COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00283-CR

CLAUDE SPILLMAN — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1419459D

MEMORANDUM OPINION[1]

Appellant Claude Spillman appeals from his conviction for sexual assault and five-year sentence and raises eight points. Spillman contends that the trial court improperly granted the State's cause challenge to a veniremember and abused its discretion by admitting prior bad-act evidence. He also contends that trial counsel was constitutionally ineffective for failing to properly preserve error

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

regarding admission of the prior bad-act evidence. We find no error in the challenged rulings and cannot find counsel to have been ineffective. Thus, we affirm the trial court's judgment.

I. BACKGROUND

A. THE OFFENSE[2]

In September 2014, Spillman, who had recently signed to play professional football for the Dallas Cowboys, invited Marjorie Davis[3] to visit him in Texas. Davis, who lived in Chicago, had met Spillman there when he was shopping at the department store where she worked. After initially being reluctant to do so, Davis agreed to fly to Texas, and Spillman bought her an airline ticket for a one-week stay. Although Davis told Spillman that she did not intend for the trip to include a sexual relationship, Spillman, who was living in an upscale Tarrant County hotel, did not book a separate room for Davis. Instead, Spillman had Davis stay in his room, which had two beds. The first night of Davis's stay, she and Spillman slept in the same bed because one of the beds had physical-therapy equipment on it. Spillman and Davis did not have sex that night.

The next day, Spillman's aggressive conduct concerned Davis and made her uncomfortable. Davis told Spillman that she wanted to go home. Spillman

[2]Spillman does not challenge the sufficiency of the evidence to support his conviction; however, we will recount the operative facts to put his appellate complaints in context.

[3]We use an alias to refer to the complainant to protect her identity. *See* 2d Tex. App. (Fort Worth) Loc. R. 7.

told her that her "attitude wasn't right" but agreed to try to change the return date for her plane ticket to the next day. Davis then got ready for bed and attempted to sleep on the bed that had the equipment still on it. Spillman picked her up, put her on the other bed, and said that she "was sleeping with him." This scared Davis, but she decided to "[j]ust get through the night."

Early the next morning while the two were still in bed, Spillman, who had already removed his clothes, forcibly removed Davis's pants and underwear. Davis attempted to stop him, but Spillman forced her to have vaginal intercourse while putting his hand around her neck and telling her to "shut up."[4] Spillman did not wear a condom and ultimately ejaculated on Davis's face, eyes, and hair. Davis began to cry. Spillman laughed, took a shower with the bathroom door open, and left for football practice. Before he left, however, Spillman changed Davis's return flight to Chicago so that she could leave that day and arranged for a car to take her to the airport.

Davis left the hotel twenty-five minutes after Spillman. When Davis got to the airport, she called her mother crying and told her what had happened. Davis's mother instructed her to not get on the flight but to report the incident to the police. Davis called the police, who found her sitting alone in the baggage-claim area, "obviously upset, distraught." She told officers that Spillman had forced her to have sex and that she repeatedly shouted at him to stop. Davis

[4]Spillman testified at trial that the sex was consensual and that Davis was the initiator.

underwent a sexual-assault examination at a hospital, and a swab of the semen in Davis's hair was taken. The DNA profile of the swab and a swab taken from Spillman revealed "to a reasonable degree of scientific certainty, assuming no identical twin, that Claude Spillman is the contributor to the sperm fraction found in the victim's hair."

B. THE TRIAL

A grand jury indicted Spillman with the second-degree felony offense of sexual assault to which he pleaded not guilty. *See* Tex. Penal Code Ann. § 22.011(a)(1)(A), (b)(1)–(2), (f) (West Supp. 2017). During jury selection, a veniremember informed the trial court that he had pleaded guilty to the felony offense of possession of marijuana with the intent to distribute in 1975 or 1976 in Oklahoma. The veniremember stated his guilty plea resulted in "probation," but he was unsure if a determination of his guilt had been deferred as part of the plea. He also stated that the offense had "never been an issue in [his] whole life." The State challenged the veniremember for cause because he was absolutely disqualified based on his felony conviction. *See* Tex. Code Crim. Proc. Ann. arts. 35.16(a)(2), 35.19 (West 2006). Spillman argued that the State had failed to prove the veniremember was absolutely disqualified because there was no evidence the guilty plea resulted in a conviction. The trial court found that the veniremember had been "pretty adamant of the fact that he knew it was a felony possession" and granted the State's challenge.

At trial, Spillman's defensive theory was that Davis consented to have sex. Davis testified during the State's case-in-chief; Spillman did not cross-examine her at that time, choosing to recall her as a witness after the State rested its case-in-chief. During Spillman's cross-examination, he questioned why she never tried to leave the hotel room during her stay or alert hotel security after the attack. During the State's redirect examination of Davis, she testified that the day before the sexual assault, she heard Spillman talking to his agent and admitting that he had pulled a gun on his former fiancée, which led to a restraining order against him and required him to attend anger-management classes. Davis saw "paperwork" about the classes and the restraining order in the hotel room. The trial court allowed this testimony, over counsel's objections, finding that Spillman had opened the door through his cross-examination and that the evidence was not unfairly prejudicial. Davis also testified that while she was in the car with Spillman the day before the assault, he "started smoking marijuana." The trial court sustained Spillman's objection to this testimony and instructed the jury to disregard the statement, but Spillman did not request a mistrial. The jury found Spillman guilty of sexual assault and after a punishment hearing, assessed his punishment at five years' confinement.

C. THE APPEAL

Spillman appeals and attacks the trial court's granting of the State's challenge for cause, the admission of the evidence regarding Spillman's prior domestic violence involving his former fiancée, and the admission of Davis's

testimony that Spillman had smoked marijuana in her presence. He further asserts that trial counsel's failure to preserve error regarding the admission of the challenged evidence constituted ineffective assistance of counsel. Finally, Spillman contends that the cumulative effect of each of these errors, even if not separately sufficient, mandates the reversal of his conviction.

II. CHALLENGE FOR CAUSE

In his eighth point, Spillman argues that the trial court erred when it granted the State's challenge for cause to a veniremember who admitted he had pleaded guilty to possession with the intent to distribute marijuana, a felony. He asserts that granting the challenge effectively gave the State an extra peremptory strike, depriving him of a fair trial. We review the trial court's ruling for an abuse of discretion because a veniremember's absolute disqualification to serve is a question of fact. *See Gardner v. State*, 306 S.W.3d 274, 300–01 (Tex. Crim. App. 2009); *Chambers v. State*, 903 S.W.2d 21, 27 (Tex. Crim. App. 1995). As such, conflicting evidence on an absolute disqualification will not support a finding of an abuse of discretion. *See Gardner*, 306 S.W.3d at 301. All that is required is that it appear that the veniremember is absolutely disqualified—certainty is not a requirement. *See id.* at 300; *Chambers*, 903 S.W.2d at 28.

Here, the veniremember stated unequivocally that he had pleaded guilty to a felony offense and been sentenced to probation. Although he was unsure whether the trial court had deferred a finding of guilt and he had never encountered a "problem" arising from the conviction, these statements were

merely competing, factual evidence that the trial court could weigh in determining whether the veniremember was absolutely disqualified. *See Hammond v. State*, 799 S.W.2d 741, 744–45 (Tex. Crim. App. 1990); *Wartley v. State*, 978 S.W.2d 672, 674 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Perry v. State*, 864 S.W.2d 794, 795 (Tex. App.—Fort Worth 1993, no pet.). We cannot say the trial court abused its discretion based on this competing evidence, and we overrule Spillman's eighth point.

III. PRIOR BAD-ACT EVIDENCE

A. DOMESTIC VIOLENCE

1. Admissibility

In his first point, Spillman argues that the trial court abused its discretion by allowing Davis to testify to what she had overheard and seen regarding what Spillman had done to his former financée, his having to take anger-management classes, and his being bound by a restraining order. He asserts that the evidence was inadmissible because it was too dissimilar to the offense alleged in the indictment, rendering it inadmissible. *See* Tex. R. Evid. 401, 404(b). He continues that even if the evidence were relevant, its probative value was outweighed by its prejudicial effect. *See* Tex. R. Evid. 403. We review the admission of this evidence for an abuse of discretion. *See Dabney v. State*, 492 S.W.3d 309, 318 (Tex. Crim. App. 2016).

Spillman's counsel argued in his opening statement that Davis accused Spillman of sexual assault only after talking to her mother who "put in into her

head that she had been raped, it created a snowball effect, and it created something that she just couldn't get out of." During his cross-examination of Davis, Spillman challenged Davis's decision to stay with Spillman and to not call for help even after she became concerned about his behavior. Spillman's counsel asked Davis, "So he wasn't holding you hostage, correct?" Davis replied, "Wrong."

After Spillman passed Davis as a witness, the State expressed its intention to ask Davis on redirect about the conversation she had overheard regarding Spillman's domestic violence and the paperwork she had read concerning the same issue because "[t]hat is part of her concern with leaving, her fear, and . . . by the questions [Spillman's counsel] asked her, he's opened the door to that." Spillman's counsel gave several arguments supporting his position that he had not opened the door to admission of the extraneous conduct. The trial court allowed the testimony, concluding that Spillman had invited the evidence through his cross-examination of Davis:

> I think the issue is this: I think they [i.e., the State] touched on it, but only for initial concerns. I think then the cross-examination went into why she acted the way she did or the actions that she took. And I . . . think that when you start going into why did you take the actions that you did or why didn't you take additional actions, I think that's enough for an explanation of why you did it. So I'm going to let it in.

Spillman objected to Davis's subsequent testimony regarding what she learned about Spillman's domestic violence under rule 403, which the trial court

overruled.[5] Davis testified to what she heard and saw about the domestic-violence incident and why that contributed to her inability to leave.

Spillman, who later testified in his own defense, explained that the restraining order arose out of an argument with his former fiancée that occurred while he was frustrated after his employer at the time, the San Francisco 49ers, cut his salary by $500,000. He testified that this stressor combined with his former fiancée's decision to move to Kentucky with their three children resulted in the argument. Spillman denied that he had held a gun to her head.

The jury charge contained a limiting instruction regarding extraneous offenses:

> You are instructed that if there is any testimony before you in this case regarding the Defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the Defendant, if any, in connection with the offense, if any, alleged against him in the indictment in this case and for no other purpose.

Rule 403 allows courts to exclude even relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. Tex. R. Evid.

[5]On appeal, Spillman argues that the evidence also was inadmissible under rules 401 and 402; however, the only objection Spillman raised at trial was under rule 403. Any argument under rules 401 or 402 is not preserved for our review. *See, e.g.*, *Orellana v. State*, 489 S.W.3d 537, 547 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

403; *see Kulow v. State*, 524 S.W.3d 383, 387 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (recognizing that trial court has discretion to exclude relevant evidence under rule 403 even if defendant opened the door to its admission). The rule favors the admission of relevant evidence and presumes that such evidence will be more probative than unfairly prejudicial. *See Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). To determine the weight of relevant evidence as compared to the danger of prejudice arising from its admission, courts must balance several factors including how compellingly the evidence makes a fact at issue more or less probable, the time needed to develop the evidence, the proponent's need for the evidence, and the potential that the evidence will unduly and indelibly impress the jury. *See State v. Mechler*, 153 S.W.3d 435, 440–41 (Tex. Crim. App. 2005).

Spillman's cross-examination of Davis challenged whether Davis consented, pointing out that she did not flee or seek help after the assault, did not notify the police until urged to do so by her mother, and was not "held hostage." This line of questioning combined with counsel's opening argument implying that Davis had lied about the assault at the suggestion of her mother raised the defensive theories of consent and fabrication. As such, the domestic-violence evidence made a fact at issue more or less probable and opened the door to the State's questions regarding Spillman's extraneous conduct with his former financée. *See Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008); *Wheeler v. State*, 67 S.W.3d 879, 885–86 (Tex. Crim. App. 2002); *Grant*

v. State, 475 S.W.3d 409, 417–18 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *Fields v. State*, No. 03-04-00422-CR, 2005 WL 1650985, at *6 (Tex. App.—Austin July 14, 2005, pet. ref'd) (mem. op., not designated for publication); *Rickerson v. State*, 138 S.W.3d 528, 531 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd); *see also* Tex. R. Evid. 404(b)(2).

Spillman's explanation for the restraining order and Davis's testimony in response to the State's questions on redirect about why the overheard conversation and the paperwork she saw made her afraid to leave or seek help took up relatively little time during the two-day trial. Finally, Spillman does not argue in his brief how this evidence unduly or indelibly impressed the jury other than to state it "was highly prejudicial to [Spillman]." Under these facts, we conclude that the trial court did not abuse its discretion by admitting this evidence over Spillman's rule 403 objection. *See, e.g.*, *Reyes v. State*, 480 S.W.3d 70, 78 (Tex. App.—Fort Worth 2015, pet. ref'd); *Marc v. State*, 166 S.W.3d 767, 776–77 (Tex. App.—Fort Worth 2005, pet. ref'd). We overrule point one.

2. Effective Assistance of Counsel

In his second and third points, Spillman argues that counsel's failure to "make his position clear," request that a limiting instruction be given at the time of the testimony, or ask for a running objection resulted in his receiving constitutionally ineffective assistance of trial counsel. We are to defer to counsel's strategic decisions and may consider them to be constitutionally ineffective only if his actions were deficient and if the result of the trial would have

in reasonable probability been different but for counsel's actions. *See Strickland v. Washington*, 466 U.S. 668, 687, 689, 694 (1984).

Spillman recognizes that finding counsel to be ineffective on direct appeal is "rare." Indeed, 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 v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). This statement is true with regard to the deficient-performance prong of the inquiry when counsel's reasons for failing to do something do not appear in the record. *Menefield*, 363 S.W.3d at 593; *Thompson*, 9 S.W.3d at 813. We cannot simply infer ineffective assistance based upon unclear portions of the record. *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 (quoting *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003)). If trial counsel is not given that opportunity, then we should 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)). We cannot so conclude here. This is especially true in light of the fact that the trial court did not abuse its discretion by admitting the evidence. *See Tatom v. State*, No. 03-00-00625-CR, 2001 WL 1044810, at *3 (Tex. App.—Austin Sept. 13, 2001, no pet.) (not designated for publication); *Campos v. State*,

No. 14-95-00740-CR, 1997 WL 295361, at *3 (Tex. App.—Houston [14th Dist.] June 5, 1997, pet. ref'd) (not designated for publication). We overrule points two and three.

B. MARIJUANA USE

In his fourth point, Spillman argues that the trial court abused its discretion by allowing Davis to testify that Spillman had smoked marijuana while they were in the car together because such testimony was not relevant and was unfairly prejudicial. Spillman next contends in his fifth and sixth points that because counsel failed to state the specific bases for his objection—rules 401, 403, and 404(b)—and failed to request a mistrial, counsel was constitutionally ineffective.

After Davis testified that Spillman had smoked marijuana in her presence, the trial court sustained Spillman's counsel's general objection and instructed the jury to disregard this testimony.[6] Davis's testimony on this issue was not admitted; thus, we will not address Spillman's point arguing that its admission was an abuse of discretion. *See generally Guillory v. State*, No. 01-98-00311-CR, 1999 WL 442159, at *2 (Tex. App.—Houston [1st Dist.] July 1, 1999, pet. ref'd) (not designated for publication) ("Here, the statement was not admitted—the jury was instructed to disregard it."). We overrule point four.

Similarly, we cannot conclude that Spillman's counsel was deficient for failing to specify that his objection was based on rule 401, 403, or 404(b). The

[6]Additionally, the jury charge admonished the jury that it "must not refer to or discuss any matters not in evidence before you."

trial court sustained counsel's general objection and instructed the jury to disregard the statement. Counsel's failure to state a specific basis for the objection did not waive any error arising from the admission of the evidence under those rules because the evidence was not admitted. We overrule Spillman's fifth point.

Finally, Spillman asserts that counsel was constitutionally ineffective for failing to pursue his objection to an adverse ruling by requesting a mistrial. The trial court corrected any error arising from Davis's statement by instructing the jury to disregard it. This instruction was sufficient to cure any prejudicial effect, and Spillman does not assert otherwise. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009); *Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995). Because the trial court corrected any error through a prompt instruction to disregard and because Spillman has failed to show that the instruction was insufficient to cure any prejudice, counsel's failure to request a mistrial could have caused no prejudice and, therefore, was not ineffective. *See Dudley v. State*, No. 12-16-00251-CR, 2017 WL 3404990, at *2 (Tex. App.—Tyler Aug. 9, 2017, no pet.) (mem. op., not designated for publication); *Zavala v. State*, Nos. 04-15-00723-CR, 04-15-00724-CR, 2016 WL 6609209, at *3 (Tex. App.—San Antonio Nov. 9, 2016, no pet.) (mem. op., not designated for publication). Further, counsel could have had strategic reasons for not moving for a mistrial; therefore, Spillman cannot show deficient performance. *See, e.g.*,

Barnett v. State, 344 S.W.3d 6, 21 (Tex. App.—Texarkana 2011, pet. ref'd). We overrule point six.

C. CUMULATIVE EFFECT

In his seventh point, Spillman argues that the cumulative effect of these alleged abuses of discretion and omissions by trial counsel allowed the jury to consider the domestic-violence evidence and the marijuana evidence, which as a whole violated his right to a fair trial. Again, the trial court instructed the jury to disregard the marijuana evidence, and there is no indication the jury did not heed this instruction. And the trial court did not abuse its discretion by admitting the domestic-violence evidence. Based on these conclusions, counsel cannot be found to have been ineffective. Because there was no error, there can be no cumulative error or harm. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999). We overrule point seven.

IV. CONCLUSION

Having overruled each of Spillman's eight points, we affirm the trial court's judgment. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

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

DELIVERED: November 9, 2017