Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00601-CR

Edwin **MEJIA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2019CR0740
Honorable Ray Olivarri, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: May 13, 2020

AFFIRMED

The sole issue presented on appeal is whether trial counsel rendered ineffective assistance of counsel by failing to: (1) request to test the defendant's cell phone prior to trial; (2) subpoena business records from Instagram; and (3) object to the submission of Count III of the indictment in the jury charge. We affirm the trial court's judgment.

BACKGROUND

The victim H.S. lived with her mother in a house two houses down from her aunt's house. Mejia was the boyfriend of H.S.'s aunt.

At trial, H.S. testified she was wearing only a towel as she was preparing to shower when Mejia entered her home without permission, threw her on a bed, removed her towel, touched her breasts, and penetrated her vagina with his penis. Mejia then used the towel H.S. had been wearing to wipe his penis. Subsequent testing established Mejia's DNA was present in semen that was on the towel. H.S. was fourteen years old when the assault occurred.

Mejia confessed to having sexual intercourse with H.S. when he was interviewed by a detective on the day the assault occurred. At trial, however, Mejia denied having sexual intercourse with H.S. Instead, Mejia testified he went to H.S.'s house in response to a message from H.S. about building a shelf for her and left the house after H.S. removed the towel she was wearing.

Mejia was charged in a four count indictment with burglary of a habitation, sexual assault of a child, and two counts of indecency with a child. A jury found Mejia guilty of all four offenses; however, based on defense counsel's argument that Count III of the indictment was a lesser included offense of Count II, the trial court only sentenced Mejia for the offenses charged in Counts I, II, and IV. Although Mejia filed a motion for new trial, the motion did not raise ineffective assistance of counsel as a ground. In addition, the record does not contain any indication that a hearing was held on the motion.

APPLICABLE LAW

"To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate two things: deficient performance and prejudice." *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). An appellant "bears the burden of proving by a preponderance of the evidence that counsel was ineffective." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To establish deficient performance, an appellant must show counsel's assistance "fell below an objective standard of reasonableness." *Id*. at 812. To establish prejudice, an appellant

"must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "If the deficient performance might have affected a guilty verdict, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Miller*, 548 S.W.3d at 499 (internal quotation marks omitted).

An appellant must overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Thompson*, 9 S.W.3d at 813. In order to defeat this presumption, "[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id*.

"Trial counsel should generally be given an opportunity to explain his actions before being found ineffective." *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). "In the face of an undeveloped record, counsel should be found ineffective only if his conduct was so outrageous that no competent attorney would have engaged in it." *Id*. (internal quotation marks omitted).

"A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal." *Thompson*, 9 S.W.3d at 813. "In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel." *Id*. at 813–14.

ANALYSIS

Mejia first contends trial counsel was ineffective in failing to request to test his cell phone prior to trial and in failing to subpoena business records from Instagram. Mejia contends the testing and Instagram records would establish H.S. called or messaged him asking him to come to her house which would support Mejia's testimony at trial.

As is the case in many direct appeals, the undeveloped record in this case fails to defeat the presumption of effective assistance because the record contains no showing that the cell phone test or Instagram records would have produced evidence supporting Mejia's testimony. Instead, the record establishes the State extracted information from Mejia's cell phone which was made available to Mejia. "Speculation about what other evidence might or might not have been available is precisely why ineffective assistance of counsel claims should rarely be brought on direct appeal." *Bone v. State*, 77 S.W.3d 828, 834 n.21 (Tex. Crim. App. 2002).

Mejia also contends trial counsel was ineffective in failing to object to the inclusion of Count III in the jury charge at the guilt/innocence phase of trial. Mejia acknowledges the trial court did not sentence him on Count III based on a double jeopardy concern trial counsel raised before the punishment phase of trial. Nevertheless, Mejia asserts he was prejudiced by the inclusion of the count in the jury charge because the jury believed Mejia committed four separate offenses.

Even if we assume trial counsel's performance was deficient in failing to object to the inclusion of Count III in the jury charge, the question becomes "whether there is a reasonable probability that, absent [that error], the factfinder would have had a reasonable doubt respecting guilt." *Miller*, 548 S.W.3d at 499 (internal quotation marks omitted). Based on the evidence presented at trial, we disagree that such a reasonable probability existed. Furthermore, we note "[w]hen an individual is convicted of two offenses that are the 'same' for double jeopardy purposes, the appropriate remedy is to affirm the conviction for the 'most serious' offense and to vacate the other conviction." *Shelby v. State*, 448 S.W.3d 431, 440 (Tex. Crim. App. 2014). Here, the trial court already provided that remedy by not sentencing Mejia for the indecency with a child offense charged in Count III of the indictment.

CONCLUSION

The trial court's judgment is affirmed.

Beth Watkins, Justice

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