Affirm and Memorandum Opinion filed June 14, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00104-CR

VICENTE EDDIE MATTA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1374647

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

Appellant Vicente Eddie Matta was convicted by a jury of capital murder. Because the State did not seek the death penalty, the trial court sentenced appellant to an automatic life in prison without parole. On appeal appellant presents three issues:[1] (1) whether the evidence is legally sufficient to support the conviction;

[1] Appellant lists five points of error in his brief; however, we analyze his ineffective assistance of counsel issues (points 3, 4, and 5) together.

(2) whether the trial court abused its discretion in allowing, over objection, the victim's nephew to testify regarding the victim's character; and (3) whether he received ineffective assistance of trial counsel. For the reasons explained below, we affirm the trial court's judgment.

BACKGROUND

The complainant, Al Dehghani, was an Iranian student, who came to the United States to attend college at the University of Houston; he met and married Brenda Allen and they remained married for almost 25 years. He invested in real estate and, by 2013, at age 63, he owned and rented out approximately fifty homes.

When complainant's rental property required maintenance, the complainant performed some work himself, but also hired day-laborers looking for work in the parking lot at Home Depot to assist him. The complainant typically worked from 8:00 a.m. to 6:00 p.m.

On the morning of January 7, 2013, the complainant picked up appellant at Home Depot to help him refurbish a house at 5425 Malmedy Road, in Houston, Texas. The complainant had employed appellant on numerous prior occasions to help renovate and clean up his rental homes. Around 9:00 a.m., complainant confirmed with Allen over the phone that he had picked up appellant. A video surveillance photo showed complainant and appellant leaving Home Depot at 9:57 a.m. A neighbor across the street from the Malmedy house saw the complainant working at the house with someone meeting the appellant's description.

That evening, the complainant did not return home. Allen became worried and called complainant's cellular phone; there was no answer. Allen called the police and hospitals to no avail. Allen drove to the rental house at 5425 Malmedy, but the house was locked and there was no sign of the complainant or

complainant's car. Allen, who knew appellant's phone number from prior work he had done, called appellant and asked if appellant knew the whereabouts of the complainant. Appellant told her that he had not seen the complainant that day. Allen was surprised by appellant's response because her husband had told her earlier that day that he was with appellant.

The next morning, appellant called Allen inquiring if she had found complainant. When Allen replied, "no," appellant said he was calling to ask for work. Allen found appellant's call suspicious. Allen and family members[2] returned to the rental house at 5425 Malmedy with keys to open the door. Allen and her son-in-law found complainant stabbed to death inside the rental home. They exited the house screaming in distress; Allen's daughter called 911 and then drove away in the car with her mother and son. Allen's nephew and son-in-law remained at the house waiting for emergency personnel and police.

Complainant suffered 22 stab wounds, including 10 to his neck, some three to four inches deep, transecting his jugular veins, carotid arteries, and spinal cord. Blood spatter as well as the positioning of the complainant's clothes indicated that the complainant had been stabbed in the living room and his body later moved into the bedroom. The complainant's pockets had been turned inside out, and his money, credit cards, shoes, iPhone, camera, tools, and car were missing. The complainant died of multiple sharp and blunt injuries to the body.

Houston Police Officer William Bush was assigned to investigate the murder. He spoke with the complainant's credit card provider which led him to a Cricket store that had surveillance video of appellant selling the complainant's iPhone on January 7, around 12:23 p.m. The store clerk commented that he

[2] Allen rode to the house with her daughter Amy Kathari, her son-in-law Bravesh "Gopaul" Kathari, her grandson, and her nephew Bradia Mojra.

thought it was odd that appellant had worn gloves throughout the entire transaction. Officer Bush followed the use of complainant's credit card to a Shell gas station next to the Cricket store where two ATM transactions were attempted. Video surveillance from the gas station showed an individual wearing the same clothing and gloves that appellant had been wearing at the Cricket store.

On January 8, the complainant's credit card was used to make four purchases from a mall kiosk called Things-n-Blings. The man who used the credit card had his entire face covered except for his nose; he bought jewelry and watches worth nearly $600. The credit card also was used at a Red Box kiosk to rent videos. Surveillance video from a nearby Valero gas station showed a man at the Red Box wearing the same clothing that appellant had been wearing at the Cricket store. From this evidence, Officer Bush obtained an arrest warrant for appellant.

The complainant's car was found parked at a grocery store. Surveillance video from the grocery store showed someone parking the car and then walking away with some items that had been inside the car. Paperwork from a nearby pawn shop was left inside the car. Upon investigation, the complainant's camera and tools were recovered from the pawn shop. The name used to pawn the items was Martin Garcia, who was appellant's roommate.

Officers arrested appellant at his apartment, which was located two blocks from the Cricket store and the Shell gas station with the ATM. Appellant's wallet contained a Metro Q card in the name of Garcia.

Garcia gave the officers consent to search the apartment. Inside the apartment, investigators found a hoodie sweatshirt that matched the one worn by appellant in the surveillance videos, and it contained appellant's DNA. Additionally, officers found a watch and a pendant that had been purchased from the Things-n-Blings store with the complainant's credit card. Garcia stated that he

went with appellant to a pawn shop and pawned a toolbox and camera for appellant because appellant needed the money and appellant did not have the requisite identification required by the pawn shop.

Officer Roy Swainson interviewed appellant at the police station. At first, appellant denied that he had contact with the complainant on January 7. After being shown several surveillance photos, he admitted he was with the complainant on January 7, the day complainant was murdered. Appellant further acknowledged pawning the complainant's tools.

Appellant was charged with the capital murder of the complainant. He pled "not guilty" to the charge. Appellant did not testify in his own defense, but his counsel put on a defensive theory that someone else killed the complainant. The jury rejected that defense and convicted appellant as charged. The trial court sentenced appellant to mandatory life imprisonment. This appeal followed.

ANALYSIS

1. Sufficiency of the Evidence to Support the Conviction

In his first issue, appellant challenges the sufficiency of the evidence to support his conviction. Specifically, he asserts that the case is entirely circumstantial and there is insufficient evidence to prove the appellant killed the complainant by any of the manner and means alleged in the indictment and charge.[3] As such, appellant contends the evidence is not sufficient to support the conviction.

[3] Appellant's indictment and jury charge included multiple manner and means of causing the complainant's death, including: striking the complainant with an unknown object; stabbing him with an unknown object; stabbing him with a bladed object; applying pressure to the throat and neck of the complainant with an unknown object; and applying pressure to the throat and neck of the complainant with his hands.

a. 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).

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).

b. Record Evidence Supporting the Judgment

To obtain a conviction for capital murder, the State was required to prove that appellant murdered the complainant and that the murder was intentionally committed during the course of a robbery. *See* Tex. Penal Code § 19.03(a)(2).

Appellant argues that there is legally insufficient evidence that he caused the complainant's death.

Viewed in the light most favorable to the verdict, the evidence at trial showed:

- On January 7, 2013, the complainant picked up appellant at Home Depot around 9:00 a.m., as shown in surveillance video;
- Complainant called his wife and told her he had picked up appellant to help refurbish a house on Malmedy Road;
- A neighbor observed the complainant and another individual meeting appellant's description at the Malmedy house;
- Appellant sold complainant's iPhone to a Cricket store around 12:23, on January 7, 2013, as shown in surveillance video;
- An individual fitting appellant's description attempted two ATM transactions with complainant's credit card at a Shell station, as shown by surveillance video;
- Complainant did not come home from work at the end of the day;
- On the evening of January 7, 2013, the complainant's wife called and asked appellant if he knew the whereabouts of the complainant and appellant claimed he had not seen the complainant that day;
- On January 8, 2013, the complainant was found stabbed to death in the rental house on Malmedy; his car, shoes, credit cards, tools, camera, and iPhone all were missing;
- An individual fitting appellant's description used complainant's credit card to purchase items from a mall kiosk, Things-n-Blings, and from a Red Box, as shown in surveillance videos;
- Appellant and his roommate pawned the complainant's tools and camera;
- Complainant's car was found in a grocery store parking lot with receipt of items pawned by appellant and his roommate;

- Appellant's apartment contained items purchased with complainant's credit card from the mall kiosk, Things-n-Blings;
- Appellant's apartment contained a hoodie (jacket) that matched surveillance video of the individual using complainant's credit card; and
- Appellant initially told police that he had no contact with the complainant on the day of his murder, but then admitted that he was with the complainant.[4]

As set forth above, circumstantial evidence alone can be sufficient to establish guilt. *See Hooper*, 214 S.W.3d at 13. A reviewing court must not engage in a divide-and-conquer approach to the evidence. *Clayton*, 235 S.W.3d at 778. Rather, it must consider the cumulative force of all the evidence, including improperly admitted evidence. *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011) (quoting *Clayton*, 235 S.W.3d at 778). Furthermore, "[w]hen the record supports conflicting inferences, [reviewing courts] presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination." *Sorrells*, 343 S.W.3d at 155 (quoting *Clayton*, 235 S.W.3d at 778).

After a thorough review of the record, and giving proper deference to the jury's verdict, we conclude that the evidence is sufficient to support appellant's conviction. Video surveillance shows appellant selling complainant's phone within a few hours after complainant picking him up at the Home Depot to go to work. The evidence further demonstrates that appellant used complainant's credit cards to purchase items that were later found in appellant's home. Appellant and his roommate pawned other items of complainant's. Appellant also lied twice

[4] "Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). The jury could have inferred intent from the evidence of appellant's lying about being with complainant on the day of the murder. *See id.*

about whether he was with complainant on the day of his murder. The State is not required to present direct evidence of intent for the evidence to be legally sufficient, only some evidence upon which rational inferences can be made. *See Herrin v. State*, 125 S.W.3d 436, 443 (Tex. Crim. App. 2002). Here, there is evidence upon which rational inferences could be made regarding the defendant's actions and linking the defendant with the missing items. *See id*.

After reviewing the evidence in the light most favorable to the verdict, we find there is sufficient evidence from which a rational trier of fact could have found that appellant intentionally murdered the victim in the course of a robbery. *See Upton v. State*, 853 S.W.2d 548, 552 (Tex. Crim. App. 1993) ("overwhelming weight of the evidence indicates appellant killed the victim for his money and other property").

We overrule appellant's first issue.

2. Admission of Victim Impact and/or Victim Character Testimony[5] at Guilt-Innocence

Appellant argues the trial court abused its discretion by overruling his objection to the victim impact and victim character evidence elicited during the testimony of complainant's nephew, Bradia Mojra, during the guilt-innocence phase of trial.

a. Standard of Review

We review the trial court's ruling as to the admissibility of evidence under an abuse of discretion standard. *See Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010); *Mayreis v. State*, 462 S.W.3d 569, 577 (Tex. App.—Houston

[5] " 'Impact' " evidence is generally recognized as evidence concerning the effect the victim's death will have on others, particularly the victim's family members. 'Character' evidence is generally recognized as evidence concerning good qualities possessed by the victim." *Mosley v. State*, 983 S.W.2d 249, 261 (Tex. Crim. App. 1998) (en banc)

[14th Dist.] 2015, no pet.). Victim impact testimony is irrelevant at the guilt-innocence phase of a trial because it does not tend to make more or less probable the existence of any fact of consequence with respect to guilt or innocence. *Miller–El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990); *Love v. State*, 199 S.W.3d 447, 456–57 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Victim character evidence also is inadmissible at the guilt-innocence phase of a trial unless it is offered to rebut evidence to the contrary that has been properly admitted on behalf of the defense or when the defense seeks to justify a homicide on the ground of threats made by the victim. *Fuentes v. State*, 991 S.W.2d 267, 280 n. 6 (Tex. Crim. App. 1999).

However, article 38.36 of the Texas Code of Criminal Procedure, which applies in prosecutions for murder, provides in relevant part:

> In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

Tex. Code Crim. Proc. Ann. art. 38.36(a).[6] A trial court is charged with exercising its discretion to distinguish admissible "victim-background" evidence, ostensibly offered as an aid to understanding the context and framework of the offense, from inadmissible "victim-impact" and "victim-character" evidence. The trial court abuses its discretion only when its decision to admit evidence lies "outside the zone of reasonable disagreement." *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010).

[6] Evidence admissible under Article 38.36 still must meet the requirements of the rules of evidence. *Smith v. State*, 5 S.W.3d 673, 679 (Tex. Crim. App. 1999).

The erroneous admission of evidence is nonconstitutional error; therefore, we analyze it to determine whether the error affected a substantial right of the defendant. Tex. R. App. P. 44.2(b); *see also Gray v. State*, 159 S.W.3d 95, 97–98 (Tex. Crim. App. 2005). A substantial right is affected when the error has a "substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the error had no or only a slight influence on the verdict, the error was harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

b. Bradia Mojra's Testimony

During the guilt-innocence stage of trial, the State called the complainant's nephew, Mojra, as a witness and the following exchange occurred:

> Q: Was Mr. Dehghani an influence in your decision to go to school?
>
> A. Definitely, yes, he was inspiring. He always told us to do the best that we can, and he showed it to us by example, also, he worked a lot himself so that was living example.
>
> Q. What were some of things that Al did that showed that he was a giving person?
>
> MR. MONCRIFFE: Your Honor, I want to object to the relevance of this line of questioning at this phase of this trial.
>
> THE COURT: Response?
>
> MS. BYROM: Simply, Your Honor, that I'm trying to elicit that Mr. Dehghani was a giving person that took chances on people and helped them.
>
> MR. MONCRIFFE: Your Honor, I don't think that's relevant at the phase of this trial.
>
> MS. BYROM: If I may respond. It's directly relevant simply because it's part of my theory of the case that Mr. Dehghani --
>
> MR. MONCRIFFE: Your Honor, may we approach?

THE COURT: Sorry, I don't need you. I'll overrule the objection.

MR. MONCRIFFE: Thank you.

Q. (BY MS. BYROM) Would you say that your uncle was somebody who took chances on people that didn't have much?

A. Definitely and I'm one of those examples. He accepted me when I was 15; and before I moved to the States, I lived with my parents in Iran. And I only met him two times, so he didn't know what kind of person I was. But he gave me opportunity to help me out to go to college here and make the best out of it. And another example of that would be he has many tenants. He would take turkeys to their home for Thanksgiving to help them out. So, he was a person that would give people chances without expecting anything in return.

Here, it is not outside the zone of reasonable disagreement to characterize Mojra's testimony as relevant to the nature of the frequent employment relationship between appellant and the complainant and admissible as an aid to understanding the context and framework of the offense, as opposed to inadmissible victim impact or character testimony. Moreover, the testimony rebutted appellant's theory of the case that someone other than appellant killed the victim. It supported the State's theory that no one else had a motive to kill the complainant, as he was a kind, giving person who liked to help those in need, including day laborers, by employing them to assist with renovating his rental homes. *See* Tex. Code Crim. Proc. Ann. art. 38.36(a); *see also Garcia v. State*, 201 S.W.3d 695, 702 (Tex. Crim. App. 2006) ("The nature of the relationship–such as whether the victim and the accused were friends, were co-workers, were married, estranged, separated, or divorcing–is clearly admissible under this Article."). We conclude that the trial court did not abuse its discretion by admitting this testimony.

We overrule appellant's second issue.

3. Ineffective Assistance of Counsel

In his last three issues, appellant contends his trial counsel rendered ineffective assistance in that counsel (1) failed to timely object that the victim impact and victim character evidence elicited during the testimony of Allen at guilt-innocence was not relevant, (2) failed to timely object that the victim impact and victim character evidence elicited during the testimony of Mojra at guilt-innocence was not relevant, and (3) failed to object that the probative value of the State's victim impact and victim character evidence was substantially outweighed by the danger of unfair prejudice.

a. Standard of Review

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must prove (1) his trial counsel's representation was deficient, and (2) 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 deprives the defendant of a fair trial only if it prejudices the defense. *Id*. at 691–92. To show prejudice, appellant must demonstrate there was 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. *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986).

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that counsel's actions were reasonably professional and 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 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); Garcia v. State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). 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 many 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). Isolated 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 counsel's performance for examination. *See Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Moreover, it is not sufficient that the defendant show, with the benefit of hindsight, that counsel's actions or omissions during trial were merely of questionable competence. *See Mata*, 226 S.W.3d at 430. Rather, to establish counsel's acts or omissions were outside the range of professionally competent assistance, the defendant must demonstrate counsel's errors were so serious that he was not functioning as counsel. *See Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

b. Failure to Object to Relevance of Victim Impact and Victim Character Evidence

i. Brenda Allen (complainant's wife)

Allen testified as the State's second witness. The following exchange occurred early in her testimony:

Q. Could you tell the ladies and gentlemen of the jury a little bit about Al, where was he from?

A. He was from Iran.

Q. And what brought him here to the United States?

A. He came here for school as a student.

Q. What was he studying when he came here?

A. English.

Q. And where was he studying that?

A. I think he first came to Stephenville.

Q. And ultimately did he go to the University of Houston?

A. He finished there, yes.

* * *

A. Yes.

Q. Mrs. Allen, what did your husband do for a living?

A. He was a real estate investor.

Q. What sort of real estate did he invest in?

A. In homes, I mean, it wasn't commercial, it was individual homes. He bought them, fixed them, rented them.

Q. At the time of January 7th, 2013, approximately how many homes did your husband own?

A. Probably 50.

Q. And what sort of relationship would you say he had with his tenants?

A. They all loved him. They loved him. He would take them stuff for Christmas. He'd take them cookies, I'd bake cookies, he

would deliver them to them. He took turkeys to one or two of the other tenants. The tenants all loved him very much.

Q. Would you describe your husband as a giving person?

A. Yes.

Q. Were there other examples you can think of where he would offer people a helping hand?

A. Yeah, I remember we had a student from Turkey that lived with us for a year, you know, it was a[n] exchange student. He brought him into our home like our son and took care of him.

Q. What about his employees, was he giving to them, too?

A. Oh, yeah, he always wanted to help them, you know, the best he could. Help them with their life. He always give [sic] them advice, and he cared about everybody especially young people. He wanted them to, you know, make the best in their life.

Appellant complains by failing to object to this testimony, his counsel failed to preserve error. He further asserts that the testimony was neither material nor relevant to the case but exemplifies the precise reason why victim impact and character evidence are not relevant at the guilt-innocence phase of trial. According to appellant, the testimony diverted the jury's attention from the issues they were to decide and tempted the jury into finding guilt on grounds apart from the charged offense by inevitably drawing a comparison between the complainant's worth, likability, and morality and that of the defendant. Appellant claims he was harmed by his counsel's deficient performance.

We need not address the challenge to this testimony because the record does not affirmatively demonstrate counsel's ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (declining to find that representation was ineffective where record did not explain counsel's failure to object). As shown, Appellant's counsel did not object to Allen's testimony on any grounds. The record does not reveal counsel's reasons for failing to object to Allen's testimony.

Appellant did not move for a new trial, and his defense counsel did not file an affidavit; thus, the record is completely silent as to counsel's strategy regarding Allen's testimony.[7] *See DeLeon v. State*, 322 S.W.3d 375, 381 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Without a complete record, we cannot determine that counsel provided ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392. Here, we cannot conclude that no competent attorney would have acted as appellant's counsel did, because there may have been strategic reasons for his decisions. For example, defense counsel may have strategically determined that the likelihood of success, and its potential benefits, was outweighed by the potential of drawing further attention to the testimony of a sympathetic witness or being viewed as insensitive to the complainant's widow. *Webb v. State*, 995 S.W.2d 295, 301 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Duren v. State*, 87 S.W.3d 719, 734 (Tex. App.—Texarkana 2002, pet. struck).

Appellant has failed to rebut the presumption of effective representation. *See Perez v. State*, 56 S.W.3d 727, 731–32 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court." *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Thus, because the record does not compel a conclusion that counsel was ineffective, appellant failed to rebut the presumption of effective representation.

We overrule appellant's third issue.

[7] A motion for new trial provides the trial court with an opportunity to hold a hearing on counsel's performance and develop a record for appeal.

ii. Bradia Mojra (complainant's nephew)

As set forth above, Mojra testified about whether the complainant was an influence on his decision to go to school. Appellant complains that his trial counsel belatedly objected to the relevance of this testimony, which resulted in the jury hearing testimony that the complainant was inspiring, taught by example, and urged others to do their best. Appellant also contends that after the court overruled counsel's belated objection, counsel failed to further object to other victim impact and character evidence indicating that the complainant took chances on others, gave to others without expecting anything in return, and distributed turkeys at Thanksgiving. Appellant maintains by failing to timely and specifically object to each item of victim impact and character evidence, counsel failed to preserve error on appeal.

Appellant contends that he was harmed by these errors. Specifically, he asserts that there is a reasonably probability that but for counsel's errors the verdict in his case would have been different. He argues that the State's case relied solely on circumstantial evidence and that the complained-of evidence of complainant's good character compared to his "jobless youthful drug addicted nature" impermissibly tempted the jury to find him guilty of capital murder on grounds apart from the charged offense. Thus, according to appellant, counsel's deficient performance undermines confidence in the reliability of the jury's verdict.

The record is silent on counsel's strategy regarding an objection, so appellant must establish his lawyer's not objecting to the testimony was "so outrageous that no competent attorney" would not have objected. *Goodspeed*, 187 S.W.3d at 392; *see also Moran v. State*, 350 S.W.3d 240, 244 (Tex. App.—San Antonio 2011, no pet.) (rejecting argument and authority implicitly supporting

argument that allowing witness to opine on victim's credibility constitutes deficient performance in all circumstances).

As set forth above, appellant's lawyer did lodge a relevance objection in the early part of Mojra's testimony, which the trial court overruled and counsel was rebuffed when he asked the court to approach. Based on that ruling, appellant's lawyer could reasonably have inferred the trial court would overrule any additional objections to testimony about complainant's character, and therefore may have strategized not to object again. We cannot conclude on this silent record that counsel's performance was deficient. Because appellant has not met his burden to establish deficient performance by his lawyer, we do not reach the question of whether appellant has shown he was prejudiced. *See Strickland*, 466 U.S. at 697.

We overrule appellant's fourth issue.

c. Failure to Object that Probative Value of Victim Impact and Victim Character Evidence was Substantially Outweighed by the Danger of Unfair Prejudice

Appellant asserts that counsel erred by failing to lodge an objection under Tex. R. Evid. 403 that the prejudicial impact of the victim impact and character evidence heard from the complainant's wife and nephew outweighed its probative value. Although appellant concedes that while the State's victim impact and character evidence "did not consume an inordinate amount of time to present," he argues that the jury was given no instruction on how to evaluate, or use, the evidence. Thus, appellant contends but for counsel's deficient performance, the verdict in his case would have been different.

These failures to object to potentially inadmissible testimony are not sufficient, in themselves, to constitute deficient performance. *See Thompson*, 9 S.W.3d at 814. There may have been strategic reasons for not objecting in these

instances, but we may not speculate on counsel's motives in the face of a silent record. *See id*.; *see also Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (declining to speculate on various failures to object to admission of evidence). Accordingly, we cannot say that defense counsel's conduct was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392.

We overrule appellant's fifth issue.

CONCLUSION

We affirm the judgment of the trial court.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, McCally, and Busby.
Do Not Publish — Tex. R. App. P. 47.2(b).