Affirmed and Memorandum Opinion filed March 14, 2024.

In The

Fourteenth Court of Appeals

NO. 14-22-00566-CR
NO. 14-22-00567-CR

JAIME LEONEL CRUZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause Nos. 1470293, 1470294

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

A jury found appellant Jaime Leonel Cruz guilty on two charges of aggravated sexual assault of a child, and the trial court assessed punishment at two concurrent sentences of life in prison. On appeal, he contends his convictions should be reversed because: (1) the State amended the indictments, which once amended were void because they had not been returned by a grand jury or, alternatively, his rights

were violated by the pretrial amendments; and (2) his trial counsel was ineffective for failing to object to the State's motion to amend the indictments.

We overrule appellant's issues and affirm the trial court's judgments.

Background[1]

In September 2015, a Harris County grand jury indicted appellant for two offenses of aggravated sexual assault of a child under six involving two different complainants, K.R. and A.B. *See* Tex. Penal Code § 22.021(a)(1)(B), (c), (f)(1). In cause number 1470293, the indictment alleged that appellant "intentionally and knowingly caused the penetration of the sexual organ of [A.B.], a child younger than six years of age, . . . with the finger of [appellant]." In cause number 1470294, the indictment alleged that appellant "intentionally and knowingly caused the penetration of the sexual organ of [K.R.], a child younger than six years of age, . . . with the finger of [appellant]." These indictments alleged offenses under Penal Code subsection 22.021(a)(1)(B)(i). Both indictments included the complainants' names.

In June 2022, the State moved to amend both indictments. The proposed amendments had two effects: (1) the complainants' initials would replace their names; and (2) instead of alleging that appellant penetrated the complainants' sexual organs with his finger, the amended indictments would allege that appellant caused the complainants' sexual organs to contact appellant's sexual organ. The proposed amended indictments alleged offenses under Penal Code subsection 22.021(a)(1)(B)(iii). The trial court signed orders granting the motion to amend the two indictments on June 30, 2022. Appellant lodged no objections to the amended indictments.

[1] Appellant does not challenge the sufficiency of the evidence to support the jury's verdicts, so we briefly summarize the facts relevant to the amendment of the indictments without delving into the facts of the offenses themselves.

Nearly a month later, on July 26, appellant's trial for both offenses began. He was arraigned under the amended indictments, again without objecting to the amendments. He pleaded not guilty to each. A jury convicted appellant of both offenses, and the trial court assessed punishment at imprisonment for life for each offense. Appellant did not file a motion for new trial.

Appellant timely appealed.

Analysis

A. Amendment of the Indictments

In his first issue, appellant contends that his right to be indicted by a grand jury under Texas Constitution article I, section 10, was violated because the amended indictments alleged a different statutory offense than the original indictments but were never reviewed by a grand jury, rendering the amended indictments void and depriving the trial court of jurisdiction. Further, assuming the amended indictments are not void, appellant claims harm from the violation because the evidence adduced at trial was insufficient to support the allegations in the original indictments.

Under the Texas Constitution, and unless waived by the defendant, the State must obtain a grand jury indictment in a felony case. *See* Tex. Const. art. I, § 10. Absent an indictment or valid waiver, a district court does not have jurisdiction over a felony case. *Teal v. State*, 230 S.W.3d 172, 174-75 (Tex. Crim. App. 2007); *Martin v. State*, 346 S.W.3d 229, 230-31 (Tex. App.—Houston [14th Dist.] 2011, no pet.).[2] An indictment provides a defendant with notice of the offense and allows him to prepare a defense. *Teal*, 230 S.W.3d at 175. Additionally, this constitutional

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[2] *Cook v. State*, 902 S.W.2d 471, 475-76 (Tex. Crim. App. 1995) ("Jurisdiction vests only upon the filing of a valid indictment in the appropriate court."); *see* Tex. Const. art. V, § 12 ("The presentment of an indictment or information invests the court with jurisdiction of the cause.").

guarantee is intended to provide the accused an impartial body that can act as a screen between the rights of the accused and the prosecuting power of the State. *Id.*

It is undisputed that appellant did not object to the amended indictments at any time. We initially consider whether appellant may raise his first argument on appeal absent a timely objection in the trial court. Appellant contends no objection was required because his constitutional right to a grand jury indictment must be implemented unless expressly waived, and he did not expressly waive the right.[3]

The thrust of appellant's preservation of error argument is that because the indictments were amended to allege a different offense from the original indictments, and because the allegations in the amended indictments were never reviewed by a grand jury, he in fact was not indicted on the offenses for which he was convicted. According to appellant, the amended indictments are invalid, meaning they do not qualify as indictments.

We disagree. An "indictment" as defined by the Texas Constitution is "a written instrument presented to a court by a grand jury charging a person with the commission of an offense." Tex. Const. art. V, § 12(b).[4] The Court of Criminal Appeals has interpreted this language to require that an indictment allege that (1) a person (2) committed an offense. *Teal*, 230 S.W.3d at 179. "Constitutionally, district courts have jurisdiction over a felony when an indictment charging a person with an offense is signed by the grand jury foreman and presented to the district court." *Id.* at 180-81. Further, the proper test to determine if a charging instrument alleges "an offense" is whether the allegations in it are clear enough that one can

[3] Appellant cites *Woodard v. State*, 322 S.W.3d 648, 657 (Tex. Crim. App. 2010).

[4] *See also* Tex. Code Crim. Proc. art. 21.01 (defining indictment as "the written statement of grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense"); *see generally Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1990).

identify the offense alleged. *Id.* at 180. Indictments charging a person with committing an offense, once presented, invoke the jurisdiction of the trial court, and jurisdiction is not contingent on whether the charging instrument contains defects of form or substance. *See id.* at 177; *see also Walker v. State*, 594 S.W.3d 330, 339-40 (Tex. Crim. App. 2020).

The amended indictments satisfy these principles. They allege that appellant caused the sexual organs of the complainants, each a child under six years of age, to contact his sexual organ. As such, they charged appellant with committing the offense of aggravated sexual assault of a child and provided sufficient information from which he could identify the offense alleged. *See* Tex. Penal Code § 22.021(a)(1)(B)(iii), (a)(2)(B) (making it an offense if a person causes the sexual organ of a child under 14 to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor); *Teal*, 230 S.W.3d at 180. Therefore, we conclude that the amended indictments are "indictments" under the Texas Constitution. Accordingly, they are not void.

Appellant's substantive complaint is that the amended indictments alleged a different offense than the original indictments, which harmed him. The "practice and procedures relating to the use of indictments, including their amendment, sufficiency, and requisites," are "as provided by law." Tex. Const. art. V, § 12(b). Under the Code of Criminal Procedure, complaints about a substantive difference in statutory offenses alleged in an amended indictment require an objection before trial.

Tex. Code Crim. Proc. arts. 1.14(b);[5] 28.10(c).[6] Appellant's position that he need not have objected to the amended indictments in order to complain on appeal about the substantive changes to them disregards the Legislature's plain statutory preservation requirements applicable to amended indictments. Assuming without deciding that the amended indictments in the present case charged appellant with a "different offense" than the original indictments, a timely objection was required. *See Teal*, 230 S.W.3d at 177.[7] Because he did not object, his first issue is unpreserved, and we overrule it on that basis. *See* Tex. R. App. P. 33.1(a)(1).

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[5] Article 1.14(b) provides: "If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding." Tex. Code Crim. Proc. art. 1.14(b).

[6] Article 28.10(c) provides: "An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced." *Id.* art. 28.10(c).

[7] Courts have routinely held that to preserve error related to a pretrial or midtrial amendment, a defendant must timely object. *See, e.g.*, *Brown v. State*, 155 S.W.3d 625, 628 (Tex. App.—Fort Worth 2004, pet. ref'd) (in burglary case, amendment to add an additional predicate offense); *Lebo v. State*, 100 S.W.3d 417, 420 (Tex. App.—San Antonio 2003, pet. ref'd) (in assault case, amendment to add an additional culpable mental state); *Hoitt v. State*, 30 S.W.3d 670, 674 (Tex. App.—Texarkana 2000, pet. ref'd) (in injury-to-elderly-individual case, amendment to add an enhancement paragraph alleging a prior conviction); *Villalon v. State*, 805 S.W.2d 588, 590-91 (Tex. App.—Corpus Christi–Edinburg 1991, no pet.) (in aggravated-sexual-assault-of-child case, amendment to change date of offense and "the allegation of 'sexual intercourse' to penile penetration of the vagina," the latter of which served to conform the indictment's allegation with the penal statute in effect on the date of offense); *Mechell v. State*, No. 01-04-00113-CR, 2005 WL 375450, at *3 (Tex. App.—Houston [1st Dist.] Feb. 17, 2005, pet. ref'd) (mem. op., not designated for publication) (in theft case, amendment to change date of prior conviction in an enhancement paragraph); *Holiday v. State*, Nos. 14-00-01555-CR to 01559-CR, 2002 WL 433134, at *4 (Tex. App.—Houston [14th Dist.] Mar. 21, 2002, pet. ref'd) (not designated for publication) (in aggravated-sexual-assault-of-a-child cases, amendment to change dates of offenses); *Gandy v. State*, No. 05-00-01384-CR, 2001 WL 1403576, at *2 (Tex. App.—Dallas Nov. 13, 2001, pet. ref'd) (not designated for publication) (in burglary case, amendment to specify the predicate offense); *Finch v. State*, No. 05-98-01754-CR, 1999 WL 1038305, at *2-3 (Tex. App.—Dallas Nov. 17, 1999, no pet.) (not designated for publication) (in possession-with-intent-to-deliver-amphetamine case, amendment to change the controlled substance from "methamphetamine" to

B. Assistance of Counsel

In his second issue, appellant contends his trial counsel provided ineffective assistance by failing to object to the amended indictments on the grounds that they alleged different statutory offenses from the original indictments.

1. *Standard of review*

We examine claims of ineffective assistance of counsel under the familiar two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Robison v. State*, 461 S.W.3d 194, 202 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). A criminal defendant must prove that his trial counsel's representation was deficient and that the deficient performance was so serious that it deprived him of a fair trial. *Strickland*, 466 U.S. at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness. *Id.* at 688. But a deficient performance will deprive the defendant of a fair trial only if it prejudices the defense. *Id.* at 691-92. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Failure to make the required showing of either deficient performance or sufficient prejudice defeats a claim of ineffectiveness. *Id.* at 697.

Our review of trial counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable professional assistance. *See Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007); *Donald v. State*, 543 S.W.3d 466, 477 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (op. on reh'g). If counsel's reasons for his or her conduct do not appear in the

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"amphetamine"); *Green v. State*, No. 05-90-01468-CR, 1991 WL 252778, at *1 (Tex. App.—Dallas Nov. 19, 1991, no pet.) (not designated for publication) (in theft case, amendment to change name of property owner).

record and there exists at least the possibility that the conduct could have been grounded in legitimate trial strategy, we defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. *See Garza*, 213 S.W.3d at 348. If, as here, counsel has not had an opportunity to explain the challenged actions, we may not find deficient performance unless the conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). In the majority of cases, the record on direct appeal is simply undeveloped and insufficient to permit a reviewing court to fairly evaluate the merits of an ineffective assistance of counsel claim. *See Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); *Robison*, 461 S.W.3d at 203.

2. *Discussion*

Here, appellant did not file a motion for new trial; thus, counsel has not had an opportunity to explain his challenged actions. *E.g.*, *Goodspeed*, 187 S.W.3d at 392 (cautioning that "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective" (internal quotations omitted)). The Fifth Court of Appeals has addressed a comparable ineffective-assistance claim based on an amended charging instrument, albeit in an unpublished disposition. *See Stewart v. State*, No. 05-95-01056-CR, 1997 WL 196357, at *3-4 (Tex. App.—Dallas Apr. 23, 1997, no pet.) (not designated for publication). There, trial counsel failed to object to an information's amendment from an allegation of reckless driving to an allegation of deadly conduct, two entirely different statutory offenses. *Id.* at *1, 3. In overruling appellant's complaint, the court explained:

> It is true that the information in this case was amended to allege a different offense, and appellant's counsel might have prevented the amendment by objecting. However, it would have been a relatively simple matter for the State to obtain a new information charging

> appellant with deadly conduct. In addition, counsel's decision not to object may have been a strategic one designed to avoid unnecessary delay in the proceedings. Appellant has not identified anything in the record that would overcome the presumption that his counsel's challenged conduct can be considered sound trial strategy. When the record contains no evidence of the reasoning behind trial counsel's action, we cannot conclude that counsel's performance was deficient.

Id. at *4.

Although securing a subsequent indictment is not the same as obtaining a new information, appellant points to nothing to suggest that the State would have been unable to obtain new indictments had the trial court sustained any objection to the amended indictments. The State filed its motions to amend the indictments thirty days before trial. The proposed amendments, moreover, charged appellant with an offense under the same section of the Penal Code as referenced in the original indictments, but changed merely the means of the offense and replaced the complainants' names with initials. Counsel may have strategically decided that objecting to the amendments would have caused only unnecessary delay in the proceedings without achieving any material benefit for the client. *See Scales v. State*, 601 S.W.3d 380, 388 (Tex. App.—Amarillo 2020, no pet.) ("Because there is nothing in the record to show why counsel chose not to object to the amendment of the indictment, we cannot say with certainty that counsel's performance was deficient or that it fell below an objective standard of reasonableness. Without some indication of trial counsel's strategy, we cannot meaningfully evaluate his reasons for not objecting."); *cf. Jefferson v. State*, 663 S.W.3d 758, 764 (Tex. Crim. App. 2022) (discussing possibility of sound trial strategy for not objecting to request to amend indictment).

Appellant has not established that his trial counsel's failure to object to the amended indictments was not a strategic choice made by trial counsel. *See Prine v.*

State, 537 S.W.3d 113, 117-18 (Tex. Crim. App. 2017); *Scales*, 601 S.W.3d at 388. Without more, our record does not support a conclusion that his attorney's failure to object was so outrageous that no other competent attorney would have done the same. *See Prine*, 537 S.W.3d at 118.

For the same reasons, appellant has not shown a reasonable probability that, but for trial counsel's decision to not object to the amended indictments, the result would have been different.

We overrule appellant's second issue.

Conclusion

Having overruled both of appellant's issues, we affirm the trial court's judgments.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Spain, and Wilson.

Do Not Publish — Tex. R. App. P. 47.2(b).