Affirmed and Memorandum Opinion filed March 1, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00601-CR

CASIMIR EME-ODUNZE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 1878875

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

Appellant Casimir Eme-Odunze appeals his conviction by a jury for the offense of assault of a family member. *See* Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2014). The trial court sentenced him to one year in Harris County jail, and probated the sentence to community supervision for a period of 18 months. Appellant challenges his conviction in three issues: (1) the State failed to meet its burden of proof in establishing Harris County as the proper venue; (2) trial counsel's failure to object to the State's failure to prove venue amounted to

ineffective assistance of counsel; and (3) the evidence is insufficient to support the conviction. Finding no error, we affirm.

I. BACKGROUND

The complainant, Chibuzo Eme-Odunze, was married to the appellant. The complainant testified that on February 1, 2013, appellant returned home to their shared apartment in Houston, Texas. He knocked on the door to gain entry to their apartment and upon entry became angry with the complainant, accusing her of "touching his things." The complainant denied the accusation, and appellant became angry and struck the complainant in the upper arm area on her left side, causing the complainant painful bruising.

On February 3, 2013, the complainant went to a Houston police station and filed a report claiming appellant assaulted her February 1, 2013. Appellant was charged with assault of a family member. *See* Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2014). He pled "not guilty." In the jury trial that followed, the complainant testified that she did not report the incident to authorities immediately because she had called the police before and appellant said he was going to kill her. According to the complainant, appellant warned her that any time she called the police, he would kill her before they arrived. The police took pictures of the bruise on the complainant's arm. After she went to the police and obtained a protective order, appellant's family told her to withdraw it. The complainant testified there have been threats from appellant and his family. Appellant denied that his family threatened or harassed the complainant. After the incident, the complainant moved out of her shared home with appellant.

At trial, appellant denied the occurrence of the entire event. Appellant testified that he did not have a job in Houston and his wife "was the one getting some money." Appellant testified that this caused their relationship to deteriorate.

Appellant asserted that the complainant fabricated the incident because he refused to renew their apartment lease. Additionally, appellant claimed the complainant was very unhappy in the marriage because she wanted a younger, rich husband. Appellant testified that the complainant abused and dominated him. Appellant stated the complainant wished to get a divorce, but divorce is unacceptable in Nigerian culture. Appellant testified the complainant filed these charges in order to leave the marriage.

II. ISSUES AND ANALYSIS

A. Sufficiency of the Evidence to Support the Conviction

In his third issue, appellant challenges the legal sufficiency of the evidence to support his conviction.[1] Specifically, he asserts that if the jury believes the complainant's testimony regarding the offense, then they cannot also find that he caused the bruising on her arm. Appellant argues the location of the bruising the complainant sustained is inconsistent with the location where a bruise would appear from this type of face-to-face altercation, and thus the evidence is not sufficient to support the conviction.

1. Standard of Review

When reviewing the legal sufficiency of the evidence, 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. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). The evidence is insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense. *See Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012).

[1] We address appellant's third issue first because, if successful, it would afford appellant the greatest relief.

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. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.* Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

2. Record Evidence Supporting the Judgment

Appellant argues that because the bruise is located on the back of the complainant's upper left arm, near her tricep, it was physically impossible for him to have struck the complainant in the bruised area while face-to-face. Appellant asserts that to have made contact with the bruised location on the complainant's body, he would have had to be standing behind her, not face-to-face with her. Appellant argues that even if the alleged punch occurred when he was standing behind the complainant, as she was walking away, the contact would not have been to her left arm because he is right-handed and, thus, could not have made contact with the complainant's left arm.

A person commits an assault of a family member when "the person (1) intentionally, knowingly, or recklessly, causes bodily injury to another, including the person's spouse." Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2014).

Circumstantial and direct evidence are equally probative, and a jury may consider both in establishing the guilt of an actor. *Hooper*, 214 S.W.3d at 13. A jury is permitted to make reasonable inferences from the evidence presented at trial and may determine guilt on circumstantial evidence alone. *Id.* In the present case, appellant was charged with "intentionally and knowingly [causing] bodily injury to Chibuzo Eme-Odunze, a member of the defendant's family. . . by striking [her] with his hand." To sustain its burden of proof, the State was required to present evidence of each element of the offense.

At trial, the jury was presented with two conflicting theories. The complainant testified that appellant hit her in the arm with his fist. According to the complainant, she was facing appellant during the argument when he struck her and caused the bruise. The complainant also testified that during the altercation, she "opened the door [to let appellant in the apartment] and turned toward the side." Appellant testified that he never assaulted the complainant, he never had an altercation with the complainant, and he never had any physical contact with her. Officer Wallace testified that the complainant had a deep bruise on her upper left arm near her shoulder when she came into the station to file a report. Officer Johns testified that the complainant's injury appeared to be on her "left arm" "near her shoulder." Appellant testified that if the alleged punch occurred when he was standing behind the complainant as she was walking away, the contact would not have been to her left arm because he is right-handed and thus could not have made contact with her left arm.

When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Each fact need not point directly and independently to the guilt of appellant, as long as the combined and cumulative force of all the incriminating

circumstances is sufficient to support the conviction. *See Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 13.

The complainant testified to all elements of the charged offense: she was the spouse of appellant, appellant intentionally struck her with his hand, and the blow caused her pain and bruising. As the trier of fact, the jury assesses the credibility and demeanor of the witnesses who testify at trial. The trier of fact "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The trier of fact may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The "guilty" verdict indicates the jury resolved the conflicting evidence presented at trial in favor of the State and rejected appellant's account of the events. *Turro*, 867 S.W.2d at 47. *See also Bargas v. State*, 252 S.W.3d 876, 888–89 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding in a sufficiency-of-the-evidence review that, where appellant's and three defense witnesses' testimony contradicted complainant's testimony, "any inconsistencies in testimony should be resolved in favor of the jury's verdict").

The record reflects that the State presented evidence on each element of the charged offense. Considering the evidence in the light most favorable to the verdict, we conclude that a rational jury could have found beyond a reasonable doubt that appellant did intentionally, knowingly, or recklessly, cause bodily injury to the complainant. We therefore overrule appellant's third issue.

B. Failure-to-Prove-Venue Claim

In his first issue, appellant contends the State failed to meet its burden of proof in establishing Harris County as the proper venue. Appellant further argues the evidence affirmatively shows that Harris County was not the proper venue.

Appellant argues that the State had the burden to prove the charged offense occurred in Harris County and that the State's failure to so prove—prior to the Court of Criminal Appeals' issuance of *Schmutz v. State*, 440 S.W.3d 29 (Tex. Crim. App. 2014)—would have been automatic reversible error. Appellant effectively urges us to ignore *Schmutz*, which we decline to do. In *Schmutz*, the Court of Criminal Appeals held that venue is not an element of the offense, failure to prove venue does not result in acquittal, and failure to prove venue does not implicate a structural or constitutional error; thus, it is subject to a harm analysis. *Id.* at 35–39.

Appellant further argues that, notwithstanding *Schmutz*, the jury charge required the State to prove beyond a reasonable doubt that the incident for which he was charged occurred in Harris County. Appellant claims that because the jury charge stated the incident occurred in Harris County, and the State did not object to this portion of the charge, appellant was entitled to have the State present evidence in conformity with the jury charge. Appellant contends that the State failed to meet its burden by proving all aspects of the jury charge beyond a reasonable doubt, and, therefore, he should not be required to show that the State's failure harmed him. Additionally, appellant requests this court take judicial notice that the city of Houston rests within three counties and not just Harris County. The State requests this court take judicial notice that the city of Houston is the county seat of Harris County.

This court declines both parties' requests to take judicial notice as doing so does not resolve the issue of venue.

1. No Preservation of Error

The State bears the burden of proving venue by a preponderance of the evidence. Tex. Crim. Proc. Code Ann. § 13.17 (West 2015); *Fulmer v. State*, 401

S.W.3d 305, 317 (Tex. App.—San Antonio 2013, pet. ref'd). However, unless disputed in the trial court, or unless the record affirmatively shows the contrary, we must presume that venue was proven in the trial court. Tex. R. App. P. 44.2(c)(1); *Schmutz*, 440 S.W.3d at 35. Appellate review of venue issues is limited to determining whether the issue of venue was raised in trial court, and, if the venue issue was not brought to trial court's attention, whether it affirmatively appears from the record that the presumption of proper venue is inapplicable. *Schmutz*, 440 S.W.3d at 35. For appellant to successfully overcome the presumption that venue was proved at trial, he must show that "the record affirmatively negates whatever proof was made by the State on the matter of venue." *Holdridge v. State*, 707 S.W.2d 18, 21–22 (Tex. Crim. App. 1986).

Appellant does not direct the court to any place in the record where he filed a pre-trial motion disputing venue, or where he disputed venue during trial. Additionally, our own review of the record does not reveal any such objection. Therefore, we conclude that appellant failed to preserve his venue complaint at trial; thus we begin our analysis with whether the record affirmatively shows venue was not proper.

2. No Affirmative and Conclusive Showing that Venue Was Improper in Harris County

Appellant attempts to rebut the presumption of proof of venue in Texas Rule of Appellate Procedure 44.2(c)(1), which provides that unless disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume that venue was proved in the trial court. Tex. R. App. P. 44.2(c)(1). Appellant attempts to show rebuttal of the presumption through the complainant's testimony that she was told to file her report with the Fort Bend County authorities. Appellant asserts that this testimony satisfies the requirement of an affirmative

showing to the contrary—that the offense did not occur in Harris County. For appellant to successfully rebut the presumption that venue was proved at trial, he must show that the State's venue evidence is affirmatively negated by the record. *See Holdridge*, 707 S.W.2d at 21–22.

The record indicates the complainant alleged three separate incidents of assault. Only the incident alleged on February 1, 2013, was before the trial court. The record indicates uncertainty as to which of the three incidents the complainant was told to report to the Fort Bend County authorities. The record shows the complainant actually went to a Houston police station and filed a report for the incident on February 1, 2013. Officer Grant, a Houston police officer, testified that the complainant met with him on February 3, 2013, to give a statement about the incident on February 1, 2013, which occurred in appellant's home. Further testimony from Officer Wallace, a Houston police officer, established that he investigated the case and spoke with the complainant regarding this incident on February 3, 2013. Officer Johns, a Houston police officer, spoke to the complainant and contacted the Harris County District Attorney's office about the complaint regarding the February 1, 2013, assault and let the district attorney decide whether to pursue charges. Appellant testified he was arrested in a Harris County court for the charged offense. The information by which appellant was charged was from Harris County. The complainant filed an affidavit for a protective order in Harris County for all three assaults, and it was submitted during trial as a joint exhibit.

We hold that the record does not affirmatively and conclusively prove Harris County was an improper venue. Furthermore, appellant does not actually allege that Harris County was an improper venue; instead, he complains only of the lack of evidence in the record to prove Harris County was a proper venue. *See Dill v.*

State, 895 S.W.2d 507, 508 (Tex. App.—Fort Worth 1995, no pet.) (holding that court of appeals will presume proper venue in an action where appellant was found guilty, as defendant did not raise issue of venue at trial and record did not affirmatively and conclusively show that venue was improper; defendant did not even allege that venue was improper but, rather, argued only that evidence was insufficient to prove that venue was proper). Because appellant failed to raise the issue of venue at trial and the record does not affirmatively and conclusively show Harris County was an improper venue, appellant failed to rebut the presumption of proper venue. We therefore overrule appellant's first issue.

C. Ineffective-Assistance-of-Counsel Claim

In his second issue, appellant contends he was denied effective assistance of trial counsel. Appellant asserts that trial counsel's performance was deficient because counsel failed to object to the State's venue evidence. This failure to object and preserve the error for appeal resulted in the presumption that venue was proved at trial under Rule 44.2(c)(1). *See* Tex. R. App. P. 44.2(c)(1).

1. Standard of Review

We examine claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986). Under *Strickland*, the defendant must prove that his trial counsel's representation was deficient, and that the deficient performance was so serious that it deprived him of a fair trial. *Id.* at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness. *Id.* at 688. A deficient performance will only deprive the defendant of a fair trial if it prejudices the defense. *Id.* at 691–92. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. *Id.* at 694. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffectiveness. *Id.* at 697. This test is applied to claims arising under both the United States and Texas Constitutions. *See Hernandez*, 726 S.W.2d at 56–57.

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that counsel's actions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When the record is silent as to counsel's strategy, we will not conclude that the defendant received ineffective assistance 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). Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In the majority of cases, the defendant is unable to meet the first prong of the *Strickland* test because the record on direct appeal is underdeveloped and does not adequately reflect the alleged failings of trial counsel. *See Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). "[I]solated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination." *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992), *overruled on other grounds* by *Bingham v. State*, 915 S.W.2d 9 (Tex. Crim.

App. 1994). Moreover, "[i]t is not sufficient that the defendant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata*, 226 S.W.3d at 430. Rather, to establish that counsel's acts or omissions were outside the range of professionally competent assistance, appellant must show that counsel's errors were so serious that [counsel] was not functioning as counsel." *Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

2. Failure to Meet First Prong of *Strickland*

Appellant asserts trial counsel acted deficiently by failing to object to the State's failure to prove venue. This failure to object, and thus preserve the error for appeal, resulted in the presumption that venue was proved at trial. *See* Tex. R. App. P. 44.2(c)(1). Appellant asserts trial counsel's deficient performance caused him actual prejudice in that he must rebut the presumption of venue having been proved at trial. However, appellant failed to file a motion for new trial after his conviction, and as such the record is silent regarding the reasons for counsel's failure to object. Appellant's claim is based on trial counsel's failure to act, however the record is not sufficiently developed to evaluate the alleged failure to act because "[n]either [his] counsel nor the State have been given an opportunity to respond to" the allegation. *See Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). Trial counsel normally should be afforded an opportunity to respond for the alleged failing prior to being deemed ineffective. *Mata*, 226 S.W.3d at 430–32; *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003).

Appellant argues no reasonable trial strategy exists for the failure to object. However, it is not unreasonable to conclude that trial counsel may have known venue was appropriate in Harris County and that any deficiency in the State's evidence could have been cured by testimony of the police officer. Therefore, trial

counsel may have chosen to employ a strategy of focusing on more persuasive evidence, such as the credibility of the complainant in an attempt to strengthen appellant's claim that he did not commit the offense. *See Atwood v. State*, 120 S.W.3d 892, 895 (Tex. App—Texarkana 2003, no pet.) (holding "it is not unreasonable to conclude it was with sound professional judgment that [defendant's] counsel considered the evidence of venue sufficient and chose, instead, to focus on more persuasive evidence in attempting to bolster [defendant's] claim that he was not guilty of the charged offense"). Additionally, trial counsel could have believed that objecting to the venue evidence would have only served to distract the jury from more substantive evidence favorable to appellant. *See id.* (holding "[a]s a matter of trial strategy, well within the norms of professional competence, counsel may well have believed that the requirements of venue were satisfied and that pursuing the issue might only serve to distract the court from evidence more favorable to his client"). Appellant has failed to show his trial counsel's representation was deficient and, thus, he has not satisfied the first prong of the *Strickland* test. Accordingly, we overrule appellant's second issue.

III. CONCLUSION

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

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.
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