Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00661-CR

Johnny **CASTILLO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 38th Judicial District Court, Medina County, Texas
Trial Court No. 11-10-10814-CR
The Honorable Camile G. Dubose, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: May 31, 2017

AFFIRMED AS MODIFIED

Appellant Johnny Castillo was indicted for the offense of aggravated assault with a deadly weapon, enhanced by a prior felony conviction. Pursuant to an open plea, Castillo pled guilty to the charged offense, and the trial court sentenced him to fifty years' confinement. On appeal, Castillo raises two points of error, contending the trial court erred in: (1) denying his motion for new trial based on ineffective assistance of counsel; and (2) assessing attorney's fees. We affirm the trial court's judgment, modifying it to delete the assessment of attorney's fees.

BACKGROUND

The State indicted Castillo for the offense of aggravated assault with a deadly weapon. Castillo entered an open plea of guilty to the charged offense. Thereafter, the trial court held a sentencing hearing. At the hearing, the victim testified that in August 2011, Castillo stabbed her twenty-three times and cut her throat. Castillo did not call any witnesses. The State asked the trial court to sentence Castillo to sixty years' confinement. The trial court sentenced him to fifty years' confinement. Castillo did not file a notice of appeal.

Subsequently, Castillo filed an application for writ of habeas corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure, contending — among other things — that his court-appointed attorney advised him to waive his right to appeal before sentencing and without an agreed recommendation from the State. The Texas Court of Criminal Appeals remanded Castillo's application to the trial court for findings of fact and conclusions of law. *See Ex parte Castillo*, No. WR-83,538-1, slip op. at 1 (Tex. Crim. App. App. June 15, 2016), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=14448e51-5308-49a0-91f3-2f3b7feb099e&coa=coscca&DT=OPINION&MediaID=7b2e9bd4-d0c2-42a3-a8b0-ddfb2173f972. After an evidentiary hearing, the trial court recommended Castillo be granted an out-of-time appeal if Castillo's plea was determined to be involuntary. *Id.* at 1–2. The court of criminal appeals concluded Castillo's waiver of appeal was involuntary and granted him the opportunity to file an appeal from his conviction. *Id.* at 2. The court ordered Castillo "returned to that time at which he may give a written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful review." *Id.* The court of criminal appeals advised that all time limits would be calculated as if Castillo's sentence had been imposed on the date the court's mandate issues. *Id.* The court's mandate issued July 11, 2016.

Castillo timely filed a notice of appeal and a motion for new trial on August 10, 2016. In his motion for new trial, Castillo alleged his trial counsel was ineffective by failing to properly investigate his mental health history or obtain expert assistance in order to raise an insanity defense or present mitigating evidence at sentencing. After a hearing, the trial court denied the motion for new trial. Thereafter, Castillo sought review in this court.

ANALYSIS

On appeal, Castillo contends the trial court erred in denying his motion for new trial based upon his claim of ineffective assistance of counsel. He also claims the trial court erred in assessing attorney's fees against him, as there was never any determination he had the ability to pay such fees.

Ineffective Assistance of Counsel

In his first point of error, Castillo asserts the trial court erred in denying his motion for new trial because his appointed trial counsel was ineffective. Castillo contends his trial counsel was ineffective because he failed to properly investigate Castillo's mental health history — specifically by obtaining his mental health records — or obtain expert assistance in order to raise an insanity defense or present mitigating evidence at sentencing. The State responds, arguing Castillo is not entitled to relief because his claim of ineffective assistance of counsel is: (1) beyond the scope of the Texas Court of Criminal Appeals' remand; (2) barred by the law of the case doctrine; and (3) without substantive merit.

Before we analyze the substance of Castillo's ineffective assistance of counsel claim, we must consider the State's contention that our review of this claim is procedurally barred. The State first contends the filing of a motion for new trial — and any subsequent hearing or ruling thereon — exceeded the scope of the decision by the court of criminal appeals to allow Castillo an out-of-

time appeal. The State seems to contend, based on the language below, that Castillo was permitted to file only a notice of appeal:

> Relief is granted. Applicant is entitled to the opportunity to file an out-of-time appeal of the judgment of conviction . . . . Applicant is ordered returned to that time at which he may give a written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal . . . . All time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issues.

Id.

We hold the State's contention is without merit. In its decision, the court of criminal appeals specifically held Castillo was to be returned to the time at which he could file a notice of appeal so he could "obtain a meaningful appeal" and that "[a]ll time limits" were to be calculated as if sentence had been imposed on the date the court's mandate issued. *Id.* at 2. The court specifically stated "*all time limits*" — which would include the deadline for the filing of a motion for new trial — were to be calculated from the date of the court's mandate. Moreover, the court held Castillo was entitled to a "meaningful appeal." The court of criminal appeals has stated many times that a claim of ineffective assistance of counsel must be "firmly founded in the record" and the record must affirmatively demonstrate" the merit of such a claim. *E.g., Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)). In the absence of a full hearing on a motion for new trial asserting ineffective assistance, during which trial counsel is afforded an opportunity to explain his actions, courts will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Thus, in this case, if Castillo was precluded from filing a motion for new trial as the State contends — particularly given it was obvious from his petition for writ of habeas corpus that he intended to raise ineffective assistance of trial counsel — he would *per*

force be denied the right to a “meaningful appeal.” The court of criminal appeals specifically held he was entitled to such an appeal. *Castillo*, No. WR-83,538-1, slip op. at 2. Thus, we hold the State’s contention — the filing of a motion for new trial and the actions subsequent thereto exceeded the scope of the remand — is without merit.

The State also contends Castillo may not raise the issue of ineffective assistance of counsel based on the law of the case doctrine. After Castillo filed his petition for writ of habeas corpus, the court of criminal appeals remanded the matter to the trial court and ordered the trial court to hold a hearing and make findings of fact and conclusions of law regarding whether trial counsel’s conduct was deficient, thereby prejudicing Castillo. *Id.* According to the State, the trial court concluded Castillo’s “rights under the Sixth Amendment had not been violated with the exception that an out-of-time appeal was warranted.” Based on the trial court’s findings, the State argues Castillo’s claims of ineffective assistance of counsel — except as they related to his right to an out-of-time appeal — were “raised and rejected” prior to the hearing on the motion for new trial, and therefore, Castillo is barred by the law of the case doctrine from pursuing them. The State misunderstands the law of the case doctrine.

Under the doctrine, “an appellate court’s resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue.” *State v. Swearingen*, 478 S.W.3d 716, 720 (Tex. Crim. App. 2016) (quoting *State v. Swearingen*, 424 S.W.3d 32, 36 (Tex. Crim. App. 2014)). The doctrine specifically refers to issues resolved by an appellate court, not a trial court. The State is relying on the trial court’s resolution of Castillo’s ineffective assistance of counsel claim. The doctrine does not apply to resolutions by a trial court. *See id.* Thus, the State’s argument based on the law of the case doctrine is without merit. We now proceed to an analysis of the substance of Castillo’s complaints.

Standard of Review

An accused has a constitutional and statutory right to counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.051 (West Supp. 2016). This right includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). However, a defendant is not entitled to "errorless counsel, but rather to objectively reasonable representation." *Lopez*, 343 S.W.3d at 142.

When, as here, an appellant asserts ineffective assistance of counsel in a motion for new trial, an appellate court reviews the trial court's denial of the motion for abuse of discretion, "reversing only if the trial judge's opinion was clearly erroneous and arbitrary." *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012); *see Humphrey v. State*, 501 S.W.3d 656, 659 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). At a hearing on a motion for new trial, the trial court is the sole judge of witness credibility. *See Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001); *Alexander v. State*, 282 S.W.3d 701, 706 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). The appellate court must view the evidence in the light most favorable to the trial court's ruling and reverse only if no reasonable view of the record would support the trial court's finding. *Riley*, 378 S.W.3d at 457; *Humphrey*, 501 S.W.3d at 659. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Riley*, 378 S.W.3d at 457.

To prevail on a claim that trial counsel was ineffective, an appellant must prove: (1) trial counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92; *Villa v. State*, 417 S.W.3d 455, 462–63 (Tex. Crim. App. 2013); *Menefield v. State*, 363 S.W.3d

591, 592 (Tex. Crim. App. 2012). The appellant must prove his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

As to the first prong, judicial scrutiny of trial counsel's performance is highly deferential, and reviewing courts engage in a strong presumption that trial counsel's conduct fell within a wide range of reasonable representation. *Villa*, 417 S.W.3d at 463; *Lopez*, 343 S.W.3d at 142. In other words, we presume trial counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). "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). "Given the difficulty in evaluating trial counsel's performance, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy." *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 100–01 (1955)). Thus, to find trial counsel was ineffective, counsel's alleged deficiencies "must be affirmatively demonstrated in the trial record." *Villa*, 417 S.W.3d at 463; *see Lopez*, 343 S.W.3d at 142. Reviewing courts "must not engage in retrospective speculation." *Lopez*, 343 S.W.3d at 142. It is not enough for the appellant that trial counsel's actions or omissions were "of questionable competence." *Id.*

As to the second prong, a defendant is prejudiced by trial counsel's deficient performance if there is a reasonable probability that but for counsel's deficient performance, the outcome would have been different. *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013); *Lopez*, 343 S.W.3d at 142. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Nava*, 415 S.W.3d at 308; *Lopez*, 343 S.W.3d at 142. Here, Castillo contends trial counsel was deficient in failing to investigate his mental health history or obtain an expert in order to mount an insanity defense. Thus, Castillo would need to prove that but for this failure, there was a reasonable probability he would not have pled guilty as he did. *See Hill v. Lockhart*, 474

U.S. 52, 59 (1985); *Ex parte Ali*, 368 S.W.3d 827, 833 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). Additionally, Castillo claims his counsel was deficient in failing to present his mental health history as mitigating evidence at sentencing. He therefore needed to show there was a reasonable probability the result of his punishment hearing would have been different if trial counsel had presented all the available evidence regarding his mental health history. *See Nava*, 415 S.W.3d at 308; *Lopez*, 343 S.W.3d at 142.

Application

After reviewing Castillo's appellate brief, we hold Castillo has failed to present any substantive argument regarding the second prong of the *Strickland* test. In other words, Castillo has not provided this court with any argument or analysis regarding whether there is a reasonable probability that but for his trial counsel's alleged deficient performance, the result of his plea proceeding or sentencing would have been different. In fact, in his brief Castillo mentions the prejudice prong of *Strickland* only in citations to authority setting out the legal standards applicable to that prong. There is no argument in the brief that but for his trial counsel's alleged deficiencies — failing to properly investigate Castillo's mental health history and hire an expert to pursue an insanity defense or present mitigating evidence at sentencing — there is a reasonable probability he would not have entered a plea or would have been sentenced to something less than the sentence of fifty years imposed by the trial court.

Castillo's failure to advance any argument or analysis relative to the prejudice prong of the *Strickland* test authorizes this court to reject his ineffective assistance of counsel claim. *See Ex parte Martinez*, 195 S.W.3d 713, 730 n.14 (Tex. Crim. App. 2006). In *Martinez*, the Texas Court of Criminal Appeals recognized that when alleging ineffective assistance of counsel, the complaining party's failure to set forth any legal or factual arguments in his brief as to *how* he was prejudiced by trial counsel's alleged deficiencies authorizes the reviewing court to deny relief. *Id.*

Here, Castillo's only argument concerns trial counsel's alleged deficiencies. With regard to the prejudice prong, Castillo provides only reference to the standards he contends are applicable to our review. Castillo has not provided any argument as to how additional investigation into his mental health history or procurement of a mental health expert would have influenced his decision to enter a plea or mitigated a potential sentence. Thus, we are authorized to affirm the judgment on this basis. *See id.*

However, in the interest of justice, we will review the substance of Castillo's complaint. After review, we cannot conclude the trial court abused its discretion in denying Castillo's motion for new trial. Specifically, viewing the evidence in the light most favorable to the trial court's ruling, we cannot conclude the trial court erred in determining trial counsel's representation, was reasonable based on prevailing professional norms. *See Strickland*, 466 U.S. at 688–92; *Villa*, 417 S.W.3d at 462–63.

Counsel is not always required to investigate a defendant's mental history to provide effective assistance of counsel. *See Barnett v. State*, 344 S.W.3d 6, 17 (Tex. App.–Texarkana 2011, pet. ref'd); *Purchase v. State*, 84 S.W.3d 696, 700–01 (Tex. App.–Houston [1st Dist.] 2002, pet. ref'd). In determining the reasonableness of an attorney's investigation, we must consider "the quantum of evidence already known to counsel and whether the known evidence would lead a reasonable attorney to investigate further." *Martinez*, 195 S.W.3d at 721. Although trial counsel has a duty to make reasonable investigations, counsel may also reasonably decide particular investigations are unnecessary. *See id.* A decision not to investigate — or further investigate — must be directly assessed for reasonableness given all the circumstances, "'applying a heavy measure of deference to counsel's judgments.'" *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003)).

We remain mindful that Castillo raised this issue in his motion for new trial, and thus, we are reviewing the trial court's ruling regarding the reasonableness of trial counsel's investigation under an abuse of discretion standard and viewing the evidence in the light most favorable to the trial court's ruling. *See Riley*, 378 S.W.3d at 457; *Humphrey*, 501 S.W.3d at 659. To reverse, we must conclude no reasonable view of the record could support the trial court's decision to deny Castillo's motion for new trial. *See Riley*, 378 S.W.3d at 457; *Humphrey*, 501 S.W.3d at 659.

In denying the motion for new trial, the trial court considered: (1) the affidavit of Castillo's original trial counsel, Deborah Stanton Burke, who withdrew before the plea proceeding; (2) Castillo's mental health records admitted at the original plea proceeding; (3) additional medical records relating to Castillo's mental health issues; (4) the affidavit and testimony of psychologist Dr. Joann Murphey; and (5) the testimony of Pedro Nieto, the attorney who represented Castillo at the time of his plea and sentencing — the attorney who is alleged to have been ineffective. The trial court also took judicial notice, at Castillo's behest, of the court's entire file.

Ms. Burke testified by affidavit that she was concerned about Castillo's mental health. As a result, she requested the court order a competency and sanity evaluation. The trial court granted the request and in December 2011, appointed Dr. Brian Skop to evaluate Castillo. The record shows Dr. Skop submitted reports in which he opined in January 2012 — after interviewing Castillo and reviewing portions of his medical records — that Castillo was neither incompetent to stand trial nor insane. Ms. Burke stated she disagreed with Dr. Skop, and had she remained on the case, she would have retained another expert and obtained Castillo's complete mental health records.

The trial court also heard evidence from Dr. Murphey. Dr. Murphey provided in depth information about Castillo's mental health issues. Her testimony was based on all of Castillo's mental health records — including those not admitted at the original plea hearing — as well as an

interview with Castillo. She detailed his family history, which was troubled according to Castillo, and noted diagnoses over the years for: (1) bipolar disorder; (2) psychotic disorder; (3) oppositional behavior; (4) agoraphobia; (5) post-traumatic stress disorder; (6) a mood disorder; (7) general anxiety disorder; (8) acute situational stress; and (9) depression. Dr. Murphey testified all of these are or could be severe mental diseases or defects, and the records showed some of the diagnoses dated back to the 1990s — depression and anxiety following a head injury — and his psychosis could be dated to 2009 at which time he claimed he heard voices. The others "roughly" occurred from March 2011 to July 2011, not long before Castillo committed the offense in August 2011. Dr. Murphey also discussed Castillo's depression, which apparently existed since the 1990s, and included a suicide attempt. The doctor also noted the numerous medications prescribed for Castillo and advised castillo reported failing to take those medications at times.

Dr. Murphey criticized Dr. Skop's opinion and his report based thereon, opining that reliance on his report was "misplaced" because he did not consider all of Castillo's records. She stated his report was incomplete given his failure to review all of the records, which would have raised concerns about Castillo's mental state at the time of the offense. However, she admitted the records — those reviewed by Dr. Skop and those he did not review — were "consistent actually." Castillo was medicated with anti-psychotics in both hospitals and his major diagnoses are included in both sets of records, though the full records "give a much larger picture of" Castillo's condition. Despite this, she still believes that had Dr. Skop been privy to all of the records, it likely would have generated a different conclusion as to Castillo's sanity.

On cross-examination, Dr. Murphey admitted it was "certainly possible" that introducing information about all of Castillo's mental health issues might have prompted the trial court to "enhance" punishment. She agreed that if the trial court knew about Castillo's long mental health history — given that Dr. Skop had already opined he was competent and sane, it might have

concluded he was a danger to the community and consider it an aggravating circumstance for sentencing. Dr. Murphey also admitted she did not know whether trial counsel considered an insanity defense. She ultimately conceded that even if Dr. Skop had reviewed all of Castillo's records, he might have reached the same conclusions regarding Castillo's sanity.

Pedro Nieto, whose representation of Castillo is challenged in this appeal, testified at the hearing on the motion for new trial. Nieto stated he could not recall whether he initiated it, but he knew "Dr. Skop was involved" and the doctor determined Castillo was neither incompetent nor insane. Nieto initially admitted he did not have access to the additional medical records referenced by Dr. Murphey, but thereafter stated he did not think he did, but he could not recall. When first asked, Nieto agreed there was no strategic reason for failing to present evidence of Castillo's litany of disorders; however, he later clarified and stated it was possible that if he had produced such evidence, the trial court might have sentenced Castillo to more than fifty years' confinement. Nieto further testified the evidence might have been harmful to Castillo, stating that if he thought it would "add fuel to the fire," he would not have pursued it.

Nieto also stated that even in light of all the medical records, it was still impossible to know Castillo's state of mind at the time of the offense. Nieto was unable to recall whether "all of the stuff that Dr. Murphey testified about had been brought to [his] attention" and testified that he was not a psychologist so he "just went by what Dr. Skop said," i.e., Castillo was neither incompetent nor insane. He concluded his statement by reminding the court he was seventy-four-years old and could not "remember very much about that hearing."

Finally, the record establishes portions of Castillo's medical records were admitted into evidence at the original plea hearing. These records noted prior diagnoses in April and May of 2011 for: (1) "depress psychosis-severe;" (2) recurring suicidal ideation; (3) anxiety; (4) opioid and alcohol dependence; (5) major depression; (6) acute psychosis; and (7) visual and auditory

hallucinations. Admittedly, the additional records relied on by Dr. Murphey show Castillo had mental health issues over many years. However, the medical records admitted as an exhibit at the original plea hearing showed Castillo was admitted to the hospital and medicated for mental health issues, including depression, acute psychosis, suicidal ideation, anxiety, and auditory and visual hallucinations. The records also revealed the existence of alcohol and drug dependence. The records introduced covered the months preceding the offense, specifically April and May of 2011 — the offense occurred in August 2011. Thus, even in the absence of the "complete" mental health records, Nieto was aware through the State's exhibit from the plea hearing that Castillo had mental health issues. He also knew about Dr. Skop's conclusions. Moreover, after the plea, a presentence investigation report was prepared and filed. This report notes Castillo reported suffering from depression, anxiety, and psychosis. The report notes a suicide attempt in 1993, and Castillo's attempt to obtain treatment for his psychological issues in 2011. The report states Castillo claimed his anxiety "took over [his] mind, it was out of control." It also references two drugs Castillo was taking for anxiety and depression.

Viewing the foregoing in the light most favorable to the trial court's ruling on the motion for new trial, we cannot conclude the trial court abused its discretion in failing to find Nieto's representation of Castillo deficient. *See Riley*, 378 S.W.3d at 457; *Humphrey*, 501 S.W.3d at 659. When deciding whether Nieto was required to further investigate Castillo's mental health condition — to mount an insanity defense or present mitigating evidence at sentencing, we must consider what he already knew and whether this would have led a reasonable attorney to investigate further. *See Martinez*, 195 S.W.3d at 721. It is undisputed that Nieto knew Castillo had been evaluated for sanity and competency by Dr. Skop, and the doctor had concluded Castillo was neither incompetent nor insane. There is no evidence Nieto failed to review the exhibit admitted at the plea hearing, which contained specific evidence of Castillo's mental health issues.

And, at best, Nieto was unclear as to whether he reviewed any additional records — he simply could not recall. Thus, the trial court could have concluded Nieto was aware of Castillo's mental health issues, but reasonably relied on Dr. Skop's opinion. Given the strong presumption that Nieto's actions were reasonably professional, we hold Castillo failed to prove by a preponderance of the evidence that Nieto's decision to rely on Dr. Skop's opinion regarding the issue of sanity fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688–92; *Villa*, 417 S.W.3d at 462–63.

As to the contention that Nieto was ineffective for failing to investigate in order to produce mitigating evidence at sentencing based on Castillo's long history of mental health, Nieto initially agreed there was no strategy behind his failure to present to the sentencing court evidence of Castillo's litany of disorders. However, he subsequently stated it was possible that if he had produced such evidence, the trial court might have sentenced Castillo to more than fifty years' confinement. Nieto further testified the evidence might have been harmful to Castillo, stating that if he had thought it would "add fuel to the fire," he would not have presented it. Even Dr. Murphey admitted Castillo's long history of mental issues might have been an aggravating factor as opposed to a mitigating factor at sentencing. Thus, we hold Castillo failed to prove by a preponderance of the evidence that Nieto's decision not to advise the trial court during sentencing about Castillo's long history of mental illness fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688–92; *Villa*, 417 S.W.3d at 462–63. An exhibit had already been introduced at the plea hearing establishing Castillo had several mental health issues. Nieto could have believed that producing even more evidence — particularly in light of Dr. Skop's prior determination of sanity — could have "add[ed] fuel to the fire," resulting in an even longer sentence.

Accordingly, we overrule Castillo's first point of error because he failed to set forth any legal or factual arguments in his brief as to *how* he was prejudiced by trial counsel's alleged

deficiencies. *Martinez*, 195 S.W.3d at 730 n.14. However, even if we were to conclude there is sufficient argument in the brief with regard to prejudice, in light of the deferential review mandated with regard to the trial court's ruling, *see Riley*, 378 S.W.3d at 457, and our assessment of counsel's performance, *see Rogers*, 369 S.W.3d at 862, we hold the trial court did not abuse its discretion in denying Castillo's motion for new trial based on ineffective assistance of counsel. Castillo did not prove by a preponderance of the evidence that given what Nieto knew about his mental condition, Nieto's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688–92; *Villa*, 417 S.W.3d at 462–63. At best, Castillo established Nieto's actions and omissions were "of questionable competence," which is insufficient. *See Lopez*, 343 S.W.3d at 142. We overrule his first point of error.

Attorney's Fees

In its judgment, the trial court ordered Castillo to pay $750.00 in attorney's fees. Castillo contends the trial court erred in assessing attorney's fees because there is no evidence Castillo had the ability to pay such fees. The State does not contest Castillo's contention with regard to the assessment of attorney's fees.

A trial court may assess attorney's fees against a defendant who had court-appointed counsel if it determines the defendant has financial resources that enable him to offset, in part or in whole, the costs of legal services provided. *See* TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West Supp. 2016). Under Article 26.05(g), "the defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees." *Cates v. State*, 402 S.W.3d 250, 251 (Tex. Crim. App. 2013) (quoting *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010)); *see Ramirez v. State*, 432 S.W.3d 373, 377 (Tex. App.—San Antonio 2014, pet. ref'd). "Article 26.05(g) requires a *present* factual determination of the defendant's financial resources without speculation about possible

future resources." *Ramirez*, 432 S.W.3d at 377 (emphasis in the original) (citing *Cates*, 402 S.W.3d at 252).

In this case, Castillo filed an "Affidavit of Indigence." In response, the trial court determined he was indigent and appointed counsel to represent Castillo at trial. As we noted in *Ramirez*, "[c]riminal defendants are not entitled to court-appointed counsel unless they are indigent." *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 26.04). Once the trial court found Castillo indigent, he is presumed to have remained indigent for the remainder of the proceedings absent a factual determination of a material change in his financial circumstances. *See id.* (citing *Cates*, 402 S.W.3d at 251; TEX. CODE CRIM. PROC. ANN. art. 26.04(p)).

Our review of the record establishes there was never a finding by the trial court that Castillo's financial circumstances changed and he was able to re-pay the costs of court-appointed counsel. Therefore, there are insufficient facts in the record to rebut Castillo's presumed indigency and justify the assessment of any attorney's fees against him under Article 26.05(g). *See* TEX. CODE CRIM. PROC. ANN. art. 26.05(g). Accordingly, we sustain Castillo's second point of error regarding the imposition of attorney's fees and reform the trial court's judgment to delete the imposition of such fees. *See Ramirez*, 432 S.W.3d at 377.

CONCLUSION

Based on the foregoing, we overrule Castillo's first point of error alleging ineffective assistance of counsel, but sustain his second point of error regarding improper assessment of attorney's fees. Accordingly, we affirm the trial court's judgment as modified to delete the assessment of attorney's fees.

Marialyn Barnard, Justice

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