# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-16-00034-CR**

THOMAS DANIEL WHITE — APPELLANT

V.

THE STATE OF TEXAS — STATE

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FROM THE 30TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 55,357-A

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## MEMORANDUM OPINION[1]

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Appellant Thomas Daniel White appeals his conviction for retaliation.[2] In one point, he contends that his trial counsel was ineffective for failing to investigate and retain an expert to testify about appellant's mental state at the time of the offense. We affirm.

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

[2]*See* Tex. Penal Code Ann. § 36.06(a)(1)(A) (West 2016).

## Background Facts

One night in November 2014, Wichita Falls Police Department Officer Corey LaPlante responded to a call of a disturbance in a residential neighborhood. When he arrived, he learned that appellant, who was occupying the house where the disturbance occurred, had outstanding arrest warrants. Officer LaPlante arrested appellant and drove him to the county jail. When they arrived there, appellant said to Officer LaPlante, "I know that you park your . . . patrol vehicle outside your house so I know where you live. Since I know where you live, I'm gonna rape your wife when you're not home."

A grand jury indicted appellant for retaliation based on his threat to Officer LaPlante's wife. Appellant received appointed counsel, and counsel filed several pretrial documents on appellant's behalf. Appellant chose the trial court to assess his punishment in the event of a conviction.

At trial, appellant pled not guilty, but after the parties presented evidence and arguments, a jury found him guilty. The trial court received evidence concerning appellant's punishment. Appellant testified and acknowledged his criminal history that includes several misdemeanor and felony convictions. He also testified that he has a long history of using illegal drugs, that he suffers from a seizure disorder, and that he takes medicine to reduce the seizures and to control his stress and anxiety. He later testified that his seizures affect his memory.

Although appellant denied using the particular words of the threat to Officer LaPlante's wife that Officer LaPlante had testified to,[3] appellant acknowledged,

> I am a Christian man and I . . . let my mouth overrun myself that night. . . . I was very frustrated with the way things were handled and I did a bad thing. I said a lot of vile, ugly things to -- about him and his wife and I think maybe his mother, too. And . . . I've regretted it every day since.

After the parties presented arguments concerning appellant's punishment, the trial court sentenced him to six years' confinement. The trial court appointed new counsel to represent appellant on appeal, and appellant brought this appeal.

**Alleged Ineffective Assistance**

In his only point, appellant contends that his trial counsel was ineffective because counsel did not investigate appellant's mental state at the time of the offense or retain an expert to testify on that issue. To establish ineffective assistance of counsel, appellant must show by a preponderance of the evidence that his counsel's representation was deficient and that the deficiency prejudiced

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[3]Appellant testified,

> I was not speaking to the officer when I was talking. There was a gentleman sitting next to me and there was another lady sitting next to him. And I had noticed prior to any of this ever going on that the police parked their cars outside of their houses and that they had identifying numbers on them. And in my train of thought, that's [idiocy]. That's advertising, hey, this is where I live. And I feel like . . . that could be a danger to them and to their family members. . . . And I turned to the guy next to me and I stated, this is complete [idiocy] that these police officers would treat people the way that they do and then park these vehicles in plain sight of their house[s] where anyone could know where they live. And that's the limit of what I said.

the 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). 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).

Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance-of-counsel claim because the record is generally undeveloped. *Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012); *Thompson*, 9 S.W.3d at 813–14. In evaluating the effectiveness of counsel under the deficient-performance prong, we look to the totality of the representation and the particular circumstances of each case. *Thompson*, 9 S.W.3d at 813. 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. Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct was not deficient. *Nava*, 415 S.W.3d at 307–08.

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 not conclude that counsel's performance was deficient unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308.

The prejudice prong of *Strickland* requires a showing that counsel's errors were so serious that they deprived the defendant of a fair and reliable trial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. In other words, appellant must show there is a reasonable probability that, without the deficient performance, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068; *Nava*, 415 S.W.3d at 308. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Nava*, 415 S.W.3d at 308. The ultimate focus of our inquiry must be on the fundamental fairness of the proceeding in which the result is being challenged. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2070.

Appellant contends that under *Ake v. Oklahoma*, he was entitled to the appointment of a psychiatrist and that his counsel was ineffective for not seeking such an appointment or calling an expert witness concerning his mental state at the time of the offense. *See* 470 U.S. 68, 74, 105 S. Ct. 1087, 1091–92 (1985) ("[W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."). He contends that counsel should have

known of (and should have investigated) a possible issue concerning his mental state based on his prior drug use, his stress and anxiety, and his seizures, all of which he testified about during the punishment phase of the trial.[4]

The State argues that on this record that is silent concerning counsel's motivations and reasoning, appellant fails to overcome the presumption that counsel's performance was objectively reasonable. The State also contends that even assuming that counsel's performance was deficient, appellant cannot show prejudice resulting from the deficiency. We agree that the record does not establish prejudice under *Strickland*. *See* 466 U.S. at 694, 104 S. Ct. at 2068; *Nava*, 415 S.W.3d at 308.[5]

As the State contends, any claim of prejudice from counsel's failure to investigate and retain an expert on the issue of appellant's mental state at the time of the offense rests on unproven assumptions: that if an investigation had occurred and an expert had been requested, the trial court would have appointed one; that such an expert would have determined that appellant did not have the necessary mental state to commit the offense; and that the expert's testimony

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[4]Appellant contends,

> It is well within our common knowledge . . . that repeated seizures can damage the brain. It is well within our common knowledge . . . that repeated drug use and addiction can damage the brain. The issue in this case was Appellant's state of mind. . . .

[5]We need not address both components of *Strickland* if an appellant makes an insufficient showing on one. 466 U.S. at 697, 104 S. Ct. at 2069; *Applin v. State*, 341 S.W.3d 528, 535 (Tex. App.—Fort Worth 2011, no pet.).

would have likely changed the trial's outcome. Counsel's failure to call witnesses is irrelevant absent showings that such witnesses were available and that appellant would have benefited from their testimony. *See Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010); *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). Similarly, to obtain relief on a failure-to-investigate claim, appellant "must show what evidence would have been obtained by the investigation and that it would have helped him." *Dotson v. State*, No. 04-14-00285-CR, 2015 WL 4273582, at *4 (Tex. App.—San Antonio July 15, 2015, pet. ref'd) (mem. op., not designated for publication) (citing *Pinkston v. State*, 744 S.W.2d 329, 332 (Tex. App.—Houston [1st Dist.] 1988, no pet.)); *see Lopez v. State*, No. 02-12-00179-CR, 2013 WL 5303593, at *3 (Tex. App.—Fort Worth Sept. 19, 2013, pet. ref'd) (mem. op., not designated for publication).

Texas courts have applied these principles to the failure to call a witness who could testify about a defendant's mental state. *Pitts v. State*, No. 05-13-01053-CR, 2015 WL 2400741, at *2–3 (Tex. App.—Dallas May 19, 2015, pet. ref'd) (mem. op., not designated for publication) (holding that an appellant could not prevail on an ineffective assistance claim based on counsel's failure to investigate a possible defense based on a brain seizure disorder when the appellant "presented no evidence that a medical evaluation would have produced helpful evidence about how his disorder contributed to the offense"); *Norris v. State*, No. 02-10-00468-CR, 2012 WL 2135594, at *4 (Tex. App.—Fort Worth June 14, 2012, pet. ref'd) (overruling an ineffective assistance point because the

record contained no evidence "that any physician or social worker would have testified that, due to Norris's mental health issues, the *mens rea* element to commit the crime of which she was convicted . . . was somehow negated"); *see also Brennan v. State*, 334 S.W.3d 64, 79 (Tex. App.—Dallas 2009, no pet.) (holding similarly).

Appellant did not file a motion for new trial, so the trial court did not receive any evidence supporting his ineffective assistance claim. Nothing in the record shows that an investigation would have led to evidence that appellant did not have the mental state required to commit the offense or that such evidence, even if presented, would have likely changed the trial's outcome. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Nava*, 415 S.W.3d at 308; *Norris*, 2012 WL 2135594, at *4. Thus, we conclude that appellant has failed to establish the prejudice requirement of *Strickland*, and we overrule his sole point complaining about trial counsel's alleged ineffectiveness.

**Conclusion**

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

PER CURIAM

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

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

DELIVERED: January 26, 2017