Affirmed and Memorandum Opinion filed April 20, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00989-CR

JAMEL JUREA WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1426876

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

A jury convicted appellant, Jamel Jurea Williams, of aggravated assault with a deadly weapon and sentenced him to 10 years' confinement. Appellant contends there is insufficient evidence to support the jury's verdict because the record shows he shot the complainant in self-defense. Appellant also contends that he was denied effective assistance of counsel when his trial counsel failed to object to alleged hearsay and opinion testimony at trial. We affirm because the record contains sufficient evidence to support appellant's conviction for aggravated

assault and appellant was not denied effective assistance of counsel.

BACKGROUND

The complainant Allen Hill and his girlfriend Tamara Carter went to the home of Tamara's aunt, Karen Williams, for a dinner on April 18, 2014. Karen is appellant's mother. Hill and appellant started arguing at the dinner. Hill hit appellant with his fist and appellant shot Hill in response. Appellant was indicted for aggravated assault with a deadly weapon. A jury trial was held from November 9, 2015, to November 12, 2015.

Hill testified at trial that he met Tamara's family when he went with Tamara to Karen's home for a Good Friday dinner. Hill began dancing with Tamara's mother in the enclosed patio. While Hill was dancing with Tamara's mother, appellant came home to the gathering. Hill had never met appellant before. According to Hill, appellant "came close and then he started talking derogatory to me." Specifically, appellant told Hill: "Move the F back." Hill testified that he "turned around and looked at [appellant] and asked [appellant] who are you talking to and that's when a[n] argument started."

Tamara's mother ran into the house to call appellant's cousin, Kedran Young. Kedran came and separated Hill and appellant, who were still arguing in the enclosed patio. When appellant said "one more cuss word" to Hill, Hill punched appellant in the face once. Kedran let go of appellant. Hill testified: "I put my guard up as if we were going to fight, since he was talking smack to me. And he stepped back and pulled out a gun and shot me." Hill testified that appellant shot him twice in the stomach while he was standing. Hill then fell to the ground and appellant shot him three more times — in the hip, arm, and chest. Hill was laying on the ground and heard "everybody saying 'Jamel, Jamel, why did you do that. Why did you do that.'" Hill testified that he did not have a gun and did

not do "anything threatening after that first initial punch." Hill was in shock when he saw appellant with the gun, and he believed appellant was going to kill him as appellant continued shooting at him.

Hill was taken to the hospital where he spent over a month and had two major surgeries. Houston Police Officer Tracy Jackson, who was in charge of the follow-up investigation, came to question Hill in the hospital on April 22, 2014. Hill testified that he told Officer Jackson he could not remember what had happened to him because "at that moment" he had "just got out of major surgery," was "hurting," and was "heavily sedated."

Appellant's first cousin Kedran Young also testified at trial. He stated he was in the kitchen getting ready to leave the dinner when he was called because appellant and Hill were arguing. Kedran did not know who had started the argument; he just saw appellant and Hill "verbal[ly] going back and forth" in a heated argument. Kedran testified that appellant "was just talking trash . . . back and forth." Kedran tried to calm appellant down and remove him from the argument so he grabbed him from behind and talked to him. While Kedran was holding appellant, Hill punched appellant in the face once. Kedran let go of appellant and expected appellant and Hill "were just going to fight physically." Instead, appellant pulled out a gun and shot Hill. Appellant shot Hill twice and Hill fell to the ground; appellant shot Hill three more times. Kedran testified that he did not see Hill with a gun and did not know if Hill had a gun.

Houston Police Officer Meghan Miller was dispatched to a "shooting in progress" at Karen's home. She secured the scene when she arrived together with other police officers and attended to Hill who was laying on the ground on the porch "with blood all over his T-shirt." Officer Miller took statements from the eyewitnesses on the scene, took pictures of the scene, and looked for evidence.

Based on her investigation, Officer Miller determined that Hill was shot on the porch. Officer Miller testified that she did not see a weapon in Hill's possession.

Houston Police Officer Tracy Jackson conducted a follow-up investigation of the shooting. He went to the hospital to interview Hill who was in the intensive care unit on April 22, 2014. He spoke briefly to Hill "due to his condition." He spoke to Karen so he could locate appellant. Officer Jackson also spoke to appellant and Kedran. Officer Jackson testified that no evidence he gathered and examined suggested there was a claim of self-defense.

After the State rested its case, the defense called appellant, Karen, and appellant's uncle to the stand.

Appellant testified that he came home to the Good Friday dinner around 10 p.m. and greeted everyone present, including Hill. After talking to his mother, appellant went to the patio to eat dinner. Hill approached him as he was sitting at the table and eating. Appellant testified that Hill stood "directly over" appellant and started talking. Appellant asked Hill several times to leave him alone. According to appellant, Karen also intervened and asked Hill to leave appellant alone but Hill continued talking to appellant. Appellant denied telling Hill to "move the f. . . back."

Appellant testified that, after asking Hill for the fifth time to leave him alone, Hill "balled his fist up in a violent manner." Appellant testified that he then stood up and Hill "went in a rage. He start raving. He ran out the back patio. He bust through the back patio door and was in the yard area and at that point that's when my mother had my arm. She said — she grabbed me by my left arm, by the elbow. She grabbed it. She said come on. Don't worry about it." Hill was in the backyard "jumping around ranting and raving" and "was trying to get [appellant] to come fight him."

While appellant continued talking to Karen, his cousin Kedran put his arms around appellant. Hill then came back on the patio and hit appellant "hard" in the face once. Appellant testified that he was in pain, in shock, and scared. When appellant turned around, he saw Hill "reaching under his shirt and running towards" appellant. Appellant thought Hill was reaching for a weapon, so appellant reached in his pocket, pulled out his gun, and shot once at Hill. Appellant testified that Hill "just kept coming at" appellant and "was running at [appellant] full speed" so appellant kept shooting at Hill until Hill fell in front of appellant. Appellant testified that he was in shock and scared for his life. Appellant claimed he did not shoot at Hill after Hill collapsed on the ground. After the shooting, Karen told appellant to leave, and he left the house.

On cross-examination, appellant denied approaching Hill while he was dancing with Tamara's mother and telling him to "back the F up." Appellant denied having an argument with Hill and denied getting angry or upset. Appellant testified that Hill "was arguing" and appellant was just sitting and eating his dinner. Appellant stated he did not know why his cousin Kedran felt he needed to hold appellant back when appellant was already talking to Karen. Appellant acknowledged not knowing if Hill had a gun and acknowledged never seeing Hill with a gun. Appellant claimed that Kedran was lying when he testified appellant shot Hill while Hill was laying on the ground.

Karen testified that appellant arrived later to the Good Friday dinner. She stated that she brought him dinner and he sat down on the patio to eat. Karen and another friend also sat at the table with appellant. Hill came to the table and said something to appellant. Karen saw appellant gesturing at Hill to go away but Hill would not move. Because Karen could see by looking at appellant that "something wasn't right," she got up and told Hill, "Leave my son alone." When Karen sat

back down, she saw Hill standing over appellant and appellant leaning back. Karen saw "that look in [appellant's] face" and saw appellant bending back so she got up again, stood between appellant and Hill, and told Hill to leave appellant alone.

Karen testified that Hill then started waving his hand and appellant stood up. Karen told appellant to ignore Hill. "[A]ll of a sudden [Hill] ran out the porch" into the backyard saying, "We can take this shit outside." Hill continued "ranting and raving" in the backyard so Karen tried to get appellant to go into the house. In the meantime, one of Karen's friends ran into the house and told Tamara to get Hill because "he was out there trying to fight" appellant. "But at that point Kedran ran out there and put [appellant] in a bear hug" while Karen was still holding on to appellant.

Karen testified that she and appellant were about to enter the house when Hill hit appellant in the head. Karen then heard a shot, looked up, and saw Hill "running forward swinging." Karen testified, "All I know is Kedran ran back in the house and I was just screaming to [appellant] to stop and [Hill] was still coming forward and then once [Hill] fell . . . I told [appellant] you need to leave . . . and he just turned around and left."

On cross-examination, Karen testified that, even though she stood next to appellant, she only heard gunshots and never saw a gun or appellant shoot Hill. She testified that she saw Hill running toward appellant and then continuing to run toward appellant even after Hill was shot. Karen could not remember after which gunshot Hill fell to the ground. Karen stated Hill ran with his arms above his waistband, and she could not remember if Hill ever lowered his arms or hands to his waistband or if he had anything in his hands. Karen claimed that she screamed at appellant because she heard shots and "just wanted everything to stop."

The last witness the defense called was appellant's uncle Jay Young. He testified that he attended the Good Friday dinner at Karen's house. Jay met Hill but did not interact with him because Jay believed Hill was drunk and was "making crazy conversations, just talking out of his head." According to Jay, Hill's tone was "pretty much mild" but "got aggressive" when Hill "was talking to another individual there."

Later in the evening, appellant arrived and greeted everyone present at the dinner, including Hill. After appellant shook Hill's hand, appellant talked to Karen and then went to the patio to eat dinner. Hill at some point went to the patio and started "leaning over the table" where appellant was sitting. Hill and appellant "exchang[ed] words" and appellant repeatedly asked Hill to leave him alone. Hill then "raised his hand up telling [appellant] we can go outside, we can take it outside. Come on. Go outside with me."

Hill left the patio and went outside into the backyard. According to Jay, Hill "was steady asking [appellant] to come out and [appellant] was sitting at the table. You know his mom was telling him you know don't go out there. Just trying to defuse, just trying to defuse everything. She was actually talking to him." Hill ran back onto the patio and appellant jumped up from the table. Karen grabbed appellant, and Hill hit appellant "twice real good." Jay testified that Hill ran back outside after hitting appellant "and then charged back in there again." Jay testified that Hill "did have his hand in his pocket when he came back through the door." Then there were gunshots and Jay saw Hill on the ground. Jay testified that Hill was "on the phone with his mother talking to his mother on his cell phone and I notice him reach in his pocket and hand [Tamara] something. I don't know what it was. I just seen him reach in his pocket and her something [sic] and she went

outside with it but it didn't dawn on me to ask because of the commotion you know with him."

On cross-examination, Jay again testified that Hill hit appellant twice. Jay also stated that he saw Hill had his hand in his pocket when he charged back onto the patio for the second time. Jay saw appellant shoot Hill. Jay testified that he moved his truck out of the way when the ambulance arrived and then left. Jay did not stay to talk to the police or give a statement at a later time; the first time he talked about the shooting was when he testified in court.

The State called Hill again as a rebuttal witness and asked him: "Did you ever at any point on April 18, 2014, make a motion with your hand as if you had a weapon in your pants to threaten the Defendant?" Hill answered, "No I did not." On cross-examination, Hill denied making "any motions towards [his] pocket or towards [his] waistband."

During closing argument, appellant's trial counsel argued that appellant acted in self-defense and asked the jury to find appellant not guilty. The jury rejected appellant's self-defense claim. The jury found appellant guilty of aggravated assault with a deadly weapon and sentenced him to 10 years' confinement. Appellant filed a timely appeal.

ANALYSIS

Appellant argues in his first two issues that he was denied effective assistance of counsel. Appellant argues in his third issue that the evidence is insufficient to support his conviction. We first address appellant's third issue because it challenges the sufficiency of the evidence and seeks rendition of a judgment of acquittal.

I. Sufficiency of the Evidence

Appellant argues in his third issue that the evidence is insufficient to support his conviction "because the jury could not have rationally found that Appellant was not acting in self-defense" when he shot Hill. Appellant does not challenge the sufficiency of the evidence as to the elements of aggravated assault. Rather, he contends that "no rational factfinder could have found that the State met its burden of persuasion that Appellant did not act in self-defense."

A person commits aggravated assault if he (1) intentionally or knowingly causes bodily injury to another; and (2) uses or exhibits a deadly weapon during the commission of the assault. *See* Tex. Penal Code Ann. § 22.01(a)(1) (Vernon Supp. 2016), §22.02(a)(2) (Vernon 2011). The jury was also instructed on the law of self-defense and deadly force in defense of person as follows:

> 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 person's use or attempted use of unlawful force. The use of force against another is not justified in response to verbal provocation alone.
>
> A person is justified in using deadly force against another if he would be justified in using force against the other in the first place and when he reasonably believes that such deadly force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.

See id. § 9.31(a) (Vernon 2011), § 9.32(a)(2)(A) (Vernon 2011).

The initial burden to produce evidence supporting self-defense rests with the defendant. *See Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991). Once the defendant produces some evidence, the State bears the burden of persuasion to disprove the raised defense. *Zuliani*, 97 S.W.3d at 594; *Moralez v. State*, 450 S.W.3d 553, 565 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); *see Saxton*, 804 S.W.2d at 913.

The issue of self-defense is a fact issue to be determined by the jury, which is free to accept or reject any defensive evidence on the issue. *Moralez*, 450 S.W.3d at 565; *see Saxton*, 804 S.W.2d at 913-14.

We presume that the factfinder resolved any conflicts in favor of the verdict and must defer to that resolution, as long as it is rational. *Darkins v. State*, 430 S.W.3d 559, 564 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). If the jury finds the defendant guilty, then it implicitly finds against the defensive theory. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 914.

"In resolving the sufficiency of the evidence issue, we look not to whether the State presented evidence which refuted appellant's self-defense testimony, but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of [aggravated assault] beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *See Saxton*, 804 S.W.2d at 914.

Appellant contends that the jury could not have rationally found he was not acting in self-defense because the evidence showed that (1) appellant and Hill were at appellant's home; (2) although Hill "claimed that [a]ppellant approached him for no reason and began 'speaking derogatory' towards him," appellant, Karen, and Jay "all testified that [a]ppellant was sitting down eating when Hill continued to stand over him and engage in a verbal argument with him, despite [a]ppellant and his mother's attempts to get Hill to leave him alone;" (3) Hill ran out into the yard, "prepared himself for a fight, and kept calling for [a]ppellant to come fight him;" (4) Hill hit appellant in the face while Karen and Kedran were ushering appellant inside the house; (5) appellant, Karen, and Jay testified that Hill was "advancing towards" appellant; and (6) appellant believed that Hill was reaching under his

shirt, and Jay observed Hill's "hand in his pocket." Appellant contends that "[d]ue to Hill's aggressiveness, Hill advancing towards [a]ppellant and reaching under his shirt, [a]ppellant was justified in using deadly force to protect himself in his home."

The jury is the sole judge of credibility and weight to be given to testimony; it was not obligated to believe appellant's and Jay's testimony that Hill started an argument, ran towards appellant, and reached under his shirt or had his hand in his pocket. *See Saxton*, 804 S.W.2d at 914. Further, the jury heard evidence contrary to appellant's and Jay's account of events.

Hill testified appellant first approached him, "came close and then he started talking derogatory." Hill testified that he and appellant argued, that Kedran came and separated them, and that he hit appellant after appellant said "one more cuss word." Hill stated, "I put my guard up as if we were going to fight" but, instead of fighting, appellant pulled out a gun and shot Hill. Hill stated that he did not (1) have a gun; (2) do "anything threatening after that first initial punch;" (3) "make a motion with [his] hand as if [he] had a weapon in [his] pants to threaten" appellant; or (4) make "any motions towards" his pocket or waistband. Hill testified that he fell to the ground after appellant shot him twice and that appellant shot him three more times while he was on the ground.

Appellant's mother Karen, who was standing next to appellant when Hill hit appellant and when appellant shot Hill, could not confirm appellant's assertion that Hill was reaching under his shirt. She testified that she did not remember if Hill had anything in his hands or if he ever lowered "his arms or hand to his waistband."

Appellant's cousin Kedran testified that he grabbed appellant because he and Hill were in a heated argument. Kedran testified that, while he was holding

appellant, Hill hit appellant once. Kedran stated that he let go of appellant because he expected appellant and Hill "were just going to fight physically" but instead appellant shot Hill. Kedran also testified that he did not see Hill with a gun and did not know if Hill had a gun. Although Kedran saw the events leading up to the shooting, he did not testify that he saw Hill run towards appellant, reach under his shirt, or put his hands in his pocket. Contrary to appellant's assertion, Kedran testified that appellant shot Hill twice; Hill fell to the ground; and appellant shot Hill three more times.

Appellant's uncle Jay was the only witness who claimed that Hill punched appellant twice; Hill, appellant, Karen, and Kedran all testified that Hill hit appellant only once. Jay also was the only witness who testified that Hill had his hand in his pocket; appellant claimed that Hill was reaching under Hill's shirt. Further, Jay did not stay to talk to police after the shooting but left the scene; nor did Jay at any time make a statement. For the first time at trial did Jay talk about the events that led up to the shooting of Hill. The jury could have found Jay's testimony to not be credible and could have determined that Jay only testified in order to help appellant who is his nephew.

The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given to their testimony. *Moralez*, 450 S.W.3d at 565. Thus, the jury was not required to believe appellant's or Jay's testimony; the jury was entitled to believe the controverting evidence and testimony of Hill and Kedran. Based on the record before us, we conclude that a rational jury could have rejected appellant's self-defense claim. *See Saxton*, 804 S.W.2d at 914.

Accordingly, we overrule appellant's third issue.

II. Ineffective Assistance of Counsel

Appellant argues in his first issue that he was denied effective assistance of counsel when his trial counsel failed to object to Officer Miller's alleged hearsay testimony. Appellant contends in his second issue that he was denied effective assistance of counsel when his trial counsel failed to object to alleged opinion testimony from Officer Jackson.

The Sixth Amendment to the United States Constitution guarantees individuals the right to assistance of counsel in a criminal prosecution. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). "The right to counsel requires more than the presence of a lawyer; it necessarily requires the right to effective assistance." *Id*. "However, the right does not provide a right to errorless counsel, but rather to objectively reasonable representation." *Id*.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id*. (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

In order to satisfy the first prong, appellant must prove by a preponderance of the evidence that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Lopez*, 343 S.W.3d at 142. A defendant must overcome the presumption that trial counsel's actions fell within the wide range of reasonable and professional assistance. *See Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim. *Id*.

To satisfy the second prong, appellant must show that there is a reasonable probability — or a probability sufficient to undermine confidence in the outcome —that the result of the proceeding would have been different but for counsel's unprofessional errors. *See Lopez*, 343 S.W.3d at 142; *Garza*, 213 S.W.3d at 348.

In determining whether counsel was ineffective, we consider the totality of the circumstances of the particular case without the benefit of hindsight. *Lopez*, 343 S.W.3d at 143. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. at 142; *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) ("Direct appeal is usually an inadequate vehicle for raising [an ineffective assistance] claim because the record is generally undeveloped."). Failure to satisfy either prong of the *Strickland* test defeats an ineffective assistance claim. *Strickland v. Washington*, 466 U.S. 668, 697 (1984); *Lopez*, 343 S.W.3d at 142.

A. Hearsay Testimony

Appellant argues in his first issue that he was denied effective assistance of counsel because his trial counsel failed to object to the following testimony from Officer Miller:

> [THE STATE:] When you arrived on scene I know I asked you and you took possible statements from eyewitnesses did that lead you to conclude that there was a shooting that occurred?
>
> [OFFICER MILLER:] Yes.
>
> [THE STATE:] Did you have any reason to look for a weapon on the complainant?
>
> [OFFICER MILLER:] No.
>
> [THE STATE:] Do you know if he had a weapon or anything like that on him?

[OFFICER MILLER:] Not that I saw.

Appellant argues that his counsel was ineffective "when he failed to object to the State asking [Officer] Miller if she had 'any reason to look for a weapon on the complainant' after speaking with witnesses at the scene." According to appellant, the "inescapable conclusion from this line of questioning is that [Officer] Miller spoke with the witnesses at the scene, and that none of their statements included evidence of the complainant having a weapon, thus proving what the content of their statements were." Appellant says a competent attorney would have objected to "this type of indirect or 'back door' hearsay" testimony "that the complainant did not have a weapon on him." Appellant also claims that Officer Miller's testimony constitutes back door hearsay because, "where a witnesses [sic] testifies that he spoke with someone and then took a specific action after talking to that person," this "produces a strong enough inference as to the substance of the statement."

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. *See* Tex. R. Evid. 801(d). "Statement" means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression. Tex. R. Evid. 801(a). "It is well settled that an out-of-court 'statement' need not be directly quoted in order to run afoul of the hearsay rules." *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999).

"[W]here there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly. In short, 'statement' as defined in [Rule 801(a)] necessarily includes proof of the statement whether the proof is direct or indirect." *Id.*

(quoting *Schaffer v. State*, 777 S.W.2d 111, 114 (Tex. Crim. App. 1989)). Whether the disputed testimony violates the hearsay prohibition necessarily turns on how strongly the content of the out-of-court statement can be inferred from the context. *Id*. "[T]he question is whether the strength of the inference produces an 'inescapable conclusion' that the evidence is being offered to prove the substance of an out-of-court statement." *Id*. at 261-62 (citing *Schaffer*, 777 S.W.2d at 114).

Contrary to appellant's assertion, we conclude that the State did not elicit hearsay testimony from Officer Miller. Therefore, appellant's trial counsel's performance did not fall below an objective standard of reasonableness when trial counsel did not object to Officer Miller's testimony.

The State's first question asked Officer Miller if "statements from eyewitnesses" led her to conclude that a shooting had occurred. The State's second question contains no such preface and simply asked if Officer Miller had "any reason to look for a weapon on the complainant;" the second question did not ask if "statements from eyewitnesses" motivated any of her actions. *Cf. Burks v. State*, 876 S.W.2d 877, 898 (Tex. Crim. App. 1994) (State indirectly elicited inadmissible hearsay testimony from a police officer when the State asked him what particular description of an individual he went looking for after questioning the victim and another witness and the police officer testified as to the particular description the witnesses provided.). Nor did the State ask if Officer Miller took any specific action, including searching for a weapon on Hill, in response to information she received from eyewitnesses. *See id*.

At best, the jury may have deduced that eyewitnesses told Officer Miller that a shooting had occurred; but Officer Miller's testimony did not produce "an 'inescapable conclusion' that [the testimony was] being offered to prove the

substance of an out-of-court statement" by eyewitnesses,[1] namely that "the complainant did not have a weapon on him." Nor was "the State's sole intent in pursuing this line of questioning to convey to the jury" that Officer "Miller spoke with the witnesses at the scene, and that none of their statements included evidence of the complainant having a weapon." *Cf. Schaffer v. State*, 777 S.W.2d 111, 112-13, 114 (Tex. Crim. App. 1989) (investigator's testimony that he had spoken to a police officer for whom appellant claimed to have been acting as an informant, and that investigator would not recommend that charges be dropped against the appellant, indirectly informed jury that the police officer denied that appellant had been acting as his informant; "the State's sole intent in pursuing this line of questioning was to convey to the jury that [the police officer] had told [the investigator] that appellant was not an informant").

Officer Miller's testimony is not hearsay, and thus no hearsay objection to the testimony was required. Appellant did not prove by a preponderance of the evidence that his trial counsel's performance was deficient because it fell below an objective standard of reasonableness under the prevailing professional norms. *See Strickland*, 466 U.S. at 689; *Lopez*, 343 S.W.3d at 142.

Accordingly, we overrule appellant's first issue.

B. Opinion Testimony

Appellant argues in his second issue that he was denied effective assistance of counsel because his trial counsel failed to object to the following testimony "as to guilt or innocence" from Officer Jackson:

> [THE STATE:] If you believed in an aggravated assault weapons case that a defendant did something, I apologize, that the Defendant did something in self-defense would you investigate that?

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[1] *Head*, 4 S.W.3d at 262.

> [OFFICER JACKSON:] The case would still be investigated but at that point if I believed that it was self-defense I would contact the DA's office and share both sides of the story and whatever facts or evidence I may have.
>
> [THE STATE:] And usually in cases like that where there is a strong self-defense claim does the DA's office decline those charges?
>
> [OFFICER JACKSON:] Yes.
>
> [THE STATE:] Was there anything, any of the evidence that you gathered in this case and you looked at did anything suggest to you that there was a self-defense claim?
>
> [OFFICER JACKSON:] Not at all. Not at all.
>
> [THE STATE:] And at the conclusion of your investigation after you looked at all the evidence did you call the DA's office?
>
> [OFFICER JACKSON:] I contacted the DA's office, presented the facts of the case to the assistant DA and at that time had charges accepted.

Appellant contends that his "trial counsel's representation fell below the objective standard of prevailing professional norms because he failed to object to the State asking Jackson his opinion as to whether or not he believed that there was any suggestion of a self-defense claim after looking at all the evidence." Appellant contends that he raised a claim of self-defense at trial and that, "[i]n direct response to that claim, the State asked [Officer] Jackson whether he believed there was anything to suggest there was a self-defense claim." According to appellant, a competent attorney would have objected to Officer Jackson's testimony because "[t]his testimony was not lay opinion testimony because the opinion is not rationally based on the perception of [Officer] Jackson and was not helpful to provide a clear understanding of [Officer] Jackson's testimony or the determination of a fact at issue."

Even if we assume for argument's sake that appellant's trial counsel was deficient for failing to object to Officer Jackson's testimony, appellant has failed to demonstrate prejudice.

With regard to the prejudice prong, appellant states in his brief that Officer Jackson's "testimony was an opinion as to the ultimate issue the jury faced in this case — whether or not Appellant acted in self-defense. This testimony was extremely detrimental to Appellant's case. There is a reasonable probability that the jury used this evidence as proof to rebut Appellant's self-defense claim. Therefore, it can be said that there is a reasonable probability that, but for Appellant's trial attorney's deficiencies, the result of the trial would have been different."

Appellant had not yet asserted a self-defense claim when Officer Jackson testified that he did not believe any evidence he gathered in his investigation suggested a self-defense claim. Only after the State rested its case did appellant testify and for the first time contend that he shot Hill in self-defense. Thus, the State did not elicit Officer Jackson's testimony "in direct response to" appellant's self-defense claim. Further, the testimony of every other witness the State called at trial negated a self-defense claim, and the record does not support appellant's assertion that Officer Jackson's "testimony was extremely detrimental to [a]ppellant's case."

Hill testified that he and appellant had an argument and, when appellant said "one more cuss word," Hill hit appellant in the face. Hill testified he did not have a weapon and did not do "anything threatening after that first initial punch." Hill testified, "I put my guard up as if we were going to fight" but appellant "stepped back and pulled out a gun and shot me." Hill also testified that he never made any

motions towards his waistband or pocket "as if he had a weapon in [his] pants to threaten" appellant.

Appellant's cousin Kedran testified that he thought appellant and Hill "were just going to fight physically" after Hill hit appellant in the face during their argument; instead, appellant pulled out a gun and shot Hill. Kedran testified that appellant shot Hill twice and then three more times after Hill fell to the ground and was laying on the floor. Kedran also testified that he did not see Hill with a gun and did not know if Hill had a gun. And although Kedran witnessed the events leading up to the shooting, he did not testify that he saw Hill make any movement or reach under his shirt or in his pocket for a weapon.

Officer Miller also testified that she did not see Hill have a gun when she first responded to the scene after the shooting.

Appellant's mother Karen, who was at appellant's side when Hill hit appellant and when appellant shot Hill, was unable to confirm appellant's contention that Hill was reaching under his shirt. Karen testified that she did not remember if Hill had anything in his hands or if he at some point lowered "his arms or hand to his waistband."

The record before us does not support appellant's assertion that Officer Jackson's "testimony was extremely detrimental to [a]ppellant's case," and that there is "a reasonable probability that the jury used this evidence as proof to rebut [a]ppellant's self-defense claim" and thus find him guilty of aggravated assault. At best, Officer Jackson's testimony was cumulative of evidence that negated appellant's self-defense claim, including testimony from Hill, Kedran, Officer Miller, and Karen. Considering the totality of the circumstances, we conclude that appellant did not demonstrate he was prejudiced and that, but for his counsel's alleged deficient performance in failing to object to Officer Jackson's testimony,

the jury would not have rejected his self-defense claim and would not have found him guilty of aggravated assault. *See Lopez*, 343 S.W.3d at 142-43.

Accordingly, we overrule appellant's second issue.

CONCLUSION

We affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby and Wise.
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