Affirmed and Memorandum Opinion filed November 14, 2017.

In the

Fourteenth Court of Appeals

NO. 14-17-00060-CR

JALEN CONWAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1491313

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

In two issues, appellant Jalen Conway appeals his conviction and sentence for aggravated robbery with a deadly weapon. First, appellant argues the trial court lacked jurisdiction because the grand jury that indicted him sat in a different Harris County District Court than the one in which his case was heard. Second, appellant argues that his trial counsel was ineffective by failing to object to evidence related to appellant's alleged involvement in a gang. We conclude that the indictment

vested jurisdiction in the trial court and that appellant's trial counsel did not render ineffective assistance. We affirm.

I. BACKGROUND

The State filed a complaint alleging that appellant committed aggravated robbery with a deadly weapon. The complaint was assigned to the 174th District Court in Harris County.

An indictment was later filed in the 174th District Court, signed by the grand jury foreman of the 337th District Court in Harris County. The trial court proceedings were conducted in the 174th District Court. After appellant pleaded "guilty" to aggravated robbery with a deadly weapon, the trial court ordered a presentence investigation (PSI) report and reconvened for the punishment hearing. Following that hearing, the trial court sentenced appellant to 12 years of confinement in the Institutional Division of the Texas Department of Criminal Justice.

II. ANALYSIS

A. Jurisdiction

Appellant argues that the trial court—the 174th District Court of Harris County—lacked jurisdiction to adjudicate his case because the grand jury of a different court—the 337th District Court of Harris County—presented the indictment. We recently considered and rejected this argument in *Matthews v. State*, No. 14-16-00913-CR, ___S.W.3d___, 2017 WL 3271195 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, pet. ref'd).

A trial court is vested with jurisdiction once it is presented with an indictment. *See State v. Dotson*, 224 S.W.3d 199, 204 (Tex. Crim. App. 2007). Presentment occurs when the indictment is delivered by the grand jury to either "the judge or clerk of the court." *Id.* (citing Tex. Code Crim. Proc. Ann. art. 20.21).

In counties with more than one district court, such as Harris County, all the district courts share the same district clerk. *See Ex parte Alexander*, 861 S.W.2d 921, 922 (Tex. Crim. App. 1993) ("Since the district clerk is the clerk of a specific *county*, he or she is the clerk of the court for all the district courts in that county."), *superseded by statute on other grounds as stated in Ex parte Burgess*, 152 S.W.3d 123, 124 (Tex. Crim. App. 2004). The district courts also share the same felony jurisdiction. *See* Tex. Code Crim. Proc. art. 4.05 (West 2017). This shared administration allows the district judges to "adopt rules governing the filing and numbering of cases, the assignment of cases for trial, and the distribution of the work of the courts as in their discretion they consider necessary or desirable for the orderly dispatch of the business of the courts." *See* Tex. Gov't Code Ann. § 24.024 (West Supp. 2016). Pursuant to these rules, district judges may agree to transfer a case from one district court to another district court within the same county, even though the indictment was returned by a grand jury impaneled by the originating district court. *See Henderson v. State*, 526 S.W.3d 818, 820–21 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *Davis v. State*, 519 S.W.3d 251, 255–56 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd).

The record reflects that the indictment in appellant's case was returned by the grand jury for the 337th District Court of Harris County. The indictment bears the file stamp of the Harris County District Clerk, which evidences its presentment. *See Dotson*, 224 S.W.3d at 204. Additionally, the indictment shows that the Harris County District Clerk filed the case with the 174th District Court of Harris County, which entered the judgment under review in this appeal. We conclude that there is no jurisdictional defect. *See Matthews*, 2017 WL 3271195, at *2 (182nd District Court of Harris County was vested with jurisdiction after being presented with indictment returned by grand jury impaneled by 179th District Court of Harris

County and filed with Harris County District Clerk); *see also Saldivar v. State*, ___S.W.3d___, No. 14-16-00888-CR, 2017 WL 4697888, at *2 (Tex. App.—Houston [14th Dist.] Oct. 19, 2017, no pet. h.) (184th District Court of Harris County was vested with jurisdiction after being presented with indictment returned by grand jury impaneled by 232nd District Court of Harris County and filed with Harris County District Clerk).

We overrule appellant's first issue.

B. Ineffective assistance of counsel

Appellant next argues that his trial counsel was ineffective by failing to object to certain gang-related evidence during the punishment hearing.[1] The PSI report,[2] which was admitted, stated that appellant was a police-documented member of a particular criminal street gang and described the defendant's tattoos. The PSI report stated that such tattoos are often indicative of gang membership and that gang members from appellant's area of Houston use specific number tattoos like those of appellant. No objection was lodged to this portion of the report. Appellant's trial counsel also did not object to the State's gang-related questioning of appellant.

[1] As a general matter, testimony regarding gang affiliation may be relevant and admissible at the punishment phase to show the defendant's character. *Beasley v. State*, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995); *Orellana v. State*, 489 S.W.3d 537, 543 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (explaining that "gang-membership evidence can properly be admitted for different purposes at the punishment phase"); *Ho v. State*, 171 S.W.3d 295, 305 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("Even if appellant was no longer affiliated with the gang at the time of the shooting, evidence that he was a gang member is relevant—and thus admissible at punishment—because it relates to his character."); *see* Tex. Code Crim. Proc. art. 37.07 § 3(a)(1) (West 2017).

[2] When assessing punishment, a trial court may consider any evidence relevant to sentencing, including the contents of a PSI report. *See Jagaroo v. State*, 180 S.W.3d 793, 799 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). In general, the rules of evidence do not apply to the contents of a PSI report. *State v. Hart*, 342 S.W.3d 659, 670 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (citing *Fryer v. State*, 68 S.W.3d 628, 631 (Tex. Crim. App. 2002)).

During cross-examination, the State asked appellant how long he had been a member of the particular named gang. Appellant denied any gang membership. The State asked appellant if he was aware that some of his tattoos were "associated with gang members." Appellant indicated that these tattoos reflect where he is from, his "neighborhood." According to appellant, this "gang" evidence did not provide sufficient information "regarding what violent and illegal activities" appellant's alleged gang was engaged in "to be useful in the trial court's determination of its sentence." Appellant contends that appellant's trial counsel had no reasonable trial strategy and that no reasonable attorney would have failed to object to such evidence.

In order to prevail on his ineffective-assistance-of-counsel claim, appellant must show that his trial counsel's performance fell below an objective standard of reasonableness when considering prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and that the challenged action could be considered to have been prompted by sound trial strategy. *Strickland*, 466 U.S. at 689; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). "[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (internal quotation marks and citation omitted)). We will not second-guess the strategy of appellant's counsel at trial through hindsight. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979); *Navarro v. State*, 154 S.W.3d 795, 799 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (citing *Blott*, 588 S.W.2d at 592). That another attorney, including appellant's appellate counsel, might have pursued a different course will not support ineffective assistance. *Blott*, 588 S.W.2d at 592;

Navarro, 154 S.W.3d at 799.

"An ineffective-assistance claim must be firmly founded in the record and the record must affirmatively demonstrate the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012) (internal quotation marks omitted); *Bone*, 77 S.W.3d at 835 ("Ineffective assistance of counsel claims are not built on retrospective speculation; they must be firmly founded in the record." (internal quotation marks omitted)). Ordinarily, trial counsel should be afforded an opportunity to explain his actions before being denounced as ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). On a silent record on direct appeal, we will not find trial counsel to be deficient unless the challenged conduct was so outrageous that no competent attorney would have engaged in it. *See Menefield*, 363 S.W.3d at 593; *Garcia*, 57 S.W.3d at 440; *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999) (where record silent as to why trial counsel failed to object, defendant failed to rebut presumption that counsel's decision was reasonable).

Here, appellant did not file a motion for new trial and the record does not reflect why appellant's trial counsel did not object to the gang-related evidence. However, our court has determined that "[n]ot objecting can be a trial strategy." *Henderson v. State*, 704 S.W.2d 536, 538 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd); *see Alexander v. State*, 282 S.W.3d 701, 705–06 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) ("[E]ven if unobjected to evidence is inadmissible on some basis, trial counsel may have a sound trial strategy in not objecting to evidence that counsel feels is relevant to appellant's defense, or not harmful to appellant."). For example:

> Counsel may have decided to permit the challenged testimony in an effort to make appellant appear more honest and forthright, or perhaps to minimize the seriousness of the earlier offense. Counsel may have

> also decided to withhold objections to avoid drawing unwanted attention to a particular issue, or to prevent the impression that she was objecting at every opportunity as a means of stonewalling evidence.

Huerta v. State, 359 S.W.3d 887, 894–95 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Appellant's trial counsel previously had attempted to challenge an allegation in the PSI report related to possible additional robberies by appellant based on a lack of evidence and was overruled. During the State's cross-examination of appellant, appellant's trial counsel also objected to a line of questioning related to appellant's prior conviction for terroristic threat based on the assumption of facts not in evidence. The trial court responded with "Overruled. It's a PSI." It is possible that appellant's trial counsel decided to withhold additional objections to prevent the impression that she was objecting at every opportunity or to avoid drawing more unwanted attention to any alleged gang affiliation. *See Huerta*, 359 S.W.3d at 894.

Faced with a silent record on direct appeal, we conclude appellant has failed to rebut the strong presumption that his trial counsel's conduct was reasonable. *See Ortiz v. State*, 93 S.W.3d 79, 88–89 (Tex. Crim. App. 2002) ("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 legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal."). Nor has appellant established his trial counsel's failures were so outrageous that no competent attorney would have made the same decision. *See Menefield*, 363 S.W.3d at 593.

Because appellant has not met the first *Strickland* prong, we overrule his second issue.[3]

[3] "Because appellant failed to demonstrate that his counsel's performance fell below an

III. CONCLUSION

Accordingly, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.

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objective standard of reasonableness, we need not consider whether his case was prejudiced by counsel's performance." *Bullock v. State*, 473 S.W.3d 857, 861 (Tex. App.—Houston [14th Dist.] 2015, no pet.).