Affirmed and Majority and Dissenting Opinions filed August 31, 2023.

In The

Fourteenth Court of Appeals

NO. 14-18-00601-CR

KENDRICK DWAYNE WALKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1520109

MAJORITY OPINION

A jury found appellant guilty of aggravated assault of a family member, and the trial court assessed punishment at confinement for twenty-five years. Appellant complains about the exclusion of evidence at the hearing on his motion for new trial, the trial court's denial of the motion for new trial based on ineffective

assistance and *Brady*,[1] and ineffective assistance of counsel not raised in the motion for new trial. We affirm.

I. BACKGROUND

A. Trial

The State introduced evidence of the complainant's recorded 911 call, photographs of the complainant's injuries, testimony from an officer who responded to the scene, and testimony from an officer who arrested appellant.

During the 911 call, the complainant said her kids' daddy hit her in the head with a pistol and a big knife, and she had a big gash and hole in her head. She said her blood was everywhere. She identified herself and gave her address. She identified the assailant as appellant, Kendrick Dwayne Walker. She described his race, age, height, weight, and clothing.

A Houston Police Department officer testified that he arrived on the scene about three minutes after the call. He immediately saw the complainant, who looked like she had been through a war zone. She had a large gash above her eye, lacerations to her neck, and a couple of bumps on her forehead. The officer testified about several statements made to him by the complainant. The complainant said she was assaulted by appellant; she gave his date of birth and "all of his information." She said appellant pistol-whipped her in the forehead and cut her neck with a knife. The officer testified that he had no reason to believe she was lying because her wounds were not self-inflicted. Appellant's son was at the house, but he did not see the assault. The son saw appellant leave the house with a knife.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

A second officer testified that she arrested appellant based on a warrant issued in this case. She testified without objection that at the time of his arrest, appellant possessed illegal contraband, i.e., Xanax, which was an arrestable offense in Texas. Appellant was not arrested for possessing the Xanax.

Both sides rested and closed the evidence. On the following morning, trial counsel asked the court to present another witness—appellant's brother. The brother was not yet at the courthouse. After waiting nearly an hour for him to appear, the court denied counsel's request to wait more time, and the parties proceeded to closing arguments. The jury found appellant guilty, and the court assessed punishment at the minimum of twenty-five years' confinement.

B. Motion for New Trial and Abatement

Appellant filed a motion for new trial supported by affidavits from himself and another attorney, Robert Fickman. Appellant alleged ineffective assistance of trial counsel based on counsel's (1) failure to impeach the complainant with evidence of two convictions for misdemeanor theft and one conviction for felony forgery under Rule 806 of the Texas Rules of Evidence; (2) failure to subpoena appellant's brother and ask for a continuance when he was late to court; (3) failure to investigate the complainant's mental health history when public records showed that she was assigned special mental health counsel while charged with several crimes; (4) failure to play the 911 recording for appellant, advise him it was likely admissible, and advise him the tape alone was sufficient for a conviction. Appellant also alleged a *Brady* violation based on the State's failure to disclose the fact that the complainant had been appointed mental health counsel.

The trial court did not hold a hearing, so the motion was denied by operation of law. On appeal, this court held that appellant was entitled to a hearing on his motion for new trial based on, at least, the alleged failure to advise about the

admissibility of the 911 recording. *See Walker v. State*, 651 S.W.3d 7, 14–15 (Tex. App.—Houston [14th Dist.] 2020, order, pet. dism'd). This court abated the appeal for the trial court to hold a hearing on appellant's motion for new trial.

At the hearing, appellant adduced testimony from Fickman, trial counsel, a clinical psychologist, and the officer who interviewed the complainant.[2] The court admitted as exhibits some of the complainant's medical records, judgments for the complainant's theft and forgery convictions, the State's *Brady* disclosure listing the complainant's criminal history, and a 2021 letter from an assistant district attorney stating that it possessed no files containing evidence of the complainant's mental illness as the case files were destroyed two years after the dates of disposition. The court excluded some testimony from Fickman, the psychologist, and the officer. The court also excluded three exhibits—orders appointing mental health counsel for the complainant, which included findings that the complainant might have been a person with mental illness or might have been incompetent.

After the hearing, the trial court denied the motion for new trial. The court signed findings of fact and conclusions of law. The court explicitly "considered no claims for relief that were not specifically mentioned in the Defendant's motion for new trial." We describe the court's other findings and conclusions in greater detail below as they relate to appellant's issues and arguments on appeal. After the appeal was reinstated, appellant and the State each filed supplemental briefs.

C. Issues on Appeal

Appellant's first two issues from his opening brief concern the trial court's failure to hold a hearing on the motion for new trial. We disposed of these issues

[2] We describe the testimony in greater detail below, when necessary, while addressing appellant's issues and arguments on appeal.

by ordering abatement for a hearing on the motion for new trial. *See Walker*, 651 S.W.3d at 14–15.

In his third issue from the opening brief, appellant contends that he was denied effective assistance of counsel because: (1) counsel failed to impeach the complainant's recorded statement pursuant to Rule 806 of the Texas Rules of Evidence; (2) counsel failed to subpoena appellant's brother and seek a continuance when the brother failed to appear voluntarily; (3) counsel failed to investigate the complainant's mental health history when public records showed that she was thrice assigned mental health counsel when charged with crimes; (4) counsel failed to play the 911 recording for appellant, failed to advise him it likely was admissible, and failed to advise him that the tape alone was sufficient for a conviction; (5) the State failed to disclose impeaching material, the complainant's mental health status;[3] (6) counsel failed to object to the 911 recording as not properly authenticated; (7) counsel failed to object to testimony regarding the complainant's statements to the investigating officer; and (8) counsel failed to object to testimony concerning an extraneous offense not included in the State's notice of intent to use extraneous offenses. In his fourth issue from the opening brief, appellant contends that the State violated *Brady* and its progeny by failing to disclose that the complainant was suffering from serious mental health problems, such that trial courts had appointed mental health counsel to represent her in three criminal cases.

In his supplemental brief, appellant presents six new issues concerning the trial court's exclusion of evidence at the motion for new trial. He contends that the

[3] Although this allegation is listed under the third issue relating to ineffective assistance, appellant does not explain how the State's failure to disclose information amounts to ineffective assistance by trial counsel. We consider this allegation as part of appellant's fourth issue regarding *Brady*.

trial court erred by sustaining the State's relevance objections to (1) Fickman's testimony that the complainant's mental health history would be relevant to trial preparation and trial; (2) Fickman's testimony about the application of Rule 806 of the Texas Rules of Evidence; (3) Fickman's testimony about the application of *Crawford v. Washington*, 541 U.S. 36 (2004); (4) some of the psychologist's testimony; (5) the investigating officer's testimony; and (6) three exhibits showing the appointment of mental health counsel for the complainant in her criminal cases. In his seventh supplemental issue, he contends that the trial court erred by overruling the motion for new trial for several of the reasons asserted in the opening brief.

II. ADMISSION OF EVIDENCE

We assume without deciding that the trial court erred by excluding evidence at the hearing on the motion for new trial. However, error in the exclusion of evidence is not reversible unless it affects a substantial right. *See* Tex. R. Evid. 103(a); Tex. R. App. P. 44.2(b). A substantial right is affected if the error had a substantial and injurious effect or influence in determining the ruling on the motion for new trial. *Cf. Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016) ("substantial and injurious effect or influence in determining the jury's verdict"). If the error did not influence the fact finder or had but very slight effect, the judgment should stand. *See id.* Appellant makes no argument in his supplemental brief that the exclusion of evidence affected a substantial right, i.e., was harmful.

As discussed in greater detail later in this opinion, even if we consider the excluded evidence while assessing the trial court's ruling on the motion for new trial, the trial court did not err by overruling the motion. Thus, any error in the exclusion of evidence did not affect appellant's substantial rights.

We overrule the first six issues from appellant's supplemental brief.

III. INEFFECTIVE ASSISTANCE

A. Standard of Review and Legal Principles

To prevail on a claim of ineffective assistance, an appellant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness and (2) counsel's deficiency caused the appellant prejudice—there is a probability sufficient to undermine confidence in the outcome that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010). This test determines "whether counsel's conduct so undermined proper functioning of the adversarial process that the trial cannot be relied on as having produced a reliable result." *Thompson v. State*, 9 S.W.3d 808, 812–13 (Tex. Crim. App. 1999). An appellant must satisfy both prongs by a preponderance of the evidence. *Perez*, 310 S.W.3d at 893.

Under the prejudice prong, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding." *Strickland*, 466 U.S. at 696. This court must determine whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* In making this determination, we consider the totality of the evidence before the jury. *Id.* at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695–96. A verdict "only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

When a defendant asserts ineffective assistance of counsel in a motion for new trial, we review the trial court's denial of the motion for an abuse of discretion. *Washington v. State*, 417 S.W.3d 713, 724–25 (Tex. App.—Houston

[14th Dist.] 2013, pet. ref'd). We review de novo the trial court's decision on the prejudice prong while giving deference to the trial court's resolution of underlying factual determinations. *Id.* at 725.

When a defendant asserts ineffective assistance of counsel for the first time on appeal, the record often will not be sufficient to overcome the strong presumption that counsel's conduct was reasonable and professional. *See Cannon v. State*, 252 S.W.3d 342, 349 (Tex. Crim. App. 2008). We will not find deficient performance unless counsel's conduct is so outrageous that no competent attorney would have engaged in it. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

B. Impeachment of the Complainant with Prior Convictions

Appellant argued in his motion for new trial that counsel failed to impeach the complainant's out-of-court statements under Rule 806 of the Texas Rules of Evidence with evidence of three prior convictions—two misdemeanor thefts and one state jail felony forgery—that were admissible under Rule 609.

We assume without deciding that counsel's performance was deficient in this regard. Appellant does not advance significant argument about how he may have been prejudiced. In the context of an ineffective assistance claim involving a failure to adduce mitigating evidence, courts have assessed prejudice by weighing the evidence supporting the conviction against the totality of available evidence, including the evidence that could have been offered if counsel had performed a proper investigation. *See, e.g., Seamster v. State*, 344 S.W.3d 592, 595 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). In assessing the harm from a trial court's exclusion of impeachment evidence, courts have applied a similar analysis by weighing the impeachment evidence against the remainder of the evidence. *See Campbell v. State*, 551 S.W.3d 371, 381 (Tex. App.—Houston [14th Dist.] 2018,

no pet.) (reasoning that the exclusion of impeachment evidence was harmless when weighing the amount of impact the impeachment evidence would have had against the strength of the evidence of guilt); *Arroyo v. State*, 123 S.W.3d 517, 520–21 (Tex. App.—San Antonio 2003, pet. ref'd) (reasoning that the exclusion of impeachment evidence—the complainant's convictions for theft and welfare fraud—did not have a substantial influence on the jury's guilty verdict for assault causing bodily injury in light of the other testimony from an eyewitness, a police officer's observation of the injury, and the emotional state of the complainant); *Aleman v. State*, 795 S.W.2d 332, 333–34 (Tex. App.—Amarillo 1990, no pet.) (reasoning that the exclusion of impeachment evidence—the complainant's conviction for theft—made no contribution to the sexual assault conviction or punishment, beyond a reasonable doubt, after considering other evidence of guilt, including that the complainant "made an immediate, positive identification of appellant, with whom she was previously acquainted").

Here, the jury heard a recording of the complainant's 911 call describing her injuries and identifying appellant—her children's father—as the perpetrator who hit her with a pistol and knife. The jury saw pictures of the injuries, including a large gash on her forehead. The jury heard from the investigating officer who observed the complainant's injuries; he opined, based on his experience, that the injuries were not self-inflicted. The complainant told him the injuries were inflicted by appellant using a gun and a knife. Appellant's son saw appellant leave the house with a knife.

The evidence of the assault was strong. The complainant was intimately familiar with appellant and described him as her attacker. Appellant did not present evidence of a factual or legal defense, such as alibi or self-defense. Considering the strong evidence of guilt, there is no reasonable probability that,

had the complainant been impeached with her convictions for theft and forgery, the result of the proceeding would have been different. *Cf. Arroyo*, 123 S.W.3d at 520–21; *Aleman*, 795 S.W.2d at 333–34.

Appellant has not shown prejudice for this claim.

C. Subpoena Witness and Request Continuance

Appellant argued in his motion for new trial that counsel failed to subpoena appellant's brother and request a continuance when he was late to court, thus depriving appellant of "crucial exculpatory testimony."

The trial court signed the following findings of fact regarding this allegation of ineffectiveness:

> 7. The defendant did not inform [trial counsel] of the existence of his brother as a potentially exculpatory witness until mid-trial.
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> 8. The Court would not have granted a written motion for continuance to procure the testimony of his brother.

The court also concluded:

> 4. There is also no prejudice from the failure to subpoena the brother. There has been no showing, by affidavit, or otherwise, that this witness was readily available to testify nor that he would have had relevant testimony to provide.

Although appellant refers to this allegation of ineffectiveness in his opening brief, he does not provide any substantive analysis of the issue. Nor does appellant refer to this issue in his supplemental brief. Appellant does not challenge the trial court's findings or conclusions.

Absent a showing that a witness was available to testify and would have provided exculpatory testimony, there can be no prejudice from failing to secure their attendance at trial. *See, e.g.*, *Stokes v. State*, 298 S.W.3d 428, 431–32 (Tex.

App.—Houston [14th Dist.] 2009, pet. ref'd). Thus, appellant has not shown prejudice for this claim.

D. Investigation of Mental Health

Appellant argued in his motion for new trial that counsel failed to investigate the complainant's mental health history when public records showed that she was assigned mental health counsel in three criminal cases in 2016, 2017, and 2018. Appellant contends further in his supplemental brief that counsel was deficient for failing to "impeach the complainant with evidence of her mental health status on credibility." Appellant contends that counsel should have retained an expert, such as the psychologist who testified at the hearing on the motion for new trial, to show how the complainant's mental health "affected her ability to testify truthfully."

Trial counsel testified at the hearing that he was aware the complainant had bipolar disorder, but he did not obtain all of the complainant's mental health records. The psychologist testified that he reviewed the complainant's mental health records. He noted that the records showed a long history of mental illness including diagnoses for major depression, bipolar disorder, anxiety, polysubstance abuse, and a "rule-out for personality disorder." He testified that bipolar disorder and depression can impact judgment and there was a "need to further explore the possibility that she may have fabricated or embellished her accounts of the assault." When asked how bipolar disorder can affect credibility, the psychologist testified:

> Well, it's not necessarily the bipolar that was my statement on that. It was based on the history, antisocial behavior, crimes of deception with others, and records that were inconsistent with the facts, inconsistencies within the record itself. So those things brought out the question of a possibly secondary to a personality disorder that—that calls into question some of the statements that she may have made at the time of the commission of the offense.

In its findings of fact and conclusions of law, the trial court wrote:

> The Court finds no prejudice from any failure to subpoena or request any medical records of the Complainant. The expert testimony adduced at the hearing did not show that they would have been relevant to any matter considered at trial. The expert did not testify that the Complainant's bipolar condition would have impaired anything about her hearsay statement.

Appellant contends that it is "well settled that parties may cross examine and impeach witnesses with evidence of mental illness," citing *Holmes v. State*, 323 S.W.3d 163, 169–70 (Tex. Crim. App. 2009), and *Virts v. State*, 739 S.W.2d 25 (Tex. Crim. App. 1987). Appellant's interpretation of these cases is overbroad and ignores the trial court's finding that the expert's testimony was irrelevant. In the seminal case, *Virts*, the Court of Criminal Appeals held that cross-examination of a witness concerning mental illness may be admissible if a witness has suffered a recent mental illness that reflects on the witness's credibility. *Virts*, 739 S.W.2d at 30. However, "the mere fact that the State's testifying witness has in the recent past suffered or received treatment for a mental illness or disturbance does not, for this reason alone, cause this kind of evidence to become admissible impeachment evidence." *Id.* A jury should be permitted to hear evidence of mental illness if there is a "persistent disabling disturbance of his mental and/or emotional equilibrium, manifested through persistent maladjustment and more or less irrational, even bizarre behavior and speech." *Id.*

The mere fact that the complainant had suffered some mental illness does not make the evidence admissible, particularly in light of the expert's equivocal testimony—that is, the "need to further explore the possibility" of fabrication or embellishment; and her bipolar disorder did "not necessarily" impact credibility. The trial court's conclusion that this evidence was irrelevant and inadmissible is supported by the record. *See Scott v. State*, 162 S.W.3d 397, 401–02 (Tex. App.—

Beaumont 2005, pet. ref'd) (upholding trial court's exclusion of evidence concerning mental illness; although offer of proof "clearly demonstrates [the witness] had suffered a recent mental illness or disturbance prior to the night in question," which was "ongoing, and persisted through and beyond that night," the testimony did not show that the mental illness affected the witness's perception of events); *cf. State v. Moreno*, 297 S.W.3d 512, 523–24 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (upholding trial court's grant of motion for new trial based on omitted evidence regarding the sexual-assault complainant's mental state when the evidence at trial conflicted sharply and the complainant's credibility was of heightened importance; noting that the evidence about the complainant's mental state "directly addressed her inability to separate fantasy from reality" and noted that the complainant had "false fantasies and confused reality with imagination").

Even if trial counsel had investigated the complainant's mental health more thoroughly, there is no reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Appellant has not shown prejudice for this claim.

E. Discussion of the 911 Call with Appellant

Appellant argued in his motion for new trial that counsel was ineffective because he failed to play the 911 recording for appellant, advise him it was likely admissible, and advise him the tape alone was sufficient for a conviction.

Appellant does not address this claim in his supplemental brief and does not challenge the trial court's findings:

> 5. [Counsel] was able to articulate that he went over the 911 call with his client and its potential admissibility. [Counsel] explained that it would most likely be admissible at trial against him. [Counsel] also explained the phone call's contents to the defendant.

> 6. Additionally, [Counsel] informed the Defendant of his plea options including all plea offers from the State in a timely manner. [Counsel] also explained the consequences of each potential plea offer to the Defendant.
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> . . . .
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> 6. The testimony at the hearing indicated that the Defendant had the plea offer conveyed to him as well as the probability that the 911 call would be admitted. Thus, no deficient performance was rendered. No contrary testimony via affidavit was found to be credible.

These unchallenged findings and conclusions are supported by the record. Appellant has not shown deficient performance for this claim.

F. Authentication of the 911 Call

Appellant contends in his opening brief that trial counsel was ineffective for not objecting to the recording of the 911 call based on a lack of authentication because "no one authenticated the calls as having actually been made by the complainant." Appellant did not raise this claim in his motion for new trial.

To demonstrate ineffective assistance based on a failure to object to evidence, appellant must show that the trial court would have committed harmful error by overruling the objection. *See, e.g.*, *Donald v. State*, 543 S.W.3d 466, 2018, no pet.).

The identity of a telephone caller may be authenticated by "self-identification of the caller coupled with additional evidence such as the context and timing of the telephone call, the contents of the statements made during the telephone call, internal patterns and other distinctive characteristics, and disclosure of knowledge and facts known particularly to the caller." *Morris v. State*, 460 S.W.3d 190, 196 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Here, the 911 caller identified herself by name, gave her location, described her injury of a big gash to the head, said she was hit with a gun and knife, and identified appellant as the perpetrator. Within three minutes of the call, a police officer arrived at the location described by the caller, found the complainant with a large gash to the head, and heard the complainant say that appellant hit her with a gun and knife.

Under these circumstances, trial counsel might have reasonably concluded that the caller's identity was adequately authenticated. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (noting that it may be strategic to not object to inadmissible evidence if trial counsel "*at that moment* may have reasonably decided that the testimony was not inadmissible").

Appellant has not shown deficient performance for this claim.

G. Complainant's Statements to the Officer

Appellant contends in his opening and supplemental briefs that counsel was ineffective for not objecting to the admission of the complainant's statements to the police officer based on the Confrontation Clause. Appellant did not raise this claim in his motion for new trial.

An out-of-court statement may be inadmissible under the Confrontation Clause if it was made by a witness absent from trial and was testimonial in nature. *See Woodall v. State*, 336 S.W.3d 634, 642 (Tex. Crim. App. 2011). A statement is testimonial when circumstances objectively indicate that it was taken for the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. *See Davis v. Washington*, 547 U.S. 813, 822 (2006). A statement is not testimonial if the circumstances indicate that the primary purpose is to enable police assistance to meet an ongoing emergency. *Id.* To determine

whether a statement is testimonial, a court should view the statement from the perspective of an objectively reasonable person standing in the declarant's shoes. *Wall v. State*, 184 S.W.3d 730, 742–43 (Tex. Crim. App. 2006).

The officer testified that he arrived three minutes after the dispatch for a priority one call. When he saw the complainant, and it "basically looked like she had been through a war zone," his first concern was to get her medical attention. He learned that appellant had fled the scene on foot with a knife or gun or both shortly before the officer arrived, so the officer searched the area for appellant.

Under these circumstances, counsel might have reasonably concluded during trial that the statements were made for nontestimonial purposes, such as assisting the police officer responding to an ongoing emergency. *See Thompson*, 9 S.W.3d at 814 (no deficient performance when counsel "*at that moment* may have reasonably decided that the testimony was not inadmissible"). Moreover, counsel may have had a reasonable trial strategy by not objecting to these statements because counsel intended to explore and expose inconsistencies between the complainant's statements to the officer and her statements during the 911 call. *See Lopez v. State*, 343 S.W.3d 137, 141, 143–44 (Tex. Crim. App. 2011) (no deficient performance on a silent record as to why counsel failed to object to inadmissible hearsay; possible strategy included exposing inconsistencies with other statements). On this record, we cannot conclude that counsel's failure to object to the officer's testimony was so outrageous no competent attorney would have acted similarly.

Appellant has not shown deficient performance for this claim.

H. Extraneous Offense

Appellant contends in his opening brief that counsel was ineffective for not objecting to testimony by the arresting officer that appellant committed an extraneous offense, i.e., that he possessed Xanax. Appellant did not raise this claim in his motion for new trial.

Trial counsel may refrain from objecting to prejudicial evidence in an effort to make a defendant appear more honest, to minimize the seriousness of the offense, or to avoid drawing unwanted attention to a particular issue. *Vasquez v. State*, 417 S.W.3d 728, 733 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Moreover, here trial counsel cross-examined the officer to show that appellant was not arrested for the possession of Xanax. This cross-examination undermined the State's evidence that it was an arrestable offense and may have undermined the State's credibility with the jury. Based on a silent record, we cannot conclude that counsel had no trial strategy and that his conduct was so outrageous no competent attorney would have acted similarly.

Appellant has not shown deficient performance for this claim.

I. Summary

Appellant has not demonstrated deficient performance or prejudice for each of his allegations of ineffective assistance of counsel. We overrule the third issue from his opening brief and seventh issue from his supplemental brief.

IV. BRADY

Appellant argued in his motion for new trial and his opening brief that the State withheld *Brady* impeachment evidence—the orders appointing mental health counsel for the complainant in three criminal cases. Appellant does not urge his *Brady* complaint in the supplemental brief.

In its findings of fact and conclusions of law, the trial court wrote:

> 10. No evidence has been brought forward to suggest that the State withheld any exculpatory information from the Defendant regarding the Complainant's mental health. There is no affidavit to support this claim. Additionally, the State disclosed a *Brady* notice on May 16, 2018 including all of the Complainant's prior criminal history. From the State's pretrial notice, Defense counsel was able to access the public documents connected to each of those cases which included information that the Complainant was appointed mental health counsel.
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> . . . .
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> 7. Because the documents on the clerks' website provided information that was more than available to both sides, there was no *Brady* violation.

Appellant does not challenge these findings.

A *Brady* violation occurs when the State suppresses evidence favorable to a defendant. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). The State is not required to seek out exculpatory evidence independently or furnish a defendant with exculpatory evidence that is fully accessible to him from other sources. *Id.* at 407. Documents that are public records are not deemed suppressed by the State if defense counsel should have known of them and failed to obtain the records because of a lack of diligence in his own investigation. *Dalbosco v. State*, 978 S.W.2d 236, 238 (Tex. App.—Texarkana 1998, pet. ref'd) (collecting cases); *see also Garner v. State*, No. 14-04-00221-CR, 2005 WL 2230254, at *3 (Tex. App.—Houston [14th Dist.] Sept. 13, 2005, no pet.) (mem. op., not designated for publication).

Here, the State disclosed to appellant several of the criminal proceedings in which the complainant was appointed mental health counsel, and the orders were

publicly available from the clerk's website. With the exercise of reasonable diligence, counsel could have discovered the records.

Moreover, to establish a *Brady* violation, the undisclosed evidence must be material—there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Harm*, 183 S.W.3d at 409. This is the same test used for ineffective assistance. *Seamster*, 344 S.W.3d at 598 & n.9. As discussed in greater detail above regarding trial counsel's failure to investigate and discover this evidence, there is no reasonable probability that the result of the proceeding would have been different if counsel had been provided with the orders appointing mental health counsel for the complainant.

We overrule the fourth issue from appellant's opening brief.

V. CONCLUSION

Having overruled each issue from appellant's opening and supplemental briefs, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Hassan, and Wilson. (Hassan, J., dissenting).
Publish — Tex. R. App. P. 47.2(b).