Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00238-CR

John Anthony **SAENZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR4558
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: March 20, 2019

AFFIRMED AS MODIFIED

On October 16, 2016, San Antonio Police Detective David Neal initiated a traffic stop of a vehicle being driven by Appellant John Anthony Saenz; the paper tags on the vehicle were expired. The detective asked Saenz to exit the vehicle. Saenz ran; a chase ensued; and Saenz was charged and arrested for evading arrest. Based on a search of Saenz's vehicle and the events at the scene, a Bexar County grand jury returned indictments against Saenz for possession of heroin and possession of methamphetamine.

The State elected to try the possession cases separately. On February 27, 2018, Saenz was found guilty by a Bexar County Jury on one count of possession of four to two-hundred grams of methamphetamine, alleged to have occurred on October 16, 2016. After finding both enhancement allegations true, the trial court assessed punishment at twenty-eight years in the Institutional Division of the Texas Department of Criminal Justice. Saenz raises two issues on appeal: (1) ineffective assistance of counsel and (2) the judgment contains clerical errors that, if not corrected, will inure to the substantial detriment of Appellant. We affirm the trial court's judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

The State elected to proceed on the possession of methamphetamine indictment first. The matter was called for trial and jury selection began on February 26, 2018.

A. Motion in Limine

After the jury was sworn, but prior to the State calling its first witness, the parties addressed the heroin discovered in Saenz's vehicle. Trial counsel objected to comments made during the audio portion of a videotape. Both the State and trial counsel had apparently agreed to watch the videotapes the night before and address the trial court with objections the following morning. Trial counsel requested that the videotapes, "where heroin is mentioned," be redacted.

Trial counsel argued that because Saenz was arrested for evading arrest, not heroin, testimony regarding the heroin was more prejudicial than probative. "If it was the heroin that got him arrested, I would understand that it's contextual, but it was not, it was the evading." The State countered that the exchange between an officer and Saenz, in the officer's vehicle, was contextual and proffered the audio recording would include the following:

> Mr. Saenz, is going to say, What am I going to jail for? And Officer Neal—I'm sorry, Officer—yeah, Officer Neal says, The heroin. And the defendant says, And then? And Officer Neal says, Oh, and the evading but that's a misdemeanor so it's

> probably just the heroin. And then about a minute later, defendant says, What's the possession for? And Officer Neal says, The heroin, I already told you. And he says, I know but what's the weight?

The methamphetamine was ultimately found in the back of the officer's vehicle where Saenz was sitting during this conversation. The State argued the evidence was relevant apart from character conformity, but showed Saenz's "knowledge of the drugs."

> Trial Court: I'm very familiar with contextual evidence. . . . If it's all happening at the same time, the heroin['s] coming in because that's, in fact, what he was arrested for and it's going to leave a vacuum. If it were at different times or if his house was searched and the car was—I wasn't going to let it in but if it's all happening at the same convenience store, the car is being searched, the heroin is being found, he has been seen in that car, he runs, they are actually putting him in custody for heroin, for the evading, and then I guess he gets subsequently arrested with another charge for drugs found in the car, in the police car; right?
>
> State: Absolutely.
>
> Trial Court: All right [It's coming in].

B. Testimony Presented at Trial

1. San Antonio Police Department Detective David Neal

On October 1, 2016, San Antonio Police Department Detective David Neal was in a marked patrol vehicle when he initiated a traffic stop of a 2008 Audi with expired paper license plates. After passing several locations, the driver and sole occupant of the vehicle stopped the vehicle at a gas station. At trial, Detective Neal identified Saenz as the driver of the vehicle and described him as "real pale. He was kind of clammy and sweaty. Appeared very nervous."

When Detective Neal requested a driver's license and insurance, Saenz reported he did not have a driver's license. Saenz was instructed to step out of the vehicle. Detective Neal asked Saenz to turn around and place his hands behind his back. As Detective Neal was in the process of handcuffing Saenz, Saenz "started to turn around and run." Detective Neal chased Saenz for approximately fifty to seventy-five yards, keeping his eye on Saenz's hands at all time to ensure

Saenz did not reach for a weapon. When Detective Neal caught up with Saenz, a civilian assisted the officer in detaining and placing handcuffs on Saenz.

While Detective Neal was restraining Saenz, Officer Clint Johnson arrived at the scene. Detective Neal frisked Saenz for weapons. Saenz was placed in the back of Officer Johnson's vehicle and transported back to the gas station. Detective Neal walked the route to ensure nothing fell out of Saenz's pockets and that Saenz had not thrown anything out of his pockets.

Detective Neal testified the dashcam videotape recorder on his patrol unit was recording the entire time he was apprehending Saenz. The officer confirmed, and the officer's dashcam videotape camera documented, an unrelated individual attempted to steal Saenz's vehicle between the time Saenz exited the vehicle and the officers returned to the gas station. The individual was in Saenz's Audi for approximately five to ten seconds, but nothing appeared to be removed from the vehicle.

Detective Neal further testified regarding the department's protocols when a vehicle is towed following an arrest. Standard procedure requires the officers inventory the contents of the vehicle prior to the vehicle's release. During the inventory of Saenz's vehicle, Detective Neal located a cigarette case with a bag of heroin in the driver's door pocket.

Saenz was transferred from Officer Johnson's vehicle to Detective Neal's vehicle and *Mirandized*. Detective Neal testified Saenz asked what he was "going to jail for." The officer told Saenz "[you're] going to jail for the heroin I found in [your] car and for evading arrest." Detective Neal further testified that when Saenz was told that he was being arrested for the heroin, Saenz never questioned the existence of the heroin. To the contrary, Saenz asked, "Well, what was the weight on the heroin."

2. San Antonio Police Department Officer Clint Johnson

Officer Clint Johnson testified he responded to a call that an officer was chasing or fighting with an individual. As Officer Johnson arrived, Detective Neal was attempting to handcuff an individual. Officer Johnson identified Saenz as that individual. After being restrained, Saenz was placed in the back of Officer Johnson's vehicle because it was the closest to where they were located at the end of the chase. Prior to placing Saenz in the back of the vehicle, Saenz was frisked for officer safety to ensure he did not have a weapon and was not a threat to the officers. Officer Johnson acknowledged the officers did not conduct a thorough search or empty his pockets. The officers' first step was to secure the original scene at the gas station and collect evidence.

Officer Johnson further testified that on October 16, 2016, as he does prior to every shift, he conducted a precheck of his vehicle.

> [B]efore I gas up my vehicle, I move all of my equipment into the car, will move the seats, tilt them forward, look underneath and sure that there is no contraband in there. We'll check underneath them as well. This particular car is an SUV so it has a little flap of fabric that goes around the edge. So if you pull that up out of the way, you can shine your flashlight down underneath and ensure there is nothing underneath the seat.

Officer Johnson verified that on the day in question his vehicle was "clear" and no one had been in the vehicle prior to Saenz.

After transferring Saenz to Detective Neal's vehicle, Officer Johnson conducted a search of his vehicle, like the one at the beginning of his shift. He explained that at the end of every arrest, a pre-inventory search is conducted to ensure "the seat's clear for the next prisoner that comes in the vehicle so that way there's no contraband there." During his search, under the passenger side seat where Saenz was sitting, Officer Johnson located three small zip-loc style bags, each containing a crystalline substance. Based on his training and experience, the officer immediately suspected the substance was methamphetamine.

Officer Johnson subsequently reviewed the camera in his patrol vehicle that captures the back seat. The officer testified Saenz was in handcuffs in the back seat when the officer observed Saenz "raise and arch up his midsection like so in a plank motion. And then [Officer Johnson] observed him digging down what appeared to be his waistline into the back side of his pants. After a few moments, he sat back up, [and] continued to look around." Shortly thereafter, Saenz was taken out of Officer Johnson's vehicle and placed in Detective Neal's vehicle for transport.

We first address Saenz's ineffective assistance of counsel issue on appeal.

INEFFECTIVE ASSISTANCE OF COUNSEL

Saenz's ineffective assistance of counsel argument is based on two grounds. First, Saenz contends trial counsel's argument, made during the motion for directed verdict, can only be construed to mean that trial counsel misinterpreted the law and believed, absent "video evidence" of Saenz hiding the methamphetamines in the vehicle, the State could not prove their case. Second, although trial counsel filed a motion in limine to exclude the officer's testimony regarding discovery of the heroin in Saenz's vehicle, trial counsel's failure *during trial* to object to the officer's testimony regarding the heroin's discovery resulted in a failure to preserve error for appellate review.

A. Standard of Review

To determine whether defense counsel's representation was ineffective, the United States Supreme Court set out a two-prong test: (1) "[t]he defendant must show that counsel's performance was deficient" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *accord Ex parte Moore*, 395 S.W.3d 152, 157–58 (Tex. Crim. App. 2013); *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012). To prove the first prong, deficient performance, Saenz must establish defense counsel's performance "'fell below an objective

standard of reasonableness' under prevailing professional norms and according to the necessity of the case." *Ex parte Moore*, 395 S.W.3d at 157 (quoting *Strickland*, 466 U.S. at 687–88). To establish harm, Saenz "must demonstrate that he was prejudiced by his attorney's performance or that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. at 158 (footnoted omitted) (quoting *Strickland*, 466 U.S. at 694).

Appellate courts are tasked to view matters "from the viewpoint of an attorney at the time he acted, not through 20/20 hindsight." *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012); *accord Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014). Accordingly, we are "highly deferential" toward defense counsel's actions and we "presum[e] that counsel's actions fell within the wide range of reasonable and professional assistance." *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007) (citing *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002)).

B. Motion for Directed Verdict

1. Arguments of the Parties

Saenz contends trial counsel's argument during the motion for directed verdict is evidence that trial counsel "believed" that to convict Saenz the State was required to produce a video depicting Saenz "stuffing evidence down behind the seat." The State counters that Saenz's appellate argument is taken out of context, undeveloped, and ignores the other actions taken by trial counsel throughout trial. The State further argues trial counsel was attempting to argue that no reasonable juror could find the essential elements, beyond a reasonable doubt, based on the lack of anyone seeing Saenz secreting the drugs in the patrol car.

2. Standard of Review

We review trial counsel's actions during the directed verdict under the same standard as a legal sufficiency review—"review[ing] all of the evidence in the light most favorable to the verdict to decide whether . . . a rational jury could have found the essential elements of the offense beyond a reasonable doubt." *Hines v. State*, 383 S.W.3d 615, 623 (Tex. App.—San Antonio 2012, pet. ref'd); *see also Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011).

3. Counsel During Motion for Directed Verdict

During the motion for directed verdict, trial counsel argued the evidence was insufficient to support the State's theory that Saenz "stuffed" the methamphetamines between the patrol vehicle's seat cushions.

> And, I mean, I—I don't know if you were watching the video when I—when we were watching the video, but I think there's visually sufficient evidence to show that he didn't—he didn't stuff anything down behind the seat. I mean, you just didn't see it. So I don't think that they've proven the case sufficiently to be able to go to the jury.

The trial court denied the motion for directed verdict.

4. Analysis

Saenz contends trial counsel's argument can only be interpreted that counsel "believed appellant could not be convicted of knowing possession in this case unless the State produced a video depicting appellant 'stuffing evidence down behind the seat.'" Saenz argues "the decision to bank so heavily upon counsel's meritless belief was objectively unreasonable. Indeed, no competent trial counsel would have gambled her client's liberty upon such a baseless defense."

Trial counsel was very involved during the trial and the record suggests trial counsel maintained a three-fold trial strategy throughout trial: (1) Saenz was a "young, dumb kid" who "bolted" from the car because he was scared; (2) the heroin was "dumped" by the guy trying to steal Saenz's car when he realized the parking lot was full of police cars; and (3) if Saenz had

methamphetamines in his pocket or on his person when the officer stopped his vehicle, logic dictates Saenz would have disposed of the narcotics or thrown them while he running from the officer.

Additionally, trial counsel appeared to be familiar with the evidence, conducted thorough voir dire of the venire panel, participated in discovery culminating in videotapes being redacted in both video and sound, lodged several objections throughout the trial, and conducted extensive cross-examination of witnesses. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (explaining appellate courts are "especially hesitant to declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation behind counsel's actions—whether those actions were of strategic design or the result of negligent conduct"). Without a developed record, this court cannot presume to know trial counsel's strategies, beliefs, plans, or understandings of the law. *See Bone*, 77 S.W.3d at 833.

Although Saenz argues trial counsel's directed verdict can only be interpreted as ineffective, we disagree. As the State points out, trial counsel may well have believed that because there was a video of Saenz, and yet no methamphetamines could be seen at any point, the jury could struggle to find the essential elements, beyond a reasonable doubt, that Saenz secreted the drugs in the patrol car. *See Adames*, 353 S.W.3d at 860. Without a more developed record, we cannot conclude Saenz established trial counsel's performance "'fell below an objective standard of reasonableness' under prevailing professional norms and according to the necessity of the case." *See Moore*, 395 S.W.3d at 157 (quoting *Strickland*, 466 U.S. at 687–88).

C. Failure to Object to State Offered Evidence

1. Arguments of the Parties

On appeal, Saenz contends that although trial counsel objected to the mention of the heroin evidence through a motion in limine, because trial counsel failed to object again during trial, trial counsel failed to preserve anything for appellate review. *See* TEX. R. APP. P. 33.1(a) (requiring complainant to object at the time the complained-of evidence is offered at trial); *see also Fuller v. State*, 253 S.W.3d 220, 232–33 (Tex. Crim. App. 2008). The State counters the admission of the evidence was offered during a contested Texas Rules of Evidence Rule 103(b) hearing before the trial court.

2. Motion in Limine

In his motion in limine, Saenz argued any subsequent discovery of heroin in Saenz's vehicle was not contextual because Saenz was arrested for evading arrest.

> [B]asically the heroin is not really what got him arrested, it was the evading arrest, not the heroin, so it's not really contextual to the—to the arrest in this case; that it would be much more prejudicial than probative. If it was the heroin that got him arrested, I would understand that it's contextual, but it was not, it was the evading.

The State countered that the methamphetamine for which Saenz was on trial was found in the back of Officer Johnson's vehicle. While Saenz was under arrest and detained in Officer Johnson's vehicle, the officers were securing the scene and heroin found in driver's side door of Saenz's vehicle. During the video, Saenz asked Officer Neal what charges he would face. The officer explained that because the evading arrest was a misdemeanor, the charges would probably only be for the possession of heroin. The State proffered the following testimony on behalf of Officer Neal:

> And then about a minute later, [Saenz] says, What's the possession for? And Officer Neal says, The heroin, I already told you. And [Saenz] says, I know but what's the weight?

The State contends Saenz's statement proves the heroin evidence is contextual and provides relevance apart from character conformity. The evidence demonstrates a plan, knowledge, and absence of mistake and is thus more probative than prejudicial "because it goes to show [Saenz's] knowledge of the drugs." In other words, "the fact that [Saenz] knew about the other drugs that were in his car goes to show that he is in possession of drugs, he's a drug user."

The trial court held the evidence was admissible because "it's all happening at the same time," and Saenz was arrested for the heroin; the evidence is contextual and omitting the evidence would "leave a vacuum."

3. Analysis

Saenz contends the harm in trial counsel's raising the objection during the motion in limine was that it allowed Officer Neal to freely discuss the heroin located in Saenz's vehicle without objection from trial counsel. Saenz's appellate argument is thus a question of trial counsel's failure to object to inadmissible evidence during Officer Neal's testimony. When a defendant claims his counsel was ineffective for failing to object to evidence, he generally must show that the evidence was inadmissible. *See Ortiz v. State*, 93 S.W.3d 79, 83 (Tex. Crim. App. 2002).

An appellate court reviews a trial court's admission of evidence under an abuse of discretion standard. *Fowler v. State*, 544 S.W.3d 844, 848 (Tex. Crim. App. 2018); *Prible v. State*, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005); *Watson v. State*, 421 S.W.3d 186, 189 (Tex. App.—San Antonio 2013, pet. ref'd). "The trial court does not abuse its discretion by admitting evidence unless the court's determination lies outside the zone of reasonable disagreement." *Watson*, 421 S.W.3d at 190 (citing *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007)).

Extraneous offense evidence may be admissible as same-transaction contextual evidence, where "several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction." *Prible*, 175 S.W.3d at 731 (quoting *Rogers v. State*, 853

S.W.2d 29, 33 (Tex. Crim. App. 1993)). "In that situation, 'the jury is entitled to know all [the] relevant surrounding facts and circumstances of the charged offense; an offense is not tried in a vacuum.'" *Id*. (quoting *Moreno v. State*, 721 S.W.2d 295, 301 (Tex. Crim. App. 1986)).

Affording proper deference, we cannot conclude the trial court abused its discretion or its determination that the evidence was same-transaction contextual evidence outside the zone of reasonable disagreement. *See Fowler*, 544 S.W.3d at 848; *Watson*, 421 S.W.3d at 189. Similarly, Saenz cannot show trial counsel's failure to object to the evidence offered during Officer Neal's testimony was a deficient performance under *Strickland*'s first prong. *See Moore*, 395 S.W.3d at 157 (quoting *Strickland*, 466 U.S. at 687–88).

D. Prejudice

Upon a review of the entire record, we conclude Saenz failed to demonstrate *Strickland*'s first requirement—the deficient performance of trial counsel. *See Moore*, 395 S.W.3d at 157 (quoting *Strickland*, 466 U.S. at 687–88). Because Saenz failed to show that trial counsel's performance was deficient, he failed to meet *Strickland*'s first prong; we thus need not address prejudice. *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

MODIFICATION OF THE JUDGMENT

The record supports, and the parties agree, the judgment should be modified to correct clerical errors. This court is vested with the authority to modify an incorrect judgment to make the record speak the truth when we have the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd).

We have compared the judgment with the record in this case[1] and agree with the parties that the judgment should include the following modifications:

Offense for which Defendant Committed: POSS CS PG 4 GRAMS TO 200 G (HABITUAL)

Statute for the Offense: 481.115(d) HSC

Degree of Offense: 2ND

Plea to 1st Enhancement: DEFENDANT DID NOT ENTER A PLEA

Plea to 2nd Enhancement: DEFENDANT DID NOT ENTER A PLEA

Findings on 2nd Enhancement: TRUE TO HABITUAL

CONCLUSION

Having overruled each of the issues raised under ineffective assistance of counsel, we affirm the trial court's judgment as modified.

Patricia O. Alvarez, Justice

DO NOT PUBLISH

[1] Although the State did not respond to Saenz's modification issue in the State's brief, the Supplemental Clerk's Record filed on December 4, 2018, includes a Motion Nunc Pro Tunc requesting the trial court enter the same changes identified in Saenz's briefing and an amended trial court judgment entered on November 13, 2018. Any such changes, however, are properly before this court and not the trial court. *See* TEX. R. APP. P. 25.2(g).