Affirmed and Memorandum Opinion filed May 18, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00467-CR

HERBERT BRISCOE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1610468

MEMORANDUM OPINION

Appellant Herbert Briscoe was charged by indictment with aggravated assault and entered a plea of not guilty. He was tried by a jury, found guilty, sentenced to ten years' confinement, and assessed a $5,000 fine. Appellant filed a timely motion for new trial and a timely notice of appeal. He raises four issues on appeal. For the reasons below, we affirm.

BACKGROUND

Complainant, Marvin Hart, testified he was shot after he left a concert in midtown Houston the night of December 30, 2016. Evidence at trial included: (1) a Mac-10 recovered at the scene that fired .45-caliber bullets, (2) Appellant's DNA thereon, (3) sixteen .45-caliber shell casings found near Appellant's vehicle, (4) Complainant's testimony that he was shot in the buttock, (5) a .45-caliber projectile retrieved from Complainant's backside on the night in question that could have been fired by the Mac-10, (6) video surveillance of the incident, (7) Appellant's testimony that in said video, he saw himself firing his weapon towards Complainant as Complainant and two other men were walking past Appellant's car, (8) Appellant's admission that he shot in Complainant's direction as Complainant was walking away, (9) Appellant's admission that he understood what it entailed when he shot in the direction of someone he "perceived to be a threat", (10) Appellant's admission that he knew a firearm was a deadly weapon, and (11) Appellant's admission that "he would do it all over again" because he believed he "made the right decision". Appellant also testified he shot at Complainant in self-defense because Complainant and "his crew" assaulted Appellant earlier that evening, stabbed him, and stole cash from him.

Appellant was indicted for aggravated assault by causing bodily injury by shooting in Complainant's direction with a firearm. *See* Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02(a)(2). Specifically, the State alleged Appellant "unlawfully intentionally and knowingly cause[d] bodily injury to Marvin Hart, hereinafter called the Complainant, by shooting in the direction of the Complainant, and the Defendant used and exhibited a deadly weapon, namely a firearm."

The jury charge[1] deviated from the indictment in two respects. First, it

[1] The jury charge reads in pertinent part as follows:

expanded the applicable *mens rea* to include recklessness (in addition to intentional and knowing *mens rea*). Second, it altered the manner and means of committing

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> A person commits the offense of assault if he intentionally, knowingly, **or recklessly** causes bodily injury to another.
> A person commits the offense of aggravated assault if the person commits assault, as hereinbefore defined, and the person uses or exhibits a deadly weapon during the commission of the assault.
> * * *
> A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
> **A person acts recklessly, or is reckless, with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint.**
> Now, if you find from the evidence beyond a reasonable doubt that on or about the 31st day of December, 2016, in Harris County, Texas, the defendant, Herbert Briscoe, did then and there unlawfully, intentionally, knowingly **or recklessly** cause bodily injury to Marvin Hart, **by shooting Marvin Hart with a firearm**, and the defendant used or exhibited a deadly weapon, namely a firearm, then you will find the defendant guilty of aggravated assault, as charged in the indictment.
> * * *
> Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Herbert Briscoe, **did shoot Marvin Hart with a deadly weapon**, as alleged, but you further find from the evidence, or you have a reasonable doubt thereof, that viewed from the standpoint of the defendant at the time, from the words or conduct, or both, of Marvin Hart, it reasonably appeared to the defendant that his person was in danger of bodily injury and there was created in his mind a reasonable expectation or fear of bodily injury from the use of unlawful force at the hands of Marvin Hart, and that acting under such apprehension and reasonably believing that the use of force on his part was immediately necessary to protect himself against Marvin Hart's use or attempted use of unlawful force, he shot Marvin Hart, to defend himself, then you will acquit the defendant; or if you have a reasonable doubt as to whether or not the defendant was acting in self-defense on said occasion and under the circumstances, then you should give the defendant the benefit of that doubt and say by your verdict not guilty.
> (Emphases added).

the offense as alleged in the indictment from causing bodily injury by shooting in the direction of Complainant to causing bodily injury by shooting Complainant. The State (to its credit) openly acknowledges both deviations.

Appellant raises four issues on appeal, arguing (1) he was denied due process "by the trial court's amendment of the indictment in the court's instructions to the jury"; (2) the evidence was legally insufficient based on a fatal variance to support his conviction; (3) the trial court abused its discretion by refusing to hold a hearing on his motion for new trial; and (4) the trial court abused its discretion by denying his motion for new trial based on ineffective assistance of counsel.

ANALYSIS

I. Sufficiency of the Evidence

We begin our analysis by addressing Appellant's legal sufficiency challenge he raises in his second issue.[2] He contends the "evidence is legally insufficient based on a variance between the court's charge to the jury and the indictment."

A. Standard of Review and Governing Law

In a legal sufficiency review, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ramjattansingh v. State*, 548 S.W.3d 540, 546 (Tex. Crim. App. 2018). Our sufficiency review does not rest on how the jury was actually instructed in the jury charge; rather, we assess a sufficiency challenge against the elements of the charged crime. *See Ramjattansingh*, 548 S.W.3d at 546

[2] We address Appellant's sufficiency issue first because, if it is meritorious, we would render a judgment of acquittal rather than reverse and remand. *Owens v. State*, 135 S.W.3d 302, 305 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (legal sufficiency challenge must be addressed first because, if evidence is insufficient, reviewing court must render judgment of acquittal).

(citing *Musacchio v. United States*, 577 U.S. 237, 243 (2016)).

The Court of Criminal Appeals "set forth the modern Texas standard" for ascertaining what the elements of the charged crime are in *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). *Id*. To determine whether the State has met its burden to prove a defendant guilty beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge for the case to the evidence adduced at trial. *See Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *Malik*, 953 S.W.2d at 240. A hypothetically correct jury "charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240.

The "law as authorized by the indictment" means the statutory elements of the offense as modified by the charging instrument. *Ramjattansingh*, 548 S.W.3d at 546. When a Texas statute lists more than one method of committing an offense, and the indictment alleges some, but not all, of the statutorily listed methods, the State is limited to the methods alleged. *Id*. at 547; *Thomas*, 444 S.W.3d at 8; *see also Cada v. State*, 334 S.W.3d 766, 773-74 (Tex. Crim. App. 2011). Although a hypothetically correct jury charge does not necessarily have to exactly track all of the allegations in the indictment, whether an unproved allegation is to be included in the hypothetically correct jury charge is determined by whether or not the variance between the allegation and proof is "material." *Ramjattansingh*, 548 S.W.3d at 547-48.

A "variance" occurs when there is a discrepancy between the allegations in the indictment and the proof offered at trial. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011); *see also Gollihar v. State*, 46 S.W.3d 243, 246 (Tex.

Crim. App. 2001). There are two types of variances in a legal sufficiency analysis: material variances and immaterial variances. *Thomas*, 444 S.W.3d at 9. Immaterial variances do not affect the validity of a criminal conviction, and a hypothetically correct jury charge need not incorporate allegations that would give rise to only immaterial variances. *Id.* But a "material" variance, one that prejudices a defendant's substantial rights, will render the evidence insufficient. *Ramjattansingh*, 548 S.W.3d at 547. This occurs when the charging instrument, as written, (1) fails to sufficiently inform the defendant of the charge against him to allow him to prepare an adequate defense at trial, or (2) subjects the defendant to the risk of being prosecuted later for the same crime. *Id*.

The Court of Criminal Appeals has recognized three different categories of variance: (1) "a statutory allegation that defines the offense, which is either not subject to a materiality analysis, or, if it is, is *always material*"; (2) "a non-statutory allegation that is descriptive of an element of the offense that defines or helps define the allowable unit of prosecution, [which is] *sometimes material*"; and (3) "a non-statutory allegation that has nothing to do with the allowable unit of prosecution, [which is] *never material*". *Id*. In a sufficiency review, courts "tolerate variances as long as they are not so great that the proof at trial 'shows an entirely different offense' than what was alleged in the charging instrument." *Id*. (quoting *Johnson v. State*, 364 S.W.3d 292, 295 (Tex. Crim. App. 2012)).

B. Variance

Appellant contends the evidence is legally insufficient to support his conviction because there is a fatal variance between the indictment and the actual charge given to the jury. He contends "the indictment alleged that Appellant intentionally and knowingly caused bodily injury to the complainant by shooting in his direction with a firearm" but the actual jury charge "authorized his conviction if

he caused bodily injury by shooting [Complainant] with a firearm" which are "[t]wo distinct manner [and] means of committing an offense." We reject Appellant's argument for several reasons.

First, Appellant misunderstands the variance doctrine. As we have stated, a variance occurs when there is a discrepancy between the allegations in the indictment and the proof offered at trial. *Byrd*, 336 S.W.3d at 246; *Gollihar*, 46 S.W.3d at 246. Therefore, to determine whether a variance occurred, we compare the indictment and the proof presented at trial; we do not compare the indictment and the actual jury charge given. *See Ramjattansingh*, 548 S.W.3d at 546; *Root v. State*, 615 S.W.3d 920, 927 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd).

Second, when comparing the charging instrument and the evidence presented at trial, we cannot conclude there is a variance in this case because the State proved what it alleged in the indictment, namely that Appellant "unlawfully, intentionally and knowingly cause[d] bodily injury to . . . Complainant, by shooting in the direction of the Complainant, and the [Appell]ant used and exhibited a deadly weapon, namely a firearm." The surveillance video presented at trial showed Appellant pointing a firearm and then firing it in Complainant's direction. Evidence also showed that Complainant was hit and injured by a bullet consistent with the bullets that were in Appellant's firearm. Further, Appellant admitted he shot in Complainant's direction as Complainant walked away and "would do it all over again" because he believed he "made the right decision". Additionally, Appellant's testimony that he shot Complainant in self-defense shows that Appellant intentionally and knowingly caused Complainant bodily injury when he shot in the direction of Complainant. Based on the evidence presented at trial, we conclude there was no variance, material or otherwise.

Third, even assuming *arguendo* that there was a variance between the

allegation in the indictment that Appellant caused Complainant bodily injury by shooting in Complainant's direction with a firearm and the proof at trial showing that Appellant caused Complainant bodily injury by shooting him with a firearm, such a variance would be immaterial. "Under Section 22.02(a)(2), a simple assault becomes aggravated if the assailant uses or exhibits a deadly weapon in committing the assault. Of course, the gravamen of the offense remains the resulting bodily injury." *Hernandez v. State*, 556 S.W.3d 308, 314 (Tex. Crim. App. 2017). Thus, a variance regarding Appellant shooting in Complainant's direction with a firearm versus Appellant shooting Complainant with a firearm would be one describing only the manner and means by which Complainant's bodily injury was caused. *See id*. at 316.

Such a variance would fall only within the second category of variance — a "non-statutory allegation" that describes the offense of aggravated assault in some way. *See id*.; *see also Johnson v. State*, 364 S.W.3d 292, 295 (Tex. Crim. App. 2012). This category of variance is material only when it converts the offense proven at trial into a different offense than what was pleaded in the indictment, which could potentially subject a defendant to another prosecution for the same offense. *Hernandez*, 556 S.W.3d at 316; *Johnson*, 364 S.W.3d at 295. Here, there is no such concern. Even assuming *arguendo* Appellant inflicted Complainant's bodily injury by shooting him with a firearm instead by shooting in his direction, that does not render the aggravated assault proven at trial different than the aggravated assault pleaded in the charging instrument. *Hernandez*, 556 S.W.3d at 316; *Johnson*, 364 S.W.3d at 295.

Because we conclude no variance occurred in this case, we reject Appellant's argument that the "evidence is legally insufficient based on a variance" to support his conviction. Accordingly, we overrule Appellant's second issue.

II. Charge Error

We next address Appellant's first issue in which he asserts that he "was denied due process by the trial court's amendment of the indictment in the court's instructions to the jury." However, despite his issue statement, Appellant makes no more than a bare-bones argument without citations to authorities[3] that seems to be a charge error complaint. We therefore interpret Appellant's first issue as raising a claim of charge error.

A. Standard of Review and Governing Law

We review alleged jury charge error by considering two questions: (1) whether error existed in the charge and (2) whether sufficient harm resulted from the error to compel reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Hocko v. State*, 590 S.W.3d 680, 698 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd). The degree of harm necessary to warrant a reversal depends on whether a defendant objected to the jury charge. *Ngo*, 175 S.W.3d at 743; *Brown v. State*, 580 S.W.3d 755, 761 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd). If a defendant preserved error with a timely objection in the trial court and the reviewing court finds error, the record need show only "some harm" to warrant a reversal. *See Ngo*, 175 S.W.3d at 743; *Brown*, 580 S.W.3d at 761.

Conversely, when there is jury charge error but the defendant fails to object, as is the case here, we must determine whether the error caused the defendant "egregious harm." *Gonzalez v. State*, 610 S.W.3d 22, 27 (Tex. Crim. App. 2020). Egregious harm requires that a defendant suffered actual harm rather than theoretical harm. *Chambers v. State*, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019); *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). In examining

[3] *See* Tex. R. App. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").

the record for egregious harm, we consider the entire jury charge, the state of the evidence, the arguments of the parties, and any other relevant information in the record. *Gonzalez*, 610 S.W.3d at 27; *Cosio*, 353 S.W.3d at 777; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g), *superseded by rule on other grounds as stated in Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988). Jury charge error is egregiously harmful if it affects the very basis of the case, deprives a defendant of a valuable right, or vitally affects a defensive theory. *Gonzalez*, 610 S.W.3d at 27; *Cosio*, 353 S.W.3d at 777.

B. Application

In this case, the State charged Appellant with the offense of aggravated assault, alleging he intentionally and knowingly caused bodily injury to Complainant by shooting in the direction of Complainant while using and exhibiting a firearm. However, the jury charge (1) defined the offense of assault as intentionally, knowingly, or recklessly causing bodily injury to another, thereby including the *mens rea* of recklessness; (2) provided a definition for recklessness; (3) incorporated that *mens rea* into the application paragraph; and (4) specified in the application paragraph the manner and means as causing bodily injury by shooting Complainant with a firearm instead of shooting in the direction of the Complainant.

The State concedes that the trial court erred by including in the jury charge the additional *mens rea* of recklessness and by "modifying" the manner and means by which Appellant caused bodily injury. Although conceding error, the State contends Appellant did not suffer egregious harm because of the trial court's error. We agree.

1. Error

The Code of Criminal Procedure states that the trial court must "deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case." *See* Tex. Code Crim. Proc. Ann. art. 36.14. As a general rule, the instructions in a jury charge must conform to allegations made in the indictment. *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012); *Reed v. State*, 608 S.W.3d 856, 859 (Tex. App.—Waco 2020, pet. filed).

Regarding the mental state of recklessness, we conclude the trial court committed error by including that mental state in the jury charge when it had not been alleged in the indictment; "the trial court improperly broadened the indictment by including 'recklessly' in the jury instructions when the indictment alleged 'intentionally' and 'knowingly.'" *See Reed v. State*, 117 S.W.3d 260, 265 (Tex. Crim. App. 2003) (holding the trial court in an aggravated assault case erroneously included in the jury charge the less culpable mental state of recklessness when the indictment only alleged that defendant acted intentionally and knowingly; remanding to the court of appeals to decide whether defendant was harmed by the error in the jury charge); *see also Gonzalez*, 610 S.W.3d at 26 ("Inclusion of the culpable mental state of recklessness in a jury charge application paragraph for aggravated assault causing bodily injury is error when recklessness is omitted from the indictment.").

The trial court also erred when it minimally modified the manner and means by which Appellant allegedly caused Complainant's bodily injury, stating in the application paragraph the manner and means as causing bodily injury by shooting Complainant with a firearm instead of by shooting in the direction of Complainant (as alleged in the indictment). *See Thomas*, 444 S.W.3d at 11 (holding trial court erred when it included a manner and means in the jury charge that was not alleged in the indictment; remanding to the court of appeals to determine whether

defendant was harmed by the error in the jury charge).

2. Harm

Next, we examine the record for egregious harm, considering *Almanza*'s four factors — the entire jury charge, the state of the evidence, the arguments of the parties, and any other relevant information in the record. *Gonzalez*, 610 S.W.3d at 27; *Cosio*, 353 S.W.3d at 777; *Almanza*, 686 S.W.2d at 171.

a. *mens rea*

We begin our harm analysis by determining whether the trial court's error of including the mental state of recklessness in the jury charge was egregiously harmful. We consider the jury charge in its entirety. Although the jury charge should not have included this less culpable mental state, the charge did include the two mental states — "intentionally and knowingly" — specified in the indictment, and thereby instructed the jury on "the law applicable to the case". *See* Tex. Code Crim. Proc. Ann. art. 36.14.

Regarding the state of the evidence, the record shows that the State's case was based on Appellant causing bodily injury to Complainant not by recklessly but by intentionally and knowingly shooting at him. In support of its case, the State presented a surveillance video which showed Appellant pointing a firearm at Complainant and then firing it in Complainant's direction after Complainant walked past Appellant's car. Complainant was hit and injured by a bullet consistent with the bullets that were in Appellant's firearm. Appellant's intent to cause Complainant bodily injury by shooting at him may be inferred from Appellant's decision, as supported by the surveillance video, to fire his weapon in Complainant's direction. *See Trevino v. State*, 228 S.W.3d 729, 737-38 (Tex. App.—Corpus Christi 2006, pet. ref'd) ("the jury could reasonably infer that by

opening fire with a semi-automatic weapon on an occupied vehicle, Trevino specifically intended to kill either or both of the occupants of the vehicle"); *Roberts v. State*, 743 S.W.2d 708, 710 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) ("[T]he appellant pointed and fired a gun at two police officers. These actions provided sufficient evidence from which a trier of fact could infer the requisite intent for aggravated assault."). Further, Appellant admitted he shot in Complainant's direction as Complainant walked away and "would do it all over again" because he believed he "made the right decision". Appellant testified that he shot Complainant in self-defense which shows that he intentionally and knowingly caused Complainant bodily injury when he shot at Complainant. Additionally, there is no evidence in the record from which a jury could have concluded that Appellant recklessly shot at Complainant.

With respect to the parties' arguments, neither the State nor Appellant or the court made any statements during the trial that exacerbated the charge error. *See Arrington v. State*, 451 S.W.3d 834, 844 (Tex. Crim. App. 2015). The State did not argue for a conviction based on the mental state of recklessness nor did it mention that culpable mental state. As the State explained the charge to the jury during its closing argument, it only discussed the "intentional" and "knowingly" mental states. Appellant also never mentioned the recklessness *mens rea* in his closing statement.

Finally, there is no other relevant information in the record that weighs in favor of finding that Appellant was egregiously harmed by the trial court's error of including the mental state of recklessness in the jury charge. Based on the record before us, we cannot conclude that Appellant suffered egregious harm.

b. manner and means

We equally cannot conclude that Appellant was egregiously harmed because

the court slightly modified the manner and means of causing bodily injury in the application paragraph from "cause bodily injury to [Complainant] . . . by shooting in the direction of the Complainant, and the Defendant used and exhibited a deadly weapon, namely a firearm", as alleged in the indictment, to "cause bodily injury to [Complainant], by shooting [Complainant] with a firearm, and the defendant used or exhibited a deadly weapon, namely a firearm".

Ordinarily, we evaluate the entire record in light of the four *Almanza* factors in determining whether Appellant was egregiously harmed. *Gonzalez*, 610 S.W.3d at 27. However, in some cases, a single consideration may persuade us that the risk of harm is so minimal, if there is any risk at all, that it precludes a finding of egregious harm. *See id*. "This case presents such a situation." *Id*. Here, the evidence established that Appellant caused Complainant's injury when he directly shot at Complainant and two other men who walked with Complainant past Appellant's car. Appellant admitted he shot Complainant. The surveillance video confirmed that Appellant injured Complainant when he discharged his firearm in the direction of Complainant thereby shooting Complainant with his firearm. The modified manner and means is inconsequential because, in this case, it expresses a nearly identical action by Appellant. The slight change in wording of the manner and means makes no difference, and the trial court's error on this record is not harmful, and certainly not egregiously so.

Because we conclude that Appellant suffered no egregious harm, we overrule his first issue.

III. Ineffective Assistance of Counsel

Appellant argues in his fourth issue that the trial court abused its discretion in overruling his motion for new trial "based on the allegation that Appellant was denied effective assistance of counsel" because his trial counsel failed to (1)

"request a jury instruction regarding defense of property", and (2) "present evidence concerning the nature of his hand injury."

A. Standard of Review and Governing Law

When, as here, a defendant asserts ineffective assistance of counsel in a motion for new trial, we review the trial court's denial of the motion for abuse of discretion. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012), *overruled on other grounds by Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018); *Straight v. State*, 515 S.W.3d 553, 564 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd); *Humphrey v. State*, 501 S.W.3d 656, 659 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). A trial court abuses its discretion when its decision is so clearly wrong as to lie outside the zone of reasonable disagreement. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). We view the evidence in the light most favorable to the trial court's ruling, and will reverse only if no reasonable view of the record could support the trial court's ruling. *Id.*; *Humphrey*, 501 S.W.3d at 659.

To prevail on a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that: (1) trial counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984); *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012).

To determine whether counsel's performance was objectively deficient under the first *Strickland* prong, we look to the totality of the representation and the particular circumstances of the case at the time of trial, ignoring the deleterious effect of "20/20 hindsight." *Jimenez*, 364 S.W.3d at 883. "Because there are 'countless ways' to render effective assistance, judicial scrutiny of trial counsel's

conduct must be highly deferential." *Ex parte Rogers*, 369 S.W.3d 858, 862 (Tex. Crim. App. 2012). We indulge a strong presumption that counsel rendered adequate assistance and acted in furtherance of a sound trial strategy. *Strickland*, 466 U.S. at 689; *Jimenez*, 364 S.W.3d at 883. To overcome the presumption of reasonable professional assistance, an allegation of ineffective assistance must be firmly rooted in the record. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

To establish prejudice under the second *Strickland* prong, a defendant must demonstrate a reasonable probability that, but for trial counsel's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 687-88; *Jimenez*, 364 S.W.3d at 883. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012). To undermine confidence in a guilty verdict, a defendant must prove that "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.

B. Deadly Force to Protect Property

We first address Appellant's contention that he was denied effective assistance of counsel because his trial counsel failed to request an instruction on the defense of deadly force to protect property.

Texas Penal Code section 9.42 provides when a person is justified in using deadly force to protect his property:

> **§ 9.42 Deadly Force to Protect Property**
>
> A person is justified in using deadly force against another to protect land or tangible, movable property:
>
> (1) if he would be justified in using force against the other

under Section 9.41[4]; and

(2) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

Tex. Penal Code Ann. § 9.42. A defendant has the right to an instruction on any defensive issue raised by the evidence, whether the evidence supporting it is strong or weak, unimpeached or contradicted, and regardless of what the trial court might

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4 Texas Penal Code section 9.41, protection of one's property, provides:

(a) A person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

(b) A person unlawfully dispossessed of land or tangible, movable property by another is justified in using force against the other when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property if the actor uses the force immediately or in fresh pursuit after the dispossession and:

(1) the actor reasonably believes the other had no claim of right when he dispossessed the actor; or

(2) the other accomplished the dispossession by using force, threat, or fraud against the actor.

Tex. Penal Code Ann. § 9.41.

think of the evidence. *Denman v. State*, 193 S.W.3d 129, 134 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *see also Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007); *Dugar v. State*, 464 S.W.3d 811, 816 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). To be entitled to an instruction, there must be some evidence, regardless of its source, on each element of the defense. *See Shaw*, 243 S.W.3d at 657-58; *Dugar*, 464 S.W.3d at 816. A counsel is not ineffective for failing to request an instruction to which the defendant is not entitled. *See Ex parte Nailor*, 149 S.W.3d 125, 133 (Tex. Crim. App. 2004); *Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999).

Appellant contends he was entitled to an instruction under section 9.42 because he testified that (1) "he had been robbed and stabbed in a club immediately prior to the shooting"; (2) "the persons he saw in the parking lot were the men who robbed him of his money and stabbed him"; (3) "he assumed the men followed him from the club"; (4) "he believed that they were armed with a knife and handgun"; (5) "the men that robbed him had taken a good portion of his money and he was afraid that they were going to try and take the rest of it because that was what they were indicating in the club"; and (6) "he thought that the men were going to kill him if he did not give them all of his money."

Contrary to Appellant's assertion, we conclude he was not entitled to an instruction under section 9.42 because the evidence at trial did not raise at least some evidence on each element of the defense. During his testimony at trial, Appellant explained that he shot Complainant to protect himself because he was worried Complainant and the other two men who passed by his car would kill him. Appellant stated he was worried he "was going to be a sitting duck to a murder." Considering Appellant's trial testimony in context, he never asserted he shot Complainant to protect his property; nor did Appellant claim he shot Complainant

because he believed shooting Complainant (1) was immediately necessary to prevent Complainant from committing robbery or another crime against Appellant's property; (2) was immediately necessary to prevent Complainant from fleeing immediately after committing robbery or aggravated robbery; or (3) was the only means to protect or recover his property. Based on Appellant's testimony, he was entitled to an instruction on self-defense, which he received. However, Appellant was not entitled to an instruction under section 9.42.

Because we conclude that Appellant was not entitled to an instruction under section 9.42, we hold that his trial counsel was not ineffective for failing to request such an instruction. Accordingly, the trial court did not abuse its discretion in overruling Appellant's motion for new trial.

C. Medical Records

Appellant also contends he received ineffective assistance of counsel because his trial counsel failed to offer his medical records into evidence. In support of his contention, he states in his brief: "A fact issue was raised during trial as to the cause of the Appellant's injury to his hand. Through the testimony of police officers, the State suggested that Appellant was injured by the recoil of the Mac-10 as Appellant fired it. Appellant's medical records would establish that he was cut or stabbed with a knife which would support a claim that he actually [was] stabbed while he was robbed."

Despite Appellant's contention, his medical records do not establish the injury to his hand was a stab wound caused by a knife. The medical records state that the reason he was seen was a "hand laceration", but nowhere in the records is there any indication what specifically caused the hand laceration or any mention of a stab wound or a knife. Although the records indicate that Appellant suffered a significant hand injury apparently requiring plastic surgery, there is no indication

what caused the injury. Appellant has failed to demonstrate in his motion for new trial a reasonable probability that, but for his counsel's allegedly deficient performance in failing to present Appellant's medical records, the result of the trial would have been different. *See Strickland*, 466 U.S. at 687-88; *Jimenez*, 364 S.W.3d at 883.

We conclude that (1) Appellant's trial counsel was not ineffective for failing to introduce Appellant's medical records into evidence, and (2) the trial court therefore did not abuse its discretion in overruling Appellant's motion for new trial. Accordingly, we overrule Appellant's fourth issue.

IV. Motion for New Trial Hearing

Appellant argues in his third issue that the trial court abused its discretion by denying his motion for new trial alleging ineffective assistance of counsel without first holding an evidentiary hearing.

We review a trial court's ruling on whether to grant a hearing on a motion for new trial under an abuse of discretion standard. *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009); *Harris v. State*, 475 S.W.3d 395, 404 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). We will reverse only when the trial court's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Smith*, 286 S.W.3d at 339; *Chapa v. State*, 407 S.W.3d 428, 431 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The purpose of a hearing on a motion for new trial is to: (1) decide whether the case should be retried and (2) prepare a record for presenting issues on appeal in the event the motion is denied. *Smith*, 286 S.W.3d at 338; *Chapa*, 407 S.W.3d at 431.

The right to a hearing on a motion for a new trial is not absolute. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009); *Smith*, 286 S.W.3d at 338.

However, a hearing on a motion for new trial is required when the motion and accompanying affidavits raise matters which are not determinable from the record and establish the existence of reasonable grounds showing that the defendant could potentially be entitled to relief. *Hobbs*, 298 S.W.3d at 199; *Hocko*, 590 S.W.3d at 694. A motion for new trial must be supported by an affidavit specifically setting out the factual basis for the claim. *Hobbs*, 298 S.W.3d at 199. "If the affidavit is conclusory, is unsupported by facts, or fails to provide requisite notice of the basis for the relief claimed, no hearing is required." *Id*.

Appellant's motion alleged a new trial should have been granted because he was entitled to a defense of property instruction and "[e]vidence should have been presented concerning the injury to [Appellant's] hand to support his claim of robbery[.]" However, we conclude the record before us sufficiently allows the determination of both arguments and that neither the motion nor the accompanying affidavit raised an issue concerning defense of property or Appellant's hand injury that is not determinable from the record. Assuming *arguendo* that both matters should have been presented to a jury, the motion for new trial contains no evidence which would have entitled Appellant to a hearing.

Accordingly, we conclude the trial court acted within its discretion in denying Appellant's motion for new trial without first holding an evidentiary hearing, and we overrule Appellant's third issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Jewell and Hassan.
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