COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-12-00576-CR

PATRICIA ELIZABETH HARKCOM — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 355TH DISTRICT COURT OF HOOD COUNTY
TRIAL COURT NO. CR12165

MEMORANDUM OPINION[1] ON REMAND

This is an appeal from a state-jail-felony conviction for possession of less than one gram of methamphetamine.[2] In one issue, appellant Patricia Elizabeth

[1]*See* Tex. R. App. P. 47.4.

[2]*See* Tex. Health & Safety Code Ann. § 481.115(a), (b) (West 2010). We originally dismissed this appeal for want of jurisdiction, but the court of criminal appeals reversed our judgment and remanded the appeal for further proceedings. *See Harkcom v. State*, No. 02-12-00576-CR, 2014 WL 4923003, at

Harkcom argues that she received ineffective assistance of counsel at trial. Because appellant has not shown that her trial counsel's representation was constitutionally deficient, we affirm.

Background Facts

On New Year's Eve in 2011, Department of Public Safety Trooper Benjamin Chase Neville pulled over a car in which appellant was a passenger because it did not have a working license plate lamp. Upon walking to the car, Trooper Neville saw a sealed black bag in the rear seat. Trooper Neville asked the driver, Julie Underhill, to follow him back to his patrol car to run her driver's license, leaving appellant alone in the car.

After returning to the car to question appellant, Trooper Neville saw her lighting a cigarette, which indicated to him that she was nervous. Appellant did not sustain eye contact with Trooper Neville and did not seem to be comfortable around him. Trooper Neville discovered an outstanding warrant for appellant's arrest, and he arrested her. He patted her down and found close to $300 in cash. He also looked inside her purse and found cash, prescription pills packaged in small plastic baggies,[3] prescription pill bottles, and cut drinking

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*4 (Tex. App.—Fort Worth Oct. 2, 2014), *rev'd*, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016).

[3]Trooper Neville testified that these pills looked like they were packaged to be sold. Although appellant had filled a prescription for one hundred pills on the day before her arrest, only thirty-five pills were in that prescription's bottle on the day of the arrest.

straws containing white powdery residue. Finding these items led Trooper Neville to believe that appellant was engaged in the sale of drugs.

When Trooper Neville searched the area surrounding appellant's seat in the car, he noticed that the previously zipped bag in the back seat was now open, and another officer saw a glass pipe and a small plastic baggie of methamphetamine (as later confirmed by a chemist) now in plain view that had not been in view at the beginning of the stop. Trooper Neville arrested both Underhill and appellant for possession of less than one gram of methamphetamine. After a grand jury indicted appellant for that offense, she pled not guilty and proceeded to trial.

At trial, Trooper Neville testified that he believed that appellant had possessed the black bag and its contents, including the methamphetamine, explaining, "Well, I knew while I had [Underhill] inside my patrol car, the only person that could have opened the bag would've been [appellant], because when we made our approach to the vehicle prior to searching, the bag had been opened." After considering the parties' evidence and arguments, the jury convicted appellant. The jury then heard more evidence and arguments concerning her punishment (including evidence concerning her criminal history and testimony from her husband) and assessed twenty-four months' confinement along with a fine. The trial court sentenced her accordingly.

While represented by new counsel, appellant filed a motion for new trial on the ground of ineffective assistance from her trial counsel. The trial court held an

evidentiary hearing on the motion for new trial and denied it. Appellant brought this appeal.

Ineffective Assistance of Counsel

In one issue, appellant argues that her trial counsel's representation was constitutionally ineffective for five reasons: (1) counsel failed to subpoena and call a crucial witness, (2) counsel failed to object to the introduction of evidence regarding appellant's prescription medication, (3) counsel failed to request a limiting instruction on that evidence, (4) counsel failed to thoroughly cross-examine Trooper Neville, and (5) counsel failed to conduct a rigorous voir dire.

The Sixth Amendment to the United States Constitution affords criminal defendants the right to reasonably effective assistance of counsel. U.S. Const. amend. VI; *Hines v. State*, 144 S.W.3d 90, 92 (Tex. App.—Fort Worth 2004, no pet.). To establish ineffective assistance of counsel, appellant must show by a preponderance of the evidence that her counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced her defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013); *Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999). Unless appellant makes both showings, it cannot be said that counsel's representation was ineffective. *See Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). However, a reviewing court need not address both components to complete the analysis. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct was not deficient but rather the product of sound trial strategy. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). In evaluating the effectiveness of counsel under the deficient-performance prong, we look to the totality of the representation rather than examining the isolated acts or omissions of trial counsel. *Scheanette v. State*, 144 S.W.3d 503, 509 (Tex. Crim. App. 2004), *cert. denied*, 543 U.S. 1059 (2005). Effective assistance does not mean perfect or errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). The issue is whether counsel's assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. *See Strickland*, 466 U.S. at 688–89, 104 S. Ct. at 2065; *Nava*, 415 S.W.3d at 307.

An ineffective-assistance claim must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). As such, direct appeal is usually an inadequate vehicle for raising an ineffective-assistance-of-counsel claim because the record is generally underdeveloped. *Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012); *Thompson*, 9 S.W.3d at 813–14. Ordinarily, the appellant cannot overcome the presumption that counsel's actions were the result of sound trial strategy absent evidence in the record of the attorney's reasons for his conduct. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

It is not appropriate for an appellate court to simply infer ineffective assistance based upon unclear portions of the record or when counsel's reasons for failing to do something do not appear in the record. *Menefield*, 363 S.W.3d at 593; *Mata v. State*, 226 S.W.3d 425, 432 (Tex. Crim. App. 2007). Trial counsel "should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Menefield*, 363 S.W.3d at 593. If trial counsel is not given that opportunity, we should conclude that counsel's performance was deficient only if the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308; *Coffman v. State*, 465 S.W.3d 797, 800 (Tex. App.—Fort Worth 2015, no pet.).

Failure to subpoena and call witness

Appellant argues she received ineffective assistance of counsel because trial counsel failed to subpoena and call a crucial witness during trial. Specifically, appellant believes trial counsel should have called Richard Trotter to testify as the owner of the car in which appellant was a passenger at the time of her arrest. During the hearing on appellant's motion for new trial, Trotter testified that his company owned the car that appellant had been riding in and that the company had regularly loaned the car to several employees, including Underhill.[4] Trotter testified that appellant's trial counsel never contacted him

[4]At the hearing on her motion for new trial, appellant testified that at least "20 some-odd employees" had authority to drive that car. From Underhill's statements on a video recording of appellant's detention and arrest, the jury

before the trial. Appellant testified that she told trial counsel about Trotter and gave counsel his telephone number and address. Trial counsel, who still represented appellant on other charges at the time of the hearing, testified that he talked to Trotter before trial and that the focus of those discussions was attempting to persuade Underhill (Trotter's employee) to testify. Trial counsel indicated that he did not believe Trotter would make a good witness because he was hard of hearing[5] and because he had loaned the car to Underhill. He also testified that his focus, upon appellant's request, was persuading Underhill to voluntarily testify. Counsel testified that he did not want to subpoena Underhill because he has "learned that if you make people show up, sometimes you're sorry."

Appellant contends that trial counsel should have called Trotter as a witness because he could have provided exculpatory evidence. A defendant's counsel has a duty to investigate and to interview potential witnesses. *See Ex parte Cano*, No. 04-08-00203-CR, 2008 WL 4500306, at *4 (Tex. App.—San Antonio Oct. 8, 2008, pet. ref'd) (mem. op., not designated for publication). But the decision whether to present witnesses is largely a matter of trial strategy. *Lair v. State*, 265 S.W.3d 580, 594 (Tex. App.—Houston [1st Dist.] 2008, pet.

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heard that the car she was driving was a company vehicle and that other people had access to the car.

[5]The State asked trial counsel, "[D]id you talk to [Trotter] about the possibility of testifying?" Trial counsel answered by stating, "No. He . . . had the same problem on the telephone that he had, I'm talking about hearing . . . ."

ref'd); *see Rodriguez v. State*, No. 02-13-00417-CR, 2014 WL 5492728, at *3 (Tex. App.—Fort Worth Oct. 30, 2014, no pet.) (mem. op., not designated for publication). We must not second-guess legitimate strategic or tactical decisions made by counsel during trial, but we must rather generally rest on the strong presumption that trial counsel acted reasonably. *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008).

The record from the hearing on appellant's motion for new trial confirms trial counsel's testimony that Trotter had a hard time hearing and therefore lends support to trial counsel's opinion that Trotter would not be a good witness. Also, trial counsel could have reasonably believed that he could present the defense of Underhill's exclusive responsibility for the methamphetamine without calling Trotter. As gleaned from trial counsel's closing argument, appellant's principal theory at trial was that Underhill had exclusive possession of the methamphetamine and associated paraphernalia. Trotter's testimony would not have significantly advanced counsel's strategy that Underhill, rather than appellant, possessed the methamphetamine. Because trial counsel expressed a reasonable strategic reason for not calling Trotter to testify, appellant has not overcome the presumption that counsel's conduct was reasonable. *See id.*

Where the record is silent

Appellant also argues she received ineffective assistance of counsel because trial counsel did not object to the admission of evidence regarding her prescription medication, did not request a limiting instruction on that evidence,

did not thoroughly cross examine Trooper Neville, and did not conduct a rigorous voir dire. Trial counsel's reasoning behind the conduct that comprises these remaining theories of ineffective assistance is absent from the record. When the record is silent, we must examine whether counsel's conduct was "so outrageous that no competent attorney would have engaged in it." *See Nava*, 415 S.W.3d at 308.

The record reflects that the State's apparent purpose for eliciting the testimony about the prescription medication was to link appellant with the methamphetamine and not as character evidence as appellant argues. *See Evans v. State*, 202 S.W.3d 158, 161–62 & n.12 (Tex. Crim. App. 2006) (stating that when determining whether a defendant is sufficiently linked to narcotics, the factfinder may consider whether the defendant possessed other drugs or contraband when arrested). But even if we were to conclude that counsel should have objected to the evidence about appellant's prescription medication, an isolated failure to object to procedural mistakes or improper evidence does not constitute ineffective assistance of counsel. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984); *Lopez v. State*, 80 S.W.3d 624, 630 (Tex. App.—Fort Worth 2002), *aff'd*, 108 S.W.3d 293 (Tex. Crim. App. 2003). Regardless, the record is silent as to trial counsel's reasoning for not objecting; absent his reasoning, appellant fails to rebut the presumption that counsel acted reasonably. *See Thompson*, 9 S.W.3d at 813–14; *Lopez*, 80 S.W.3d at 630; *see*

also Gamble v. State, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (declining to speculate on various failures to object to evidence).

Likewise, counsel did not request a limiting instruction on the evidence about the prescription medication, and the record does not contain counsel's reasons for not requesting such an instruction. When the record is silent on trial counsel's reasons for not seeking a limiting instruction, it is reasonable to conclude that the decision was the product of some strategic motive. *See, e.g.*, *Agbogwe v. State*, 414 S.W.3d 820, 837–38 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that on a silent record it was reasonable to conclude counsel believed seeking a limiting instruction would draw further attention to the evidence); *see also Aldaba v. State*, 382 S.W.3d 424, 433 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) ("[B]ecause the record does not reflect trial counsel's reasons for not requesting the limiting instruction, there is no basis for concluding trial counsel did not exercise reasonably professional judgment."), *cert. denied*, 559 U.S. 979 (2010); *Ali v. State*, 26 S.W.3d 82, 88 (Tex. App.—Waco 2000, no pet.) (holding that a defendant did not establish ineffective assistance of counsel when counsel failed to request a limiting instruction but the record was silent as to the reason for that failure). Thus, we cannot conclude that trial counsel was ineffective for not requesting a limiting instruction.

Appellant also contends that trial counsel was ineffective because his cross-examination of Trooper Neville was not extensive. During cross-examination of Trooper Neville, trial counsel asked only a handful of questions.

Cross-examination is inherently risky, and "a decision not to cross-examine a witness is often the result of wisdom acquired by experience in the combat of trial." *Ex parte McFarland*, 163 S.W.3d 743, 756 (Tex. Crim. App. 2005). The suggestion that counsel should have conducted cross examination differently does not rebut the presumption that counsel acted reasonably, especially given the fact that counsel was not given the opportunity to explain his rationale for how he questioned Trooper Neville. *See Resendiz v. State*, 112 S.W.3d 541, 548 (Tex. Crim. App. 2003); *see also Nava v. State*, Nos. 11-12-00115-CR, 11-12-00116-CR, 2013 WL 4052560, at *4 (Tex. App.—Eastland Aug. 8, 2013, no pet.) (mem. op., not designated for publication) ("The extent of cross-examination does not prove ineffective assistance."); *Barragan v. State*, No. 01-93-01137-CR, 1994 WL 719778, at *3 (Tex. App.—Houston [1st Dist.] Dec. 29, 1994, no pet.) (not designated for publication) ("Whether to cross-examine a witness and the extent of cross-examination are prime examples of trial strategy.").

Finally, appellant argues that counsel's voir dire was insufficient, although she concedes that "this court may not have a sufficient record to find [counsel] ineffective from his voir dire questioning." To begin, the State conducted an extensive voir dire. The State questioned veniremembers about whether they knew appellant's attorney or the trial's potential witnesses, about their occupations, about their past experiences with law enforcement (as a victim or otherwise), about their understanding of the elements of the offense, about whether they had previously served on juries in criminal trials, about their

opinions on legalizing marijuana or methamphetamine, about their understanding of appellant's Fifth Amendment right against compelled self-incrimination, about whether they could consider the full range of punishment, and about their opinions on the best rationale for punishment in criminal cases.

Appellant's counsel questioned veniremembers about whether they had experienced a "change in philosophy of life"; he asked them, for example, about whether they had changed religious beliefs from childhood to adulthood. Counsel also asked which members believed they could be fair and asked questions regarding veniremembers' occupations and prior jury service. Finally, counsel conversed with the veniremembers about their understanding of the definition of "possession" of illegal substances.

At the hearing on appellant's motion for new trial, appellant did not question counsel concerning his voir dire strategy. On appeal, appellant does not specify what questions counsel should have asked veniremembers but did not. Where the record provides no insight into counsel's reasoning, failure to ask questions in voir dire believed by the defendant to be important does not indicate that counsel's performance was deficient or that it rose to a level so outrageous that no competent attorney would have engaged in it. *Harrison v. State*, 333 S.W.3d 810, 814 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd), *overruled on other grounds by Stairhime v. State*, 463 S.W.3d 902, 908 (Tex. Crim. App. 2015); *see also Jackson v. State*, 491 S.W.2d 155, 156 (Tex. Crim. App. 1973) (stating that trial strategy could dictate the extent of voir dire). On this limited

record, we cannot conclude, with respect to counsel's performance in voir dire, that counsel's conduct was deficient; the conduct was not so outrageous that no competent attorney would engage in it. *See Nava*, 415 S.W.3d at 308.

For all of the reasons stated above, appellant has not established that the totality of her trial counsel's representation was constitutionally deficient. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Nava*, 415 S.W.3d at 307–08; *Scheanette*, 144 S.W.3d at 509. We overrule her only issue.

Conclusion

Having overruled appellant's only issue, we affirm the judgment of the trial court.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and MEIER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: July 21, 2016