**Affirmed and Memorandum Opinion filed October 20, 2016.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-13-00840-CR**

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**LORENZA ANDRE SAM, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 240th District Court**
**Fort Bend County, Texas**
**Trial Court Cause No. 10-DCR-055360A**

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

Lorenza Andre Sam appeals his conviction for capital murder. *See* Tex. Penal Code § 19.03(a)(2) (West 2015). Appellant presents two issues: (1) that the evidence was insufficient to support a conviction; and (2) that his trial counsel rendered ineffective assistance. We affirm.

## I. Factual and Procedural Background

Leesa Nascimento, the complainant, employed appellant as a handyman in her home and business. Complainant did not timely compensate appellant for his

work and appellant complained to an associate that she owed him money. To recover the unpaid funds, appellant said he took personal property from complainant's home, to which he had access. Complainant's diamond tennis bracelet went missing in May 2010. Complainant's brother became aware that her bracelet was missing in May 2010 and he helped her look for it. He could not find the bracelet. Appellant pawned a diamond tennis bracelet in June 2010. Complainant then fired appellant and did not pay him his amount due. After his termination, appellant said to Vanessa Cox, a Spec's employee acquainted with complainant and appellant, that he was going to get "what [complainant] owed him."

Complainant's employee, Lena Salazar, and complainant's associate, Linda Shores, last saw complainant on July 6, 2010, in Houston, Texas. That evening, appellant's girlfriend Adriane Gipson dropped him off at complainant's home, located in Fort Bend County. The geolocation for appellant's cell phone records indicated that he was at complainant's home for approximately three hours. Complainant's phone reflected that no calls were made that evening. Appellant arrived at his apartment complex later that evening in complainant's Jeep. The following morning, complainant was scheduled to meet an associate for a business opportunity; however, complainant did not appear. The business associate stopped by complainant's home but neither she nor her Jeep was there. That same morning, complainant's phone made two calls to Gipson.

Two days later, a hunter in Gibsland, Louisiana, saw complainant's Jeep pass by on his leased property. The hunter later discovered complainant's Jeep abandoned and hidden within thick brush. The hunter phoned the police to report the discovery. Members of the Fort Bend County Sheriff's Department recovered the Jeep and discovered blood in the backseat. The Jeep also contained a Fanta

bottle, a receipt, and gloves. According to the receipt and to CVS surveillance video, appellant purchased the Fanta bottle after complainant was last seen on July 6, 2010. The DNA recovered from the bottle and gloves matched appellant's DNA. The blood in the back of the Jeep matched complainant's DNA. Gipson testified that while they were in Louisiana, appellant disposed of complainant's Jeep. Although appellant denied driving the car to Louisiana, he admitted buying the Fanta bottle found in the Jeep. Additionally, phone records corroborate testimony placing appellant in Gibsland, Louisiana, around the time complainant's Jeep was abandoned.

Three days after her disappearance, a landscape worker discovered complainant's body in a pond near her business in Sugarland, Texas. Complainant's body was wrapped in a rug that contained a broken lamp piece and a robe from her home. She had on the same clothes that she was wearing on July 6, 2010. The medical examiner determined that complainant's body was in the pond for at least two days. An autopsy revealed that complainant died from a gunshot wound to the head. A projectile recovered from complainant's skull was determined to be a .25 caliber bullet. Complainant was known to have owned a .25 caliber pistol that police did not recover. There were no signs of forced entry in her home.

Following the discovery of complainant's body, the police found her property, including her shotgun, jewelry, and credit card, with appellant's associates. These associates testified that appellant asked them to safeguard the items. The police also recovered complainant's suitcase, which contained designer purses, in appellant's apartment. Complainant's brother identified some of the purses as complainant's property.

The jury convicted appellant of capital murder. Because the state was not

seeking the death penalty appellant was automatically sentenced to confinement for life without the possibility of parole in the Texas Department of Criminal Justice – Institutional Division.

## II. Analysis

Appellant presents two issues on appeal: (1) that the State's evidence was legally insufficient to support a charge of capital murder; and (2) that trial counsel was ineffective.

### *A. Sufficiency of the Evidence*

Appellant contends that the evidence presented at trial was insufficient to show that he intentionally caused complainant's death or committed the underlying robbery or burglary of her habitation. Specifically, he asserts that the State produced: no eyewitness; no police confession; no DNA fingerprint on complainant's body; no murder weapon in appellant's possession; no evidence of unlawful entry or force in taking complainant's property; and no reliable cause or time of death.

When engaging in a review of the legal sufficiency of the evidence supporting a conviction, we "examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Price v. State*, 456 S.W.3d 342, 347 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). "Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder." *Price*, 456 S.W.3d at 347. We must take into account the "combined and cumulative force of the evidence," rather than engaging in a "divide and conquer approach, separating each piece of

evidence offered to support Appellant's conviction, followed by speculation on the evidence the State did not present." *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012) (internal citations omitted).

"It is not necessary that the evidence directly prove defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone may be enough to establish guilt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013). The jury is permitted "to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial." *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). Intent may be determined from a defendant's words, acts, and conduct, and "is a matter of fact to be determined from all of the circumstances." *Smith v. State*, 965 S.W.2d 509, 518 (Tex. Crim. App. 1998).

An individual commits the offense of capital murder if he: (1) intentionally or knowingly caused the death of an individual; and (2) intentionally committed the murder in the course of committing or attempting to commit burglary or robbery. *See* Tex. Penal Code §§ 19.02(b)(1), 19.03(a)(2) (West 2015). An individual commits burglary if:

> without the effective consent of the owner, the person: (1) enters a habitation . . . with intent to commit a felony, theft, or an assault; or (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

*Id.* § 30.02(a) (West 2015). A person commits robbery if:

> in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

*Id.* § 29.02(a) (West 2015).

Having considered all record evidence in the light most favorable to the verdict, we conclude that a reasonable jury properly could have found that appellant committed both the murder and either (or both) of the underlying felonies.

Appellant asserts that there was no eyewitness, no confession to police, no DNA fingerprint on complainant's body, and no reliable cause or time of death. However, direct evidence, such as an eyewitness account, is not required to support a conviction. *See Carrizales*, 414 S.W.3d at 742.

With regard to murder, the evidence was legally sufficient. Appellant confessed to Gipson that he "killed that bitch." There was evidence which tends to show that appellant murdered complainant on the night Gipson dropped him off at complainant's home. The medical examiner determined that complainant was in the pond for at least two days. Additionally, complainant was found wearing the clothes she had been seen in on July 6, 2010. Gipson and cell phone records place appellant at the scene of complainant's death on July 6, 2010. While mere presence at the scene is, in and of itself, insufficient to sustain a conviction, "it is a circumstance tending to prove guilt which may be combined with other facts to show that appellant was a participant." *Wilkerson v. State*, 874 S.W.2d 127, 130 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). Complainant's blood was in her home and a large blood stain was found in her Jeep's backseat. The Fanta purchase receipt, DNA match, cell phone records, and witness testimony indicate that it was appellant who abandoned the blood-stained Jeep in Louisiana and hid it within the brush of an uninhabited area. The medical examiner indicated that complainant suffered a laceration to her scalp before death, and that she was shot in the nose by a small caliber firearm. The evidence presented at trial is sufficient

to support that appellant intentionally caused complainant's death by shooting her in the head with a firearm.

With regard to the burglary of complainant's habitation or the robbery of complainant, there is significant evidence upon which a jury reasonably could rely to support a conviction. After complainant did not pay him, appellant said that he was going to get what he was owed. There was evidence appellant was financially strained—his apartment had posted a "lock-out" notice on his apartment door for nonpayment on July 4, 2010. Following complainant's disappearance, appellant paid his rent in cash.

There was evidence indicating the murder and theft occurred concurrently and in complainant's home. The phone records placed appellant at complainant's home before complainant arrived. Gipson also did not see the white Jeep at complainant's home when they arrived. Complainant's body was discovered wrapped in a rug along with a broken ceramic piece that matched an item from her home. Complainant's kitchen had trace amounts of her blood. She had a laceration on her scalp and a gunshot wound to her head. Following her death, the police located complainant's suitcase and designer purses in appellant's apartment. Appellant also enlisted his associates to hold some of her other property—a bag containing her jewelry that his associates had seen appellant take out of complainant's Jeep on the evening of July 6, 2010. The evidence presented at trial is sufficient to show that appellant either robbed complainant or burglarized her home. *See Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993) (there may be sufficient evidence of intent to commit murder to facilitate theft even where theft occurred after murder).

Appellant also asserts that there was no evidence of unlawful entry, and no murder weapon in appellant's possession. Unlawful entry is not an element the

State must prove for burglary or robbery. *See* Tex. Penal Code Ann. §§ 29.02(a), 30.02(a). No murder weapon was recovered. However, the bullet recovered from complainant's body was identified as .25 caliber. Witnesses testified that complainant carried a .25 caliber gun, and .25 caliber ammunition was found in her home. Additionally, on July 8, 2010, appellant left complainant's shotgun with his friend Dakarr Pierce and asked Pierce to hold it for him. According to Pierce, appellant also had a small pistol.

Finally, appellant notes the State failed to account for the possibility that appellant asked to borrow complainant's Jeep, left her unharmed before driving to Louisiana, and afterwards, someone else killed complainant and disposed of her body. This argument is misguided because "it is the State's burden to prove each element of the offense beyond a reasonable doubt, not to exclude every conceivable alternative to a defendant's guilt." *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). Likewise, "the evidence is not rendered insufficient simply because appellant presented a different version of the events." *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). The State was not required to directly refute appellant's defensive theory.

The evidence presented at trial was sufficient to prove each element of capital murder beyond a reasonable doubt. We overrule appellant's first issue.

*B. Ineffective Assistance of Counsel*

In his second issue, appellant contends that his counsel was ineffective by: (1) not objecting to witness testimony mentioning appellant's extraneous offenses; (2) failing to cross-examine Gipson on whether she was given consideration to testify against appellant; (3) not calling an expert to challenge the accuracy of the State's expert; (4) not moving for a directed verdict at the close of the evidence; (5) not seeking a charge for Gipson as an accomplice in fact; (6) failing to rebut the

State's evidence during closing argument; and (7) not seeking an election of manner and means by the State as to which underlying felony they were basing their case upon.

The United States and Texas Constitutions guarantee an accused the right to the effective assistance of counsel. U.S. Const. Amend. VI; Tex. Const. art. I, § 10; Tex. Code Crim. Proc. art. 1.051 (West 2015); *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show by a preponderance of the evidence that: (1) counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *Strickland*, 466 U.S. at 688–92; *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). When determining whether a defendant was prejudiced, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. "Appellant must prove both prongs of *Strickland* by a preponderance of the evidence in order to prevail." *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000).

On appeal, there is a "strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). This is because the record may not "adequately reflect the motives behind trial counsel's actions." *Id.* (internal quotation marks omitted). "To overcome the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id.* (internal quotation marks omitted).

Appellant did not allege ineffective assistance of counsel in a motion for new trial, and the record contains no explanation for counsel's conduct during trial. When the record is silent regarding trial counsel's strategy, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

First, appellant submits that his counsel was ineffective for failing to object to testimony discussing his "extraneous offenses" during the State's examination of Cheryl Mathis, appellant's neighbor, and Gipson. Appellant fails to adequately identify any such "extraneous offenses" and we have insufficient information to conduct a *Strickland* analysis on this point.

Second, appellant argues that trial counsel was ineffective because he failed to ask Gipson whether the State gave her any consideration for her testimony. The record contains no explanation for this omission. Appellant points to no evidence in the record that could have been used to impeach Gipson as to any consideration she might have been given to testify. Moreover, appellant failed to explain how such failure prejudiced the defense. In the face of a silent record, appellant has not overcome the presumption of reasonable professional judgment. Therefore, counsel's strategy in cross-examining Gipson provides no basis for relief.

Third, appellant contends that trial counsel was ineffective when he did not call an expert to challenge the State expert's testimony regarding use of the cell phone data for geolocation. Generally, the failure to call an expert witness does not constitute ineffective assistance of counsel without a showing that the witness was available to testify and that the testimony would have benefitted the defendant. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) ("Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a

showing that such witnesses were available and appellant would benefit from their testimony."); *see also Parker v. State*, 462 S.W.3d 559, 565 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (finding no prejudice for trial counsel's failure to request appointment of a second mental health expert to challenge earlier mental health report that was favorable to the State). Nothing in this record shows that an expert witness had been contacted and was willing to testify or what his testimony would have been with respect to the cell phone data. Therefore, counsel's conduct provides no basis for relief.

Fourth, appellant complains that trial counsel provided ineffective assistance by failing to move for a directed verdict. Counsel is not deficient for failing to take action that is without legal basis. *See Jagaroo v. State*, 180 S.W.3d 793, 800 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("It is not ineffective assistance for counsel to forego making frivolous arguments and objections."). As we determined in appellant's first issue, the evidence is legally sufficient to establish that appellant committed the offense. In this case, trial counsel's strategy could have been to refrain from making a losing argument. The record is silent on counsel's strategy with respect to such motion, and in the face of a silent record, appellant has not overcome the presumption of reasonable professional assistance.

Next, appellant contends that trial counsel rendered ineffective assistance by not seeking a charge for Gipson as an accomplice in fact and failing to rebut the State's evidence generally throughout trial and particularly during closing argument. The record in this case is silent as to why appellant's counsel did not seek an accomplice charge. Again in the face of a silent record, appellant has not overcome the presumption of reasonable professional judgment. With regard to trial counsel's alleged failure to rebut the State's evidence, our review of the record indicates that trial counsel cross-examined many of the State's witnesses,

including: Gipson; Cox; Salazar; Nikita Hobson, appellant's co-worker; investigator Rick Waits; lead detective David McKinnon; and Remon Nash, appellant's neighbor. During closing, trial counsel emphasized the presumption of innocence and that the defendant does not need to prove his innocence or even produce any evidence at all. He also assailed the State's evidence as wholly circumstantial and provided alternative explanations and inferences for evidence such as appellant's being in possession of the Jeep, the gloves, and the shotgun. Trial counsel argued that the State had not sufficiently proven the timing of the murder in connection with any theft. With regard to Gipson, trial counsel argued that she made up a story against appellant because she was biased and mad at him. We cannot conclude that these circumstances present the sort of outrageous behavior in which no competent counsel would engage. Moreover, appellant failed to explain how such performance prejudiced the defense. Appellant has not met his burden under *Strickland* on these points.

Finally, appellant contends that trial counsel failed to seek an election regarding the underlying felony and that his due process rights were violated. The Court of Criminal Appeals has previously held that no such election is required. *Gardner v. State*, 306 S.W.3d 274, 302 (Tex. Crim. App. 2009) (stating, in a capital murder case, that the "charge properly set out the underlying felonies of burglary and retaliation in the disjunctive, and the jury did not need to be unanimous concerning which felony appellant was in the course of committing"), *cert denied*, 562 U.S. 850 (2010). The record is silent as to why appellant's counsel did not seek an election but in any event the trial court properly could have refused it. Moreover, appellant failed to explain how such performance prejudiced the defense.

We overrule appellant's second issue.

## III. Conclusion

We overrule both of appellant's issues and affirm the judgment of the trial court.

/s/ Marc W. Brown
Justice

Panel consists of Justices Busby, Donovan, and Brown.
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