Affirmed and Memorandum Opinion filed February 27, 2018.

In the

Fourteenth Court of Appeals

NO. 14-16-00916-CR

JAMES GUY GARNER, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 155th District Court
Austin County, Texas
Trial Court Cause No. 2016R-0058

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

A jury found appellant James Guy Garner guilty of the offense of unlawful possession of a firearm by a felon, *see* Tex. Penal Code Ann. § 46.04(a) (West 2017), and the trial court sentenced appellant to four years of confinement in the Texas Department of Criminal Justice, Institutional Division. In three issues, appellant contends: (1) the evidence was factually and legally insufficient to prove appellant was in possession of a firearm; (2) the evidence was legally insufficient

to prove appellant had the intent to possess a firearm; and (3) his trial counsel's ineffective performance prejudiced appellant's defense. In support of his third issue, appellant complains that his trial counsel garnered, rather than restricted, evidence concerning the reasons for the warrant for appellant's arrest. Appellant further complains that trial counsel failed to call his mother and another unnamed individual as witnesses at trial. We affirm.

I. BACKGROUND

A grand jury indicted appellant with the offense of unlawful possession of a firearm by a felon. The indictment stated that appellant, "having been convicted of the felony offense of Abandon/Endanger Child W/O Intent to Return . . . [did] intentionally or knowingly possess a firearm before the fifth anniversary of the defendant's release from confinement following conviction of said felony, against the peace and dignity of the State." At his jury trial, the following evidence was presented.

Prior to appellant's arrest, his aunt and uncle contacted Deputy Cox of the Austin County Sheriff's department to let him know appellant was staying at the property next to Cox's home in Cat Spring, Texas. According to Cox, appellant's aunt and uncle told him "[appellant] was bad news, and they were trying to let all the neighbors know . . . ." Using appellant's name and date of birth provided by his aunt and uncle, Cox determined there was a blue warrant[1] for appellant's arrest in Wharton County.

On or about May 17, 2017, one of Cox's neighbors informed him appellant was on the property next to Cox's home. Cox contacted the warrant officer for Austin County, Deputy Hagen. Cox, Hagen, and a few other members of law

[1] Parole officer Hamilton testified the warrant was referred to as a "blue warrant" because the court issued it on a blue piece of paper.

enforcement then met and proceeded to the neighboring property to arrest appellant.

When Hagen approached appellant, he was at a picnic table working on some electrical wire. After appellant was arrested, he initially lied about his identity. Hagen advised appellant he would test appellant's fingerprints to discover his identity, and appellant disclosed his true identity.

Securing the area after the arrest, Hagen found a rifle with one live round in the chamber and a magazine holding another twenty rounds. The rifle was propped up on the inside door jamb of a shed located between the trailer home and defendant's location. Testimony regarding the proximity of the rifle to appellant varied. Hagen testified the rifle was about ten yards away from appellant, while appellant testified he was within fifty yards of the rifle. Cox and Hagen testified that when Hagen approached appellant with the rifle, appellant stated he used the rifle to shoot snakes.

Appellant testified the property was owned by his mother and he was there to fix up the property: build fences, work on electrical items, fix the house—"just everything." Appellant explained the rifle should have been under his mother's bed in her house, but "somebody" had pulled it out to shoot snakes on the lake and then left it in the shed. Appellant did not deny telling officers he used the gun to shoot snakes but testified he did not remember telling officers he used the gun. Appellant said he knew it was "against [his] parole to even be in the vicinity" of the gun, "[s]o [he] sure wasn't gonna put [his] hands on it." However, at the time of appellant's arrest, no one else was on the property.[2]

The jury found appellant guilty. Appellant subsequently filed a one-

[2] Only appellant and law enforcement were on the property at the time of appellant's arrest.

sentence motion for a new trial pro se, stating "when defend [sic] did not have his Due process to Affective [sic] Counsel." The trial court briefly allowed appellant to expand on his allegation of ineffective assistance of counsel in a hearing immediately before the punishment phase of trial. The court stated its purpose in examining the allegation was to determine whether or not to remove appellant's trial counsel before the punishment phase.

Appellant alleged many grounds of ineffective assistance at the hearing, but he did not complain that trial counsel asked and allowed questions about the reasons for the blue warrant. Appellant did not mention trial counsel's failure to call his mother to testify during the guilt/innocence phase of trial. Appellant did complain that trial counsel "failed to subpoena the person who claimed responsibility for the rifle." In response to this allegation, appellant's trial counsel and the court had the following exchange:

> A. [By appellant's trial counsel]: I spoke to the man on a number of occasions, and he is a truck driver. He was driving a truck somewhere in the west, maybe Utah, somewhere out of state when I talked to him. . . . He said, well, I am out of state and I won't be there. And if I can't serve him, I can't get him to be there.
>
> Q. [By the Court] And what information did he supposedly have that could have theoretically changed the outcome of this case?
>
> A. Nothing, Judge. The witness was going to say that they were here, and it all came out in trial anyhow, you know, they were here up through Sunday, left Monday morning, he was picked up on Tuesday and the gun was still out in the middle of the yard, I mean. And so that is all the witness is going to testify to.
>
> Q. What about the defendant, is that all he was going to say?
>
> A. Going to say we were out there shooting over the weekend, we left on Sunday or early Monday morning, you know, more than 24 hours later Mr. Garner was arrested, and, you know, the jury heard all of that.
>
> Q. Okay. Back to you, Mr. Garner. What else?

A. [By appellant] On this witness, sir, he is saying that the gentleman that was going to be subpoenaed is claiming responsibility for the weapon that they were shooting, that I had nothing to do with it. This is in his words. This is a copy of the letter that [trial counsel] wrote me . . . .

Q. [By the Court] Hang on. So, [did your counsel] write a letter that said that—

A. [By appellant's trial counsel] I did, and you can have my copy. You can have his copy as soon as I can find it.

Q. [By the Court] Was he saying it was his gun or what was he saying?

A. It was Mr. Garner's, Ms. Garner's gun. It was out at the farm where he was arrested. It had been stored under a bed in one of the cabins that was there. And after these guys came out there, they were shooting the gun. They left. 24 hours later when the police came out to arrest Mr. Garner, the gun, as you may recall from trial, the gun was from here to there from Mr. Garner.

Q. And possession is not defined as ownership in the statute, is it?

A. [By the prosecutor] Care, custody, control.

A. [By appellant's trial counsel] The jury believed that, you know, we made argument on that.

Q. [By the Court] It was in his possession. All right.

The letter appellant's counsel had written to him, which was entered into evidence as Defendant's Exhibit 1, did not say the truck driver, referenced in the letter as Mr. Worthington, was going to "take responsibility for the weapon" or testify appellant "had nothing to do with it." It simply stated, in relevant part:

> Mr. Worthington is a truck driver. He is out on the road and I am unable to have him served to appear. He will not do so voluntarily.
>
> . . .
>
> Mr. Worthington tells me he was out at the farm on Saturday and Sunday, May 14 and 15. He was with his son and Mr. Oldham. They were shooting the gun, which is supposed to be kept under the bed in the camphouse. Mr. Worthington left for a period on Sunday

afternoon, then returned to spend the night. He then left on Monday morning for a job that took him to New Braunfels.

The trial court concluded there was no reason appellant's trial counsel should be removed as appellant's attorney and proceeded to the punishment phase of trial.

During the punishment phase, appellant's counsel called his mother, Carolyn Ermis, to testify. On direct examination, Ermis testified that appellant helped her take care of her house and farm at Cat Spring, he did a good job, and she needed his help. On cross-examination, Ermis testified that the rifle belonged to her. She testified that after appellant was arrested, she called the prosecutor's office to ask about getting her rifle back. She testified she previously told the prosecutor's assistant the rifle had been under the bed at another home she owned in El Campo, and appellant had lived there. The prosecutor asked Ermis to confirm her prior statement to him that appellant must have taken the gun from the El Campo house out to the Cat Spring property; Ermis said she did not remember saying that but agreed the prosecutor's notes might reflect that. She also said she must have been mistaken in her conversation with the prosecutor and his assistant because the gun was kept under the bed at the house in Cat Spring, not El Campo. She testified appellant had called her on Monday to come and pick him up because his friends had left him at the house in Cat Spring with the gun. When she arrived the next day, appellant had already been arrested. Ermis also testified although the State issued a subpoena for her to come to court (for the guilt/innocence phase of the trial), she did not attend because she was on a vacation in Branson that could not be cancelled.

The trial court sentenced appellant to four years' confinement. This appeal followed.

II. ANALYSIS

A. Sufficiency of the evidence

In his first issue, appellant asserts the evidence is factually and legally insufficient to support his conviction because the jury's conclusion that he possessed the firearm was contrary to the overwhelming weight of the evidence. Appellant asks this court to conduct a factual-sufficiency review of the evidence adduced at trial—a standard the Court of Criminal Appeals expressly has rejected. *Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.). As an intermediate appellate court, we are without power to conduct factual-sufficiency review because we are "bound to follow the law as declared by the state's highest courts." *Rodriguez v. State*, 47 S.W.3d 86, 94–95 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd); *see also Mayer v. State*, 494 S.W.3d 844, 848 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

In *Brooks*, the Court of Criminal Appeals directed intermediate courts to apply a single standard of review to legal- and factual-sufficiency challenges in criminal cases, using the Constitutional standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks*, 323 S.W.3d 893 at 912. The Court of Criminal Appeals determined the standard announced in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), should no longer be applied to review the factual sufficiency of the evidence, and instructed lower courts to follow the *Jackson* standard for the review of factual-sufficiency challenges. *Brooks*, 323 S.W.3d 893 at 912. In numerous later decisions, the Court of Criminal Appeals has reaffirmed its directive to the courts of appeals—not merely as a plurality of the court, but instead by its now-unanimous precedent. *See, e.g.*, *Griego v. State*, 337 S.W.3d 902, 903 (Tex. Crim. App. 2011) (per curiam); *Martinez v. State*, 327 S.W.3d 727, 730 (Tex. Crim. App. 2010). In a situation such as this, where the Court of

Criminal Appeals "has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation." *Mason v. State*, 416 S.W.3d 720, 728 & n.10 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Accordingly, we apply a legal-sufficiency standard of review in determining whether the evidence is sufficient to support the jury's determination that appellant was in possession of a firearm.

Under a legal-sufficiency standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318–19; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Criff v. State*, 438 S.W.3d 134, 136–37 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). This standard applies to both direct and circumstantial evidence. *Criff*, 438 S.W.3d at 137. Accordingly, we uphold the jury's verdict unless a rational factfinder must have had a reasonable doubt as to any essential element. *West v. State*, 406 S.W.3d 748, 756 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). This standard is also applicable to appellant's second issue, the legally sufficiency of the evidence that appellant intentionally or knowingly possessed the firearm. Consequently, we consider appellant's first and second issues together.

B. Knowing possession

To establish unlawful possession of a firearm by a felon, the State must show the accused was convicted of a prior felony offense and possessed a firearm after the conviction and within five years of his release from confinement or from community supervision, parole, or mandatory supervision, whichever date is later. Tex. Penal Code Ann. § 46.04(a). The Penal Code defines "possession" as "actual care, custody, control, or management." Tex. Penal Code Ann. § 1.07(a)(39) (West Supp. 2015). Possession is voluntary if the possessor knowingly obtains or

receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control. Tex. Penal Code Ann. § 6.01(b) (West 2017).

In cases involving possession of a firearm by a felon, we analyze the sufficiency of the evidence under the rules adopted for cases involving possession of a controlled substance. *Corpus v. State*, 30 S.W.3d 35, 37 (Tex. App.—Houston [14th Dist.] 2000, pet ref'd). Accordingly, the State had to prove appellant: (1) knew of the firearm's existence and (2) exercised care, custody, control, or management over the firearm. *Id.* at 38. Although the State may prove possession through direct or circumstantial evidence, the evidence must establish that the accused's connection with the weapon was more than fortuitous. *Poindexter v. State*, 153 S.W.3d 402, 405–06 (Tex. Crim. App. 2005), *overruled in part on other grounds by Robinson v. State*, 466 S.W.3d 166, 173 & n.32 (Tex. Crim. App. 2015).

When, as here, the accused is not in exclusive control of the place the weapon was found, "there must be independent facts and circumstances linking the accused to the contraband." *Corpus*, 30 S.W.3d at 38. Affirmative links to the firearm may circumstantially establish an accused's knowing possession of a firearm including, without limitation: (1) his presence when a search is conducted; (2) whether the firearm was in plain view; (3) whether the firearm was in close proximity to him and he had access to the firearm; (4) whether he had a special connection to the firearm; (5) whether he possessed other contraband when arrested; (6) whether he made incriminating statements when taken into custody; (7) whether he attempted to flee; (8) whether he made furtive gestures; (9) whether he owned or had the right to possess the place where the firearm was found; (10) whether the place where the firearm was found was enclosed; (11) whether

conflicting statements on relevant matters were given by the persons involved; and (12) whether his conduct indicated a consciousness of guilt. *See Evans v. State*, 202 S.W.3d 158, 162 & n.12 (Tex. Crim. App. 2006); *James v. State*, 264 S.W.3d 215, 219 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd); *Corpus*, 30 S.W.3d at 38. The absence of any of these various links does not constitute evidence of innocence to be weighed against the links present. *Williams v. State*, 313 S.W.3d 393, 398 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Instead, we measure the sufficiency of the evidence by looking to the logical force of all of the evidence, rather than the number of links present in a given case. *See id.*

Appellant contends there is no evidence he touched the rifle or otherwise possessed it. He contends he did not exercise care, custody, control, or management over the rifle. Appellant further contends no evidence or insufficient evidence was introduced to prove appellant's intent to possess a firearm. Appellant emphasizes no fingerprint evidence was introduced. Appellant points out that at the time of arrest, he was many yards away from the firearm, working on electrical wire at a picnic table. Appellant references Hagen's testimony that the firearm was not in plain sight. Appellant asserts his own testimony did not establish he knew the rifle was in the shed. Appellant refers to his own testimony that others had been firing a rifle and must have removed the rifle from its case under his mother's bed. Appellant contends his testimony that he "wasn't gonna put [his] hands on" the rifle meant his fingerprints would not be found on the rifle. Appellant also relies on his testimony that he would never touch someone's firearm because he knew being in the "vicinity" of the firearm was a violation of his parole.

Despite circumstances that may distance him from the firearm, several other factors present in this case support the jury's finding that appellant possessed the

gun. Appellant was the only person present when the rifle was found. Appellant had taken responsibility for maintaining the property where the rifle was found. Appellant initially lied to officers about his identity, indicating consciousness of guilt. The rifle was propped up on the inside door jamb of a shed located between the trailer home and defendant's location. The rifle contained one live round in the chamber and a magazine holding another twenty rounds. According to Cox and Hagen, appellant admitted he used the rifle to shoot snakes. As the "sole judge of credibility and weight to be attached" to the evidence, the jury was entitled to rely on this evidence and disbelieve appellant's self-serving testimony to the contrary. *See Temple*, 390 S.W.3d at 360 (citing *Jackson*, 443 U.S. at 319). A rational jury could have inferred from this direct and circumstantial evidence that appellant had care, custody, control, or management of the rifle. A rational jury also could have inferred appellant knowingly obtained or received the rifle or was aware of his control of it for a sufficient time to permit him to terminate his control.

Further, to the extent appellant focuses on evidence that is absent from the record, such as the lack of fingerprint evidence, we reiterate that the absence of an affirmative link does not constitute evidence of innocence to be weighed against the links present. *Williams*, 313 S.W.3d at 398; *see also Freeman v. State*, No. 07–16–00334–CR, 2017 WL 393982, at *1–2 (Tex. App.—Amarillo Jan. 26, 2017, no pet.) (mem. op., not designated for publication) (defendant's focus on "what [was] absent from the record, such as evidence of his fingerprints on the weapon or evidence that the weapon was registered to him" misplaced, where "the true question [was] whether the evidence actually admitted, when coupled with the logical inferences that one [could] make from it, [was] enough"); *Haynes v. State*, No. 01–09–00380–CR, 2010 WL 5250881, at *3–4 (Tex. App.—Houston [1st Dist.] Dec. 9, 2010, pet. ref'd) (mem. op., not designated for publication) (evidence

sufficient although "State could not match [defendant]'s fingerprints to a latent fingerprint from the gun"). We also note that the State is not required to disprove all reasonable alternative hypotheses inconsistent with the defendant's guilt. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012); *Cantu v. State*, 395 S.W.3d 202, 207 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).

Viewing this evidence in the light most favorable to the verdict, we conclude a rational factfinder could have found beyond a reasonable doubt that appellant knowingly possessed the firearm. *See Jackson*, 443 U.S. at 319; *James*, 264 S.W.3d at 219–20; *Corpus*, 30 S.W.3d at 38; *see also Brown v. State*, No. 14–12–01035–CR, 2013 WL 6237341, at *2 (Tex. App.—Houston [14th Dist.] Dec. 3, 2013, pet. ref'd) (mem. op., not designated for publication) (evidence legally sufficient to support conviction for unlawful possession of firearm where loaded weapon was found in upstairs attic above hallway where appellant was apprehended). We overrule appellant's first and second issues.

C. Ineffective assistance of counsel

In his third issue, appellant asserts his trial counsel rendered ineffective assistance of counsel that prejudiced the jury. Specifically, appellant complains his trial counsel "elicited specific detail of the alleged violations from Appellant's parole officer about the reasons the 'blue warrant' was issued." Appellant complains trial counsel failed to file a motion in limine so testimony regarding parole violations could be restricted. Appellant further complains trial counsel failed to call appellant's mother and another unnamed witness to testify on appellant's behalf. We begin our analysis of these issues by identifying the standard of review.

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). To prove ineffective assistance, appellant must show: (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688–92 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

We consider the totality of the circumstances in determining whether counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). Unless appellant proves both *Strickland* prongs, we must not find counsel's representation to be ineffective. *Lopez*, 343 S.W.3d at 142.

To determine whether counsel's performance was objectively deficient under the first prong, appellant must identify acts or omissions of counsel that allegedly were not the result of reasonable judgment. *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (quoting *Strickland*, 466 U.S. at 690). Appellant must overcome the presumption that trial counsel's actions fell within the wide range of reasonable and professional assistance. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). It is not sufficient for an appellant to show his counsel's actions or omissions during trial were merely of questionable competence. *Lopez*, 343 S.W.3d at 142–43. Instead, in order for an appellate court to find counsel ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record and the court must not engage in retrospective speculation. *Id.* at 142. We will not second-guess the strategy of appellant's trial counsel 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).

Ordinarily, counsel must be accorded an opportunity to explain his actions before being condemned as unprofessional and incompetent. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). When the record is silent as to trial counsel's strategy, we will not conclude appellant received ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Robison v. State*, 461 S.W.3d 194, 203 (Tex. App.—Houston [14th Dist.] 2015) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

To establish prejudice under the second prong, appellant must demonstrate a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012) (quoting *Strickland*, 466 U.S. at 694). To undermine confidence in a guilty verdict, appellant must prove "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Rico v. State*, 707 S.W.2d 549, 556 (Tex. Crim. App. 1983) (quoting *Strickland*, 466 U.S. at 697).

1. Evidence of parole violations

Appellant argues he received ineffective assistance of counsel at trial because his trial attorney questioned appellant's parole officer about the reasons the blue warrant was issued and failed to file a motion in limine to restrict

testimony regarding appellant's alleged parole violations.[3] Appellant's trial counsel engaged in the following line of questioning with appellant's parole officer:

> Q. [By appellant's trial counsel] Tell me, you know, the warrant was issued over a year before he was arrested. How does this work? I am not really familiar with the parole system. So . . .
>
> A. [By appellant's parole officer] Okay.
>
> Q. Did y'all make any effort to find him, I guess is my question?
>
> A. If the offender, for whatever reason, we'll say stops reporting, okay, there are stipulations that a parole officer has to do prior to the Board approving a warrant.
>
> Q. Okay.
>
> A. Multiple moving contacts need to be made, meaning attempts to go out to their home and attempt contact with the offender. Reporting instructions given for the defendant to report on set days, attempts to contact next of kin, sponsors, previous employers, if any. If any of that does not come back positive, then the parole officer can then request to the Board for a warrant.
>
> Q. And when you say positive—
>
> A. Meaning that there was contact made with the offender or any of the above mentioned.
>
> Q. Okay. So were there contacts made with either Mr. Garner or his family?
>
> A. That, I do not know because I was not supervising the case prior to.
>
> Q. Okay. What requirements did he have to be made [sic] under his parole agreement?
>
> A. He had 0.19, which states I shall participate in anger control training and counseling; 0.01, Unless otherwise provided, I shall reside in the county in which I resided at the time I committed the offense for which I was sentenced; 0.03, I shall submit to testing

[3] Appellant does not contend his trial counsel failed to object to or restrict evidence of the blue warrant's existence.

for alcohol or controlled substance; 0.04, I shall reimburse the state [sic] of Texas for the cost of any post secondary [sic] education programs in which I participated while in TDCJ; V2, which says I shall not intentionally or knowingly commit [sic] directly or indirectly with the victim of the offenses.

Q. Has Mr. Garner, to your knowledge, had he taken care of all those requirements?

A. To my knowledge, I am not aware.

Q. You are not aware? How would we find that out? Does the Board know this, or—

A. Yes. The Board would, it would actually have knowledge of this.

. . .

Q. And you are not sure if anybody made contact with him at all during the time that he was out of pocket or out of touch with the parole department?

A. Oh, other than checking into the computer system to see, specifically what the prior or previous officer stated, I can say no. Only thing that I would have to indicate that is what the previous [parole] officer wrote in the 48 or the Rights of Offender Violation Form. Now, there is nothing in this stating that [appellant] absconded. There were two allegations in regards to violating Rule Number Two, for the State of Texas.

Q. What is Number 2 now?

A. Well, he was alleged for disorderly conduct.

Q. So that is new violations?

A. These are for the open cases, correct.

Q. So you said Rule Number 2, that is new violations?

A. Right. Correct. Yes.

Q. And do you know anything about, there was, I guess, a new violation back before May of 19—or 2015, had that been resolved? Do you know anything about that case?

A. I don't know anything about that case.

Q. Okay. Thank you.

Immediately after this line of questioning, the State followed up with further direct examination:

> Q. [By prosecutor] Just to quickly reiterate, though, this is a valid warrant that was issued for him for violating rules, correct?
>
> A. [By parole officer] Correct.
>
> Q. Okay. So it doesn't matter if he had checked in or not, correct?
>
> A. Once again, I am not sure exactly what the warrant was issued for, for which one of the rules that were alleged violated.

Appellant's trial counsel continued to ask questions regarding parole violations on further cross-examination of the parole officer:

> Q. [By appellant's trial counsel] In a parole revocation hearing, I mean if someone has not been reporting, what you sound like is that is not the same as absconding, is that correct?
>
> A. [By parole officer] No. That is the same. Not reporting and absconding are the same thing.
>
> Q. Okay. I thought it sounded like you said differently, so. How much weight is given to that in the hearing process?
>
> A. It's a violation, so it's going to be up to the Board how to determine one level of a violation compared to another.
>
> . . .
>
> Q. And you are not aware of what violations are at this point, except—
>
> A. For the open, for the alleged open charges?
>
> Q. Or, you know, his parole violations. Has he paid his money, has he, you know, taken care of his, you know, urinalysis or drug test, did he move out of the country?
>
> A. That, I am not aware of. No.
>
> Q. Okay. Thank you.

Appellant's trial counsel later put appellant on the witness stand and asked him to testify about his compliance with the conditions of his parole, and his parole

violation. Immediately after appellant introduced himself, his trial counsel began questioning him regarding parole:

> Q. [By appellant's trial counsel] You were intimately involved in all those things that the parole has or has not done for you?
>
> A. That, and more.
>
> Q. During the time before the warrant issued, were you hearing from your parole officer on a regular basis?
>
> A. Yes, sir.
>
> Q. And?
>
> A. I was up to date, completed everything that was required. I have the paperwork in my possession at the jail.
>
> Q. What was required?
>
> A. Substance abuse, anger management, AA, twice a week, $18.00 a month for parole fees, court costs, reporting twice monthly.
>
> Q. Why did you quit reporting?
>
> A. Basically, I thought that they were gonna violate and arrest me in the, in the Angleton area, which I have, I have no means of transportation to, to get to Angleton.
>
> Q. So—
>
> A. If you see that my violation comes within the first two months I was released. My violation was disorderly conduct between me and my daughter. I asked her to please get out of my house.
>
> Q. So there was a fight with your daughter?
>
> A. I asked her to leave, roughly, yes. Yes, sir.
>
> Q. And she called the police? Who called the police?
>
> A. She didn't call the police. She went and got the police.
>
> Q. Okay. And they came and arrested you for that?
>
> A. Yes, sir. Disorderly conduct.
>
> Q. Okay. What level of misdemeanor?
>
> A. Class [C] Misdemeanor. I paid the fine. It was $272.00. I was released that night, and that violated my parole.

Q. Okay. Any you didn't call and talk to your parole officer after that?

A. No, sir. She told me to report to Angleton, which I, already understood that they was gonna arrest me immediately there.

Q. Could you have reported to the county you were in?

A. If they would have called, yes, I could have. I was expecting a call from them. I was expecting them to come by. My bags were packed waiting on the call, but it never happened.

Q. So you just let it go?

A. Yes, sir.

Appellant's trial counsel did not have an opportunity to explain why he questioned appellant's parole officer about the reasons the blue warrant was issued. Trial counsel likewise did not have an opportunity to explain why he failed to file a motion in limine to restrict testimony regarding appellant's alleged parole violations. In the absence of a developed record, we presume a sound trial strategy. *See Ortiz v. State*, 93 S.W.3d 79, 88–89 (Tex. Crim. App. 2002).

The challenged conduct was not "so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392. Trial counsel could have reasonably concluded he could not successfully challenge admission of the existence of the warrant,[4] and therefore, an explanation of the circumstances leading up to the warrant would benefit appellant. As the jury was aware appellant was a convicted felon, trial counsel may have reasonably concluded that it may be better to reveal appellant's parole violation resulted from a low-level misdemeanor rather than have the jury speculate appellant was guilty of a more serious crime. Appellant has failed to rebut the presumption that trial counsel's questions about

[4] *See Sorrells v. State*, No. 03–08–00072–CR, 2010 WL 1404625, at *6 (Tex. App.—Austin Apr. 9, 2010, pet. ref'd) (mem. op., not designated for publication) (in pretrial hearing on motion in limine, trial court concluded State could properly introduce evidence that officers were executing felony warrants for appellant's arrest to provide context).

parole violations were part of a sound trial strategy.

Even if counsel's performance was objectively unreasonable, there is no showing of prejudice under the second prong of *Strickland*. Appellant only briefly addresses the issue of prejudice. In a single sentence, appellant makes a summary conclusion: "Had circumstances been different, the outcome of the trial would have been different in that Appellant would have been found not guilty." We disagree. Based on our review of the record as a whole, the State presented a strong case of appellant's guilt, including appellant's own admission that he used the rifle to shoot snakes. Appellant has not shown a reasonable probability that the outcome of trial would have been different but for these alleged errors by trial counsel.

2. Failure to call witnesses

Appellant also argues he received ineffective assistance of counsel because his trial attorney failed to call two witnesses to testify on his behalf. Appellant complains trial counsel failed to move for a continuance of the trial to allow for his mother to testify at the guilt/innocence phase of his trial. Appellant further complains trial counsel failed to subpoena an unnamed "witness who could have corroborated Appellant's testimony regarding the presence and use of the rifle."

When the claim of ineffective assistance is based on counsel's failure to call witnesses, the appellant must show: (1) such witnesses were available to testify, and (2) appellant would have benefitted from their testimony. *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983)); *Robinson v. State*, 514 S.W.3d 816, 824 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd).

Appellant has not shown his mother was available to testify or that her

testimony would have benefitted him. Ermis testified during the punishment phase of appellant's trial that she could not attend the guilt/innocence phase because she was in vacation in Branson. She did not testify she would have been available to testify on appellant's behalf during the guilt/innocence phase if trial had been continued. Appellate counsel did not attach any affidavit from Ermis concerning her availability to testify. Perhaps Ermis's testimony at the punishment phase is some evidence Ermis would have been available to testify during the guilt/innocence phase if trial had been continued, but even assuming she would have been available, it is not clear that Ermis's testimony would have benefitted appellant.

During the punishment phase, Ermis testified to some facts favorable to appellant. She corroborated appellant's testimony that the rifle belonged to her and that appellant helped her with the Cat Spring property. Overall, however, Ermis's testimony could be viewed as unfavorable to appellant. She called the prosecutor to express concern over her rifle, not her son. She told the prosecutor's assistant, allegedly mistakenly, that the rifle had been under the bed at her El Campo house where appellant lived and appellant must have taken the gun from El Campo out to the Cat Spring property. She also testified appellant had called her on Monday to come and pick him up because his friends had left him at the house in Cat Spring with the gun. From this testimony, a jury could infer appellant was alone with the gun for a full day. Finally, Ermis's unwillingness to forgo a vacation to prevent her son from going to prison also indicates her testimony may not have benefitted appellant.

Appellate counsel did not attach any affidavit from Ermis concerning any difference there may have been between her testimony during the punishment phase and the testimony she would have offered during the guilt/innocence phase.

Consequently, appellant has not shown he would have benefitted from his mother's testimony during the guilt/innocence phase of trial.

Appellant has also failed to show Worthington was available to testify or his testimony would have benefitted appellant. Appellate counsel did not attach any affidavit from Worthington concerning his availability to testify. According to trial counsel, Worthington was a truck driver who would not voluntarily testify on appellant's behalf and could not be served. *See Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2004) (holding trial counsel was not ineffective for failing to call witness because defendant did not establish witness was available to testify at his trial).

The record is also undeveloped as to what Worthington's testimony would have been. Appellant has not presented an affidavit or offered testimony from Worthington, whom he never refers to by name. The record does not include any sworn testimony concerning what Worthington's testimony would have been had he been called to testify at trial. Instead, evidence of the content of the testimony Worthington purportedly could have provided was limited to trial counsel's summary statements, which do not indicate Worthington would have offered any testimony to show appellant was not in care, custody, control, or management of the rifle. Without a record reflecting what facts, if any, Worthington could have actually provided, appellant cannot show prejudice from counsel's failure to subpoena him. *Starz v. State*, 309 S.W.3d 110, 119–120 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (finding counsel was not ineffective for failing to interview witness because, although witness was available, record did not indicate what information he possessed and whether it would be helpful to defendant). Appellant has not shown his trial counsel was constitutionally ineffective in his failure to secure the presence of his mother or Worthington at trial. Appellant has not

demonstrated a reasonable probability that, but for the alleged deficiencies, the result of the trial would have been different. We overrule appellant's third issue.

III. CONCLUSION

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

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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