate.

On May 10, 2008, Raymond Balcerowicz and his ten-year-old son were in their boat floating next to a dock near the boat launch while waiting for Raymond's wife, Rebecca. Appellant, a fifty-two year-old man, approached and made "small talk." Appellant then returned to his truck, drove through the gated entrance/exit, and exited his truck to close and lock the gate. Simultaneously, Rebecca drove up to the gate in her vehicle, but appellant's truck blocked her entry. As outlined below, the details of the subsequent interaction between appellant and the Balcerowiczes are vigorously disputed.

According to Raymond, while still in his boat, he "hollered" at appellant to allow Rebecca to enter. Appellant responded, "[T]he gate's supposed to stay locked at all times," but then reversed his truck to allow Rebecca to enter. Appellant then parked sideways in front of Raymond's truck, exited, and argued with Raymond "back and forth about the gate." When Rebecca entered the boat, Raymond said, "Hold [the boat] for a minute, I want to talk to this guy." Raymond intended to record appellant's license plate number so that he could report appellant to the homeowners' association. Raymond exited the boat and walked up the dock toward appellant. The men continued to argue about the gate, but Raymond did not threaten appellant with bodily harm. When Raymond was approximately thirty yards from appellant, appellant drew a handgun from a holster located underneath the right side of his shirt and pointed the gun directly at Raymond. Raymond put his hands up, asked "What's wrong, what's the problem?," and explained, "All I want is your information, I need to know who you are, where you live." The men continued to argue "for a minute," at which point appellant holstered his gun. Appellant returned to his truck, and Raymond walked to his truck, trying to maintain a distance from appellant. Raymond intended to retrieve a pencil and paper from his truck; he did not have any weapons on his person or in his truck or boat. A truck belonging to

Raymond's friend was parked parallel to Raymond's truck, with the driver's side facing the passenger's side of Raymond's truck.

As Raymond approached his truck, he came "face to face" with appellant. Appellant took a step backward and reached for his right side. Believing appellant was reaching for his gun, Raymond knocked appellant into his truck and wrestled him to the ground. Rebecca was looking in her purse for a pen and did not witness how this altercation began. Raymond took appellant's gun, threw it aside, and instructed Rebecca to hide the gun. The men continued to wrestle, and Raymond hit appellant. After "probably [less than] a minute," Raymond stopped fighting because appellant "quit fighting back." Raymond then headed for his truck.

Raymond's truck keys were in the boat, and he told Rebecca to unlock the truck remotely. He also told Rebecca to find a pen and paper, but she could not find a pen. Raymond testified that he did not remember opening the door to his truck before appellant returned. However, Rebecca testified she saw Raymond emerge from his truck with nothing in his hands. Raymond testified that appellant approached him from behind and said "something." Raymond turned and saw appellant standing eight feet away with a different handgun drawn. According to Raymond, "When I turned around[,] . . . we were facing each other real close together, and he just pulls the weapon straight up and I turned sideways, but like I said I was trapped between two trucks, I didn't know where to go when he shot me." Raymond testified he never threatened appellant before the shooting, but made clear to appellant that he just wanted to write down appellant's license plate number.

Appellant shot Raymond in the right side of his torso, and Raymond went down "on [his] hands and knees." The bullet penetrated Raymond's spleen. Appellant then approached and placed the gun "almost against [Raymond's] forehead." Rebecca screamed and started running toward the boat. Appellant yelled, "[W]here in the F do you think you're going, lady," and pursued Rebecca. Raymond ran after appellant and

struck him, causing appellant to drop his gun. Rebecca testified that she retrieved this gun and placed it next to the other gun.

According to Raymond, he dragged appellant "back over by [appellant's] truck," and began "hitting [appellant] and punching him wherever I can and whenever I can." Raymond tired and lay across appellant, holding him against the ground. Appellant then drew a pocketknife with a three-inch blade and stabbed Raymond in the shoulder area three times. With the third stabbing, appellant "gritted his teeth and started twisting [the knife] back and forth." Raymond shoved his thumb into appellant's right eye socket, and appellant withdrew the knife. Raymond's hand was stabbed several times as he attempted to take the knife from appellant. Rebecca unsuccessfully attempted to take the knife and also attempted to call 911, but her cell phone did not have service.

At that point, Minnie Chevalier, a retired sergeant with the Houston Police Department, arrived. Chevalier lived nearby and heard, but did not see, the shooting. She called 911 and then proceeded to the boat launch. Chevalier told the men to stop fighting, but Raymond explained he would not allow appellant to stand until he released the knife. Appellant gave Chevalier the knife, and the men separated. Chevalier testified that both men were in pain and appellant said he could not move. Chevalier called 911 again from the boat launch.

Appellant's account of the altercation differed significantly. According to appellant, when he was about to close and lock the gate, he could not hear what Raymond was yelling because it was windy and appellant is hearing impaired.[1] However, appellant saw Raymond gesturing with both middle fingers. Appellant reversed his truck to allow Rebecca to enter the gate and then stood outside his truck. When Raymond waved for appellant to come speak with him, appellant pulled his truck in front of Raymond's truck. Raymond was yelling at appellant, so appellant rolled down his window but still could not hear what Raymond was saying. Appellant exited his truck in order to hear

[1] In contrast, Rebecca testified it was not windy that day.

Raymond. Raymond left his boat and began "walking at an extremely fast pace right directly at [appellant.]" Appellant asked Raymond "what was wrong," but Raymond did not reply. When Raymond was within eighteen feet of appellant, Raymond said, "Who made you the F-ing ranger of the boat ramp?" Appellant, believing Raymond was "quite upset," began to back up toward his vehicle. When Raymond was within five feet, appellant saw that Raymond's face was red and both fists were clenched. Appellant asked Raymond several times to stop and talk, but Raymond did not respond. Believing he was about to be attacked, appellant drew his handgun and pointed it at the ground. It was undisputed that Raymond is much larger than appellant. Additionally, appellant testified that he was disabled due to serious back problems and was unable to defend himself.

After appellant drew his gun, Raymond stopped and asked who appellant was. Appellant responded he lived in the subdivision and was supposed to close the gate. Appellant believed the situation had "cooled off" at that point. Raymond said, "[Y]ou're going to jail for pulling a gun on me," and told his wife to call the police. Appellant then turned and was holstering his gun when Raymond struck him in the back of the head, knocking appellant into his truck and rendering him unconscious. When appellant regained consciousness, he was being violently beaten by Raymond. Rebecca screamed for Raymond to stop because he was killing appellant. Raymond eventually stood and said something that "scared [appellant] to death." The substance of Raymond's statement was not admitted at trial; however, appellant testified that the statement made him believe Raymond intended to retrieve a weapon from his truck.

Appellant crawled to his truck and lay across the front seat. He was in pain and disoriented. Appellant saw Raymond digging through the glove box of Raymond's vehicle and believed he was looking for a weapon. Appellant did not know where his handgun was, so he retrieved a second handgun from his truck. He then exited and, using his truck for support, walked around to the tailgate. At this point, Raymond was still looking through his glove compartment. Raymond exited his truck, looked at appellant,

and ran "towards [him] as fast as a man can possibly sprint." Appellant took a few steps back, raised his gun, and fired once at Raymond. The shot "did not phase" Raymond, and he tackled appellant and began to choke him. Appellant dropped the gun and saw Rebecca retrieve it. Appellant began to lose consciousness, and Raymond tried to tear appellant's right eye out. Appellant took out his pocketknife and stabbed Raymond once under the left armpit. Chevalier then arrived and, according to appellant, he asked her to take the knife.

Shortly thereafter, officers began arriving on the scene. One officer testified that, when he arrived, he saw "a male laying at the end of [appellant's truck] on the back side of the vehicle and another male laying just west of him approximately, give or take, 10 feet away from each other." Raymond was taken by helicopter to the hospital, where he received emergency surgery to repair his spleen. Appellant sustained a serious injury to his eye, broken bones in his wrist, and various injuries to his face. Appellant was taken by ambulance to a different hospital.

II. SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant contends the evidence is factually insufficient to support the findings that he committed aggravated assault and did not act in self defense.

A. Applicable Law and Standard of Review

A person commits aggravated assault if he intentionally, knowingly, or recklessly causes serious bodily injury to another. Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02(a)(2) (West Supp. 2009).

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. *Id.* § 9.31(a) (West Supp. 2009). The use of force against another is not justified in response to verbal provocation alone. *Id.* § 9.31(b). "Reasonable belief" refers to "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(a)(42) (West Supp.

2009). A person is justified in using deadly force (1) if he would be justified in using force under section 9.31 of the Penal Code, and (2) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. *Id.* § 9.32(a)(1), (2)(A) (West Supp. 2009).

The initial burden to produce evidence supporting self-defense rests with the defendant. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). Once evidence is produced, the burden shifts to the State to disprove the defense beyond a reasonable doubt. *Id.* This burden of persuasion is not one that requires the production of evidence, but requires only that the State prove its case beyond a reasonable doubt. *Id.* When a jury finds the defendant guilty, there is an implicit finding against self-defense. *Id.*

While this appeal was pending, five judges on the Texas Court of Criminal Appeals held that only one standard should be employed to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency. *See Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926 (Cochran, J., concurring). Accordingly, we review appellant's challenge to factual sufficiency of the evidence under the legal-sufficiency standard. *See Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (applying single standard of review required by *Brooks*); *see also Caddell v. State*, 123 S.W.3d 722, 726–27 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (explaining that this court is bound to follow its own precedent).

When reviewing sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899 (plurality op.). We may not sit as a thirteenth juror and substitute our judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *Id.* at 899, 901; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (expressing that jury may choose to believe or

disbelieve any portion of the testimony). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). When reviewing the legal sufficiency of the evidence supporting a finding against self-defense, we view the evidence in the light most favorable to the verdict to see if any rational trier of fact could have found (1) the essential elements of the charged offense beyond a reasonable doubt, and (2) against appellant on the self-defense issue beyond a reasonable doubt. *See Hernandez v. State*, 309 S.W.3d 661, 665 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

B. Analysis

It is undisputed that appellant intentionally caused serious bodily injury to Raymond by shooting him with a handgun. Thus, we must determine whether the evidence is sufficient to support the jury's finding that appellant was not justified in using deadly force.

According to Raymond, at the time of the shooting (1) his initial altercation with appellant had ended, (2) appellant was aware Raymond merely wanted to write down appellant's license plate number, (3) Raymond was standing outside his truck, (4) appellant came up from behind Raymond, (5) Raymond turned and saw appellant standing eight feet away with a handgun drawn, and (6) appellant shot Raymond. Additionally, Rebecca witnessed Raymond and appellant walk toward each other, appellant quickly draw a gun and shoot Raymond, and Raymond fall to his knees. This evidence supports the jury's finding that an ordinary and prudent man in appellant's position would not have believed the use of deadly force was immediately necessary to protect himself against Raymond's use or attempted use of unlawful deadly force. The jury was entitled to believe Raymond's and Rebecca's testimony and disbelieve appellant's testimony. *See Clayton*, 235 S.W.3d at 778. Accordingly, we conclude the evidence is factually sufficient to support the jury's implied finding beyond a reasonable doubt that appellant was not justified in using deadly force against Raymond. We overrule appellant's first issue.

III. WITNESS BOLSTERING

In his second and third issues, appellant contends the trial court erred by allowing (1) Raymond to testify he has never been in trouble with the law, and (2) the prosecutor to argue that the State's witnesses testified consistently with their police statements, which were not admitted into evidence.

The following exchange occurred at the beginning of the State's direct-examination of Raymond:

> [Prosecutor:] Have you ever been in trouble with the law or been convicted of any felonies or crimes of moral turpitude?
>
> [Appellant:] Object to relevance.
>
> [Trial Court:] Overruled. You may answer.
>
> [Raymond:] No.

By asking Raymond whether he had "ever been in trouble with the law," the State did not seek general background information, such as employment or education,[2] or seek to rehabilitate his impeached character;[3] the State's sole purpose was to bolster Raymond's credibility "without substantively contributing 'to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" *Rivas* v. *State*, 275 S.W.3d 880, 886 (Tex. Crim. App. 2009) (quoting *Cohn v. State*, 849 S.W.2d 817, 819–820 (Tex. Crim. App. 1993)). Thus, the question was irrelevant, *see* Tex. R. Evid. 401, and the trial court erred by overruling appellant's objection.

During jury argument, the prosecutor argued as follows:

> [Prosecutor:] I want you to take all the evidence back and look at

[2] A party may present information about a witness's background to enable the jury better to evaluate the witness's credibility and assess the weight to give his testimony. *Williams v. State*, 604 S.W.2d 146, 149 (Tex. Crim. App. 1980); *Johnson v. State*, 932 S.W.2d 116, 118 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

[3] "Reputation evidence as to the character of a party's own witness for truthfulness" is admissible "after the witness's character for truthfulness has already been attacked by the opposing party." *Rivas* v. *State*, 275 S.W.3d 880, 886 (Tex. Crim. App. 2009) (citing Tex. R. Evid. 608(a)).

> everything and think about how both of their stories are similar in some ways but vastly different in others and I want you to keep in mind that Raymond and Rebecca and the witnesses all gave statements that night and the defense counsel has had access to those statements. You don't get those statements, they're not entered into evidence but had anything been different that they said that night - -
>
> [Appellant:] Objection. . . . Outside the record.
>
> [Trial Court:] It's overruled.
>
> [Prosecutor:] If anything was different than what they said that night versus yesterday on the stand you would have heard about it. Those statements are not in evidence but you can consider everything that they said on the stand as testimony.

During jury argument, the State is allowed wide latitude in drawing inferences from the evidence as long as the inferences drawn are reasonable and offered in good faith. *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997). However, argument that attempts to introduce matters not in the record is clearly improper. *See Berryhill v. State*, 501 S.W.2d 86, 87 (Tex. Crim. App. 1973). Argument inviting the jury to speculate about possible evidence that is not in the record is even more dangerous because "it leaves to the imagination of each juror whatever extraneous 'facts' may be needed to support a conviction." *Id.*

Several witnesses testified that Raymond and Rebecca provided statements after the incident occurred. However, the prosecutor argued outside the record when, in an attempt to bolster credibility, she suggested that Raymond's and Rebecca's statements mirrored their trial testimony. A prosecutor may not interject matters outside the record to bolster the credibility of a witness. *See Menefee v. State*, 614 S.W.2d 167, 168 (Tex. Crim. App. 1981). Thus, the trial court erred by overruling appellant's objection to this argument. We next consider whether these errors were harmful.

We review the trial court's erroneous evidentiary and jury-argument rulings for harm under Texas Rule of Appellate Procedure 44.2(b). We must disregard non-constitutional errors that do not affect a criminal defendant's "substantial rights." *Id.* We may not reverse if, after examining the record as a whole, we have fair assurance that the

errors did not have a substantial and injurious effect or influence in determining the jury's verdict, or had but a slight effect. *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Stated differently, if we have "a grave doubt" that the result was free from the substantial influence of the error, we must treat the error accordingly. *Burnett v. State*, 88 S.W.3d 633, 637–38 (Tex. Crim. App. 2002) (citation omitted). "Grave doubt" means that "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* (citation omitted).

In assessing the likelihood that a jury's decision was adversely affected by the errors, we consider everything in the record, including any testimony or physical evidence admitted, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence, and the cumulative effect of the trial court's errors. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002); *Martin v. State*, 151 S.W.3d 236, 242 (Tex. App.—Texarkana 2004, pet. ref'd); *Harris v. State*, 56 S.W.3d 52, 59 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). We may consider statements made during voir dire, jury instructions, the State's theory of the case, any defensive theories, closing argument, and whether the State emphasized the errors. *Motilla*, 78 S.W.3d at 355–56. Additionally, we consider the cumulative effect of the trial court's errors. We are also cognizant that a trial court's overruling of a defendant's objections puts a "stamp of approval" on the prosecutor's improper cross-examination or jury argument, increasing the risk of harm. *See Lee v. State*, 971 S.W.2d 130, 131 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

The evidence of appellant's guilt was not overwhelming. Instead, the case was largely a "swearing match" between appellant and the Balcerowiczes. Therefore, credibility of the witnesses played a crucial role.

The record contains evidence favoring the Balcerowiczes' credibility *and* evidence favoring appellant's credibility. Evidence concerning appellant's guns favored the Balcerowiczes' credibility. Raymond testified that, after taking the first handgun from

appellant and throwing it, he instructed Rebecca to hide the gun. Rebecca placed the first handgun, and later the second handgun, by a nearby tree. An investigating officer testified that Rebecca led him to the handguns. Appellant did not dispute this evidence and agreed on cross-examination that it was possible Raymond had control of the first handgun and could have used it. Nevertheless, appellant testified he believed, based on a statement made by Raymond, that Raymond intended to retrieve a weapon from his truck. The jury reasonably could have disbelieved appellant's testimony that he believed Raymond intended to retrieve a weapon; Raymond already had subdued appellant, and Rebecca was in control of appellant's first handgun. In fact, the prosecutor emphasized this point during argument. Additionally, Raymond testified he did not have any weapons in his truck, and an investigating officer testified he searched for, but did not find, a firearm in Raymond's truck.

Evidence regarding appellant's knife also supported Raymond's credibility. Raymond testified that, when Chevalier arrived, he asked her to take the knife from appellant. Chevalier corroborated this testimony. In contrast, appellant testified that *he* asked Chevalier to take the knife. Additionally, Raymond's wounds corroborated his testimony that he was stabbed three times and impeached appellant's testimony that he stabbed Raymond once.

Portions of evidence also supported appellant's credibility. Appellant testified that he witnessed Raymond rummaging through the glove compartment of his truck, presumably to find a weapon. Raymond testified that he did not remember opening the door of his truck before he was shot. However, Rebecca's testimony that she saw Raymond digging through his truck corresponds with appellant's testimony.

Additionally, appellant's credibility was strengthened by the blood evidence. Blood was found alongside the driver's side, and on the ground near the tailgate, of appellant's truck. Appellant testified that, after he retrieved the second gun from his truck, he used the driver's side of his truck to keep his balance. According to appellant, he was standing near the tailgate of his truck when he shot Raymond, and the blood

found on the ground near that area belonged to both men. An investigating officer testified that, to the rear of appellant's truck, he found an area on the ground where gravel had been moved and blood had pooled, indicating an altercation occurred in that location. During closing argument, appellant's counsel emphasized that the blood evidence was more consistent with appellant's testimony.[4]

In sum, there was evidence reinforcing the credibility of appellant and the Balcerowiczes. In light of the evidence, we next consider the nature of the errors.

Appellant argues that "[t]he jury was much more likely to believe [Raymond] after learning that he had never been convicted of a crime or in trouble with the law—especially where defense counsel did not [and could not] elicit similar testimony from [appellant.]" We disagree. "Because the lack of a criminal record, even if true, is not particularly probative of the credibility of the witnesses, the severity of the misconduct is not great." *Jones* v. *State*, 38 S.W.3d 793, 797 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The State did not emphasize Raymond's lack of a criminal history during its questioning of other witnesses or jury argument. Thus, it is unlikely the jury's decision to believe Raymond turned on his clean record.[5]

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[4] The blood evidence was not necessarily inconsistent with the Balcerowiczes' testimony. Raymond testified that he was shot when standing in between his truck and his friend's truck, not when he was near the tailgate of appellant's truck. However, Raymond also testified that, after he tackled appellant the second time, he dragged appellant back by appellant's truck, although Raymond did not indicate where in relation to appellant's truck. Rebecca testified that Raymond was shot when he was walking in the direction of appellant's truck and she found the men fighting on the ground behind a truck, although it is unclear from the record which truck. A responding officer testified that, when he arrived, he saw the men lying on the ground behind appellant's truck where blood was found. Additionally, we note that a bullet casing was located nearer to the front of Raymond's truck, although the importance of this fact was lessened by an investigating officer who agreed that a casing may travel some distance when ejected from a gun.

[5] In *Tweedle v. State*, the Court of Criminal Appeals reversed the defendant's conviction because the State improperly bolstered an important witness's credibility, including by eliciting testimony that the witness had never been charged with a criminal offense. 153 Tex. Crim. 200, 203–04, 218 S.W.2d 846, 849 (1949) (per curiam), *disapproved of by Elam v. State*, 518 S.W.2d 367, 369 & n.1 (Tex. Crim. App. 1975) (holding that questions designed to elicit a witness's background information are proper, but noting that the criminal-history question in *Tweedle* was improper). However, *Tweedle* was decided before adoption of Texas Rule of Appellate Procedure 44.2(b), which changed the harm analysis for nonconstitutional errors. Thus, *Tweedle* does not control.

Similarly, the prosecutor's improper argument implying that Raymond's and Rebecca's prior statements paralleled their trial testimony was not significant. We acknowledge that the prosecutor concluded with this argument, meaning the jury received an improper bolstering of the Balcerowiczes' testimony immediately before deliberating. However, at most, this argument suggested that Raymond's and Rebecca's story had not changed since the date of the altercation.

This case differs from the situation we addressed in *Ortiz v. State*, 999 S.W.2d 600 (Tex. App.—Houston [14th Dist.] 1999, no pet.). There, the arresting officer, based on information provided by a confidential informant, entered a house where he found the defendant and narcotics. *Id.* at 602–03. At trial, two pages were redacted from a document admitted into evidence. *Id.* at 604. During jury argument, the defendant argued that the arresting officer lacked information regarding events in the house. *Id.* In rebuttal, the prosecutor clearly argued matters outside the record by directing the jury to the missing pages and implying that they contained information given by an informant, which the jury should consider. *Id.* at 604–05. We reversed the conviction because the defendant's possession of the narcotics was in question and the evidence of his guilt was "not overwhelming," meaning the prosecutor's request that the jury speculate regarding the substance of the missing information harmfully tied the defendant to the narcotics. *Id.* at 606–07.

Here, the prosecutor's improper argument did not refer to outside evidence supporting elements of the charged offense; instead, it referred to outside evidence suggesting the Balcerowiczes' version of events remained consistent. Furthermore, immediately after improperly suggesting the substance of the statements, the prosecutor argued, "Those statements are not in evidence but you can consider everything that [Raymond and Rebecca] said on the stand as testimony." It is unlikely the jury's decision

to believe Raymond and Rebecca turned on the consistency of their stories (or even the consistency of their stories coupled with Raymond's lack of a criminal record).[6]

In conclusion, we have fair assurance that the errors did not have a substantial and injurious effect or influence in determining the jury's verdict, or had but a slight effect. *Casey*, 215 S.W.3d at 885; *Johnson*, 967 S.W.2d at 417. We overrule appellant's second and third issues.

IV. ASSISTANCE OF TRIAL COUNSEL

Finally, in his fourth issue, appellant contends his counsel was ineffective by failing to call character witnesses during the punishment phase.

In reviewing ineffective assistance claims, an appellant first must prove by a preponderance of the evidence that his trial counsel's representation was deficient because it fell below the standard of prevailing professional norms. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). We begin with the strong presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). To overcome the presumption, the "allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)).

During the punishment phase, the parties stipulated that appellant had twenty-year-old misdemeanor convictions for driving while intoxicated and unlawfully carrying a weapon. The State presented evidence regarding the severity of Raymond's injuries. Appellant was the defense's only witness. He testified regarding his pre-existing back

[6] In *Spriggs v. State*, the Court of Criminal Appeals held harmful the prosecutor's argument that an important witness's prior statement (which was not admitted) was consistent with his testimony. 160 Tex. Crim. 188, 189, 268 S.W.2d 191, 192 (1954). Admittedly, this is precisely our situation. Nevertheless, *Spriggs* was decided before the adoption of Texas Rule of Appellate Procedure 44.2(b). Thus, *Spriggs* does not control our analysis here.

condition and explained why probation was appropriate. Trial counsel attempted to call appellant's wife as a witness, but decided not to when the State pointed out that she had been in the courtroom during appellant's testimony. The punishment range for appellant's conviction was between two and twenty years' confinement, and the jury had the option to recommend probation. The jury sentenced appellant to five years' confinement, not probated.

Appellant filed a motion for new trial in which he argued trial counsel was ineffective for failing to call character witnesses during the punishment phase. Attached to appellant's motion were the affidavits of several witnesses who vouched for appellant's character. At an evidentiary hearing on appellant's motion, trial counsel testified that he asked appellant multiple times to provide the names of character witnesses, but appellant responded he "did not want to bring his family into this." According to counsel, appellant provided one character witness whom appellant agreed did not need to be subpoenaed. Two days before the punishment trial, this witness stopped answering trial counsel's phone calls and ultimately did not testify. Trial counsel agreed that character witnesses may have been beneficial and admitted he did not document appellant's refusal to provide such witnesses. Appellant disputed trial counsel's testimony and testified that counsel assured him character witnesses were unnecessary. The trial court denied appellant's motion and expressed on the record, "I make a finding that I believe the testimony of [trial counsel]."

We conclude appellant has not met his burden to establish that trial counsel's performance was deficient. The trial court was free to believe trial counsel's testimony that appellant refused to provide character witnesses. Additionally, appellant did not show that counsel was ineffective by failing to subpoena the witness who stopped answering his calls because we cannot foreclose the possibility the witness was no longer willing to testify on appellant's behalf. Further, although counsel admitted that character witnesses may have aided appellant, counsel's reasoning for not urging that appellant's wife be allowed to testify during punishment is not apparent on the record. Counsel may

have concluded that testimony from appellant's wife would have been duplicative of appellant's testimony and not efficacious, particularly because she had an obvious bias for testifying favorably for appellant. Accordingly, counsel's alleged ineffectiveness is not "firmly founded in the record." *See Thompson*, 9 S.W.3d at 814 (quoting *McFarland*, 928 S.W.2d at 500). Appellant's fourth issue is overruled.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.

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