Affirmed and Memorandum Opinion filed August 22, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00194-CR

JUAN MANUEL MATA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 13-CR-2480

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

Appellant Juan Manual Mata challenges the sufficiency of the evidence in support of the jury's guilty finding against him for assault on a public servant and alleges he received ineffective assistance of counsel. We affirm.

Background

Appellant was at a party at his brother's home in Dickinson, Texas at approximately 1:45 a.m. when a neighbor made a noise complaint. Officer Paxton

responded to the call. The partygoers were in the garage when Paxton approached the open garage door and asked a woman to turn down the music. She complied, and Paxton walked back toward his car. As he was unlocking the car door, he heard a loud group of four or five people approaching him.

Paxton testified that something was thrown near his feet, and he turned his attention to the loud group. Appellant was in front of the group, and, according to Paxton, appellant used a racial slur to refer to Paxton. When Paxton turned around, appellant was holding a beer bottle by the neck, swinging it, and "motioning that he was going to hit [Paxton] with it." When Paxton saw appellant with the beer bottle, Paxton presumed that another beer bottle had been thrown at him and that was what landed near his feet.

At that point, Paxton asked appellant for his identification and told him he was not free to leave. The group returned to the garage, and Paxton followed. He also called for backup. Appellant threatened to "kick [Paxton's] ass." Appellant pulled out a cellphone and began filming the encounter. Around that time, Officer McCollum arrived with a taser gun and told the crowd to back up. Appellant did not follow McCollum's command; he fled. Paxton chased appellant through the garage into a laundry area.

Paxton grabbed appellant, and they both fell. Others chased Paxton and appellant into the laundry room and were hitting Paxton. Paxton then felt a tug on his belt and testified that appellant pulled on Paxton's gun in an attempt to take it. At that point, Paxton began to hit appellant with a flashlight and pushed the crowd back. Appellant and others kept hitting Paxton. Paxton was scared and began "kicking and pushing" to "force[] everybody out of the room . . . to the adjacent wall in the garage." People, including appellant, continued to hit Paxton during this time. Appellant specifically was "fighting, hitting, kicking, trying to get away."

Paxton and appellant then collided with the adjacent wall in the garage, and Paxton fell on a workbench. Appellant landed on top of Paxton, and appellant and others kept hitting Paxton. At some point during the scuffle, McCollum ordered everyone to get off Paxton. Finally, Paxton was able to get control of appellant.

The next day, Officers Vargas and Banda took appellant to the hospital to have him evaluated to see if he was healthy enough for incarceration.[1] Appellant told Banda he did not remember what happened, but appellant admitted "he was really drunk and that's probably what caused the situation" and apologized.

Appellant was charged with assault on a public servant and attempting to take a weapon from an officer. The jury found appellant guilty of assault on a public servant but acquitted him of attempting to take a weapon from an officer. The jury sentenced appellant to 3.75 years of confinement.

Discussion

In two issues, appellant challenges the sufficiency of the evidence in support of the jury's guilty verdict and alleges he received ineffective assistance of counsel because his trial counsel erroneously stated during opening statements that Paxton was on suspension for excessive force and his trial counsel failed to investigate, interview, and present mitigation witnesses during the punishment phase of trial.

I. Jury Verdict Supported by Legally Sufficient Evidence

We first address appellant's second issue challenging the sufficiency of the evidence. Appellant argues the "overwhelming evidence showed" that Paxton initiated the violence and appellant acted only in self-defense.

When reviewing sufficiency of the evidence, we view all of the evidence in

[1] Appellant had refused treatment from emergency medical personnel the night before.

the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational factfinder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). We do not sit as a thirteenth juror and may not substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, we defer to the factfinder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id*. This standard applies equally to both circumstantial and direct evidence. *Id*. Each fact need not point directly and independently to the appellant's guilt, as long as the cumulative effect of all incriminating facts is sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

As an initial matter, appellant argues that in analyzing his sufficiency challenge, we must determine whether "any rational trier of fact would have found . . . against appellant on the self-defense issue beyond a reasonable doubt," citing *Konemany v. State*, No. 14-10-01195-CR, 2011 WL 5553785, at *2 (Tex. App.—Houston [14th Dist.] Nov. 15, 2011, no pet.) (mem. op., not designated for publication). But at trial, appellant did not argue he acted in self-defense, request a self-defense instruction, or object to the lack thereof. The State argues because appellant failed to do so, we should not consider self-defense in our analysis. We agree. Nevertheless, we shall treat appellant's argument as a straightforward challenge to the sufficiency of the evidence in support of the jury's verdict finding him guilty of assault on a public servant. *See Davis v. State*, 268 S.W.3d 683, 695 n.1 (Tex. App.—Fort Worth 2008, pet. ref'd).

The State was required to prove that appellant "intentionally, knowingly, or

recklessly cause[d] bodily injury to another" whom appellant knew to be "a public servant while the public servant [was] lawfully discharging an official duty." Tex. Pen. Code § 22.01(a)(1), (b)(1).

Appellant argues the following evidence establishes that appellant did not intentionally or recklessly strike Paxton:

- Paxton pursued appellant only after appellant began to film their encounter.
- A video introduced by the State shows appellant assuring Paxton "that [appellant was not] going anywhere while asking [Paxton] to call his supervisor."
- Paxton admitted he pushed people into the garage, slammed appellant into the wall so hard they fell, and fought his way out of the laundry room.
- Paxton's incident report did not state that appellant hit him.
- Paxton admitted to striking appellant with his flashlight, and there was a pool of appellant's blood on the floor after the encounter.
- Paxton lost his body camera during the encounter and did not collect the bottle "that was allegedly thrown at him."[2]

Appellant asks us to reevaluate the weight and credibility of the evidence, which we cannot do. *See Isassi*, 330 S.W.3d at 638. The jury, as the sole judge of the weight and credibility of the evidence, heard the above evidence in addition to the following evidence.

Paxton testified that as he was leaving the property, appellant and others approached him. Appellant was swinging a bottle, and Paxton thought appellant was threatening to hit him. At that point, Paxton asked for identification and told

[2] The body camera was never recovered.

appellant he was not free to leave.

Everyone returned to the garage, where appellant threatened to "kick [Paxton's] ass." Appellant began filming the encounter at that point and eventually fled. Paxton chased appellant into the laundry room, where a struggle ensued. According to Paxton, appellant hit and kicked him multiple times to get away. After appellant tried to grab Paxton's weapon, Paxton hit him.

McCollum's taser gun had a video camera on it that recorded a portion of the encounter. The jury saw the video at trial, which reflects appellant and a woman on top of Paxton hitting him.[3] An audio recording of the encounter taken from Paxton's patrol car also corroborates Paxton's version of events.

The neighbor who made the noise complaint testified that he saw four people "jump[] that officer" in the garage doorway and one was appellant. The people had been yelling obscenities at Paxton. The neighbor said Paxton was "on the ground" and four people were on him, including appellant. The neighbor also testified while viewing the taser gun video at trial, that he could see that appellant was "the person in that video" who "with the left hand came down on the officer like this with a punch."

Furthermore, the next day, appellant, despite denying any memory of the event, admitted to Banda that he was intoxicated and "probably . . . caused the situation."

Viewing the evidence in the light most favorable to the verdict in deference to the jury's responsibility to weigh the evidence and draw reasonable inferences therefrom, *see id.*, we conclude that the jury's guilty finding was supported by

[3] The video is hard to follow, but McCollum confirmed at trial that it reflects appellant "swinging at" Paxton.

legally sufficient evidence. We overrule appellant's third issue.

II. Ineffective Assistance Not Established

Appellant complains in his first issue that his counsel provided ineffective assistance by erroneously stating in opening statements that Paxton was on suspension for excessive force and by failing to investigate, interview, and present mitigation witnesses during the punishment phase of trial.

To prevail on an ineffective-assistance claim, a defendant must prove that counsel's representation fell below an objective standard of reasonableness and the defendant suffered prejudice from such deficiency. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable assistance. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To defeat this presumption, "[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *See Thompson*, 9 S.W.3d at 813.

A. No Showing of Prejudice Resulting from Counsel's Comments during Opening Statements

During his opening statements, defense counsel referred to Officer Paxton as a "thug" and asserted that he was on suspension from the Brazoria County Sheriff's Department.[4] The State presented evidence during trial that Paxton had never been suspended and had never worked for Brazoria County. Defense counsel apologized for his comments during closing argument and stated that he had "relied on some bad information and [he] was wrong."

Appellant argues that defense counsel's statements about Paxton during

[4] The trial court sustained the State's objection to the "thug" comment.

opening constituted a harmful act that could not have been trial strategy. *See Miller v. State*, 728 S.W.2d 133, 134-35 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) (holding counsel did not have a reasonable trial strategy in making inflammatory and racist remarks to the jury and arguments that had no basis in the record, among other things, and holding "aggregate of errors" were prejudicial). While we agree that defense counsel's error cannot be interpreted as sound trial strategy—he admitted as much through his apology[5]—appellant has not established prejudice.

A defendant establishes prejudice by proving a reasonable probability that the result of the proceeding would have been different had counsel's performance been proficient and thus, the defendant was deprived of a fair trial. *Strickland*, 466 U.S. at 694; *Thompson*, 9 S.W.3d at 812. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694; *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012). In evaluating prejudice, we consider the totality of the evidence. *Strickland*, 466 U.S. at 695; *see also Frangias v. State*, 413 S.W.3d 212, 218 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (op. on reh'g). A verdict weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. *Strickland*, 466 U.S. at 695; *Frangias*, 413 S.W.3d at 218.

Appellant argues that defense counsel's mistake translated into his loss of credibility, leaving the jury with the impression that defense counsel is a "dishonest" attorney. Presuming that counsel's apology did not mitigate the impact of his mistake, there is ample evidence in the record, outlined above, that appellant confronted, threatened, and hit and kicked Paxton multiple times. Considering the strength of the evidence against appellant, we cannot conclude there is a reasonable

[5] But the right to effective assistance of counsel does not entitle a defendant to errorless or perfect representation. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006).

probability that but for counsel's mistake, the result of the proceeding would have been different. *See West v. State*, 474 S.W.3d 785, 793–94 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding appellant failed to show prejudice when record contained ample evidence of guilt). Accordingly, appellant has not shown that he suffered prejudice from defense counsel's mistake.

B. No Showing of Lack of Trial Strategy Regarding Failure to Investigate, Interview, and Present Mitigation Witnesses

Appellant also complains that his trial counsel provided ineffective assistance by failing to investigate, interview, and present mitigation witnesses during the punishment phase of trial. In the majority of cases, the appellant is unable to show that trial counsel's representation fell below an objection standard of reasonableness because the record on direct appeal is undeveloped. *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). When the record is silent as to trial counsel's strategy, as here, we will not conclude that appellant received ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it."[6] *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). 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 representation. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006).

It is not sufficient for the appellant to 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 the attorney's acts or omissions were outside the range of professionally competent assistance, appellant "must show that counsel's errors were so serious that he was not

[6] Appellant did not file a motion for new trial presenting evidence regarding trial counsel's strategy or lack thereof.

functioning as counsel." *Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995). We may not presume a lack of sound trial strategy on the part of trial counsel merely because we are unable to discern any particular strategic or tactical purpose in counsel's trial presentation. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

Appellant contends that he had family members at trial who were "*seemingly* available to offer insight into the nature of his character." (Emphasis added.) Both the record and appellant's brief, however, are silent as to whether any mitigating evidence *actually* was available for presentation. *See Bone*, 77 S.W.3d at 834–35; *Swanner v. State*, 499 S.W.3d 916, 921 (Tex. App.—Houston [14th Dist.] 2016, no pet.). We may not presume a lack of sound trial strategy on the part of defense counsel merely because he did not present mitigation witnesses. *See Bone*, 77 S.W.3d at 836 ("A vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent. . . . [A] defendant must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission."); *Swanner*, 499 S.W.3d at 921-22. Likewise, we will not speculate as to how the failure to present mitigating evidence might have prejudiced the outcome of the case. *See Bone*, 77 S.W.3d at 835; *Swanner*, 499 S.W.3d at 921.

As to appellant's contention regarding trial counsel's failure to investigate and interview potential mitigation witnesses, appellant similarly has not established that his counsel failed to do so, and we will not speculate. *See Bone*, 77 S.W.3d at 835; *Swanner*, 499 S.W.3d at 921-22. Even if trial counsel had, appellant has not shown what the investigation and interviews would have revealed. Without a showing of what an investigation or witness interview would have revealed that reasonably could have changed the result of the case, a claim fails for ineffective assistance

based on trial counsel's general failure to investigate the facts of the case or interview a witness. *Straight v. State*, 515 S.W.3d 553, 568 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

For the foregoing reasons, we overrule appellant's first issue complaining of ineffective assistance of counsel.

Conclusion

Having concluded that the jury's verdict is supported by sufficient evidence and appellant did not establish he received ineffective assistance of counsel, we affirm the judgment of the trial court.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Boyce, Jamison, and Brown.
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