



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

NO. 02-16-00440-CR

CHARLESTON LEE COLE

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM COUNTY CRIMINAL COURT NO. 10 OF TARRANT COUNTY
TRIAL COURT NO. 1446175

MEMORANDUM OPINION¹

I. INTRODUCTION

A jury convicted Appellant Charleston Lee Cole of the offense of assault causing bodily injury. See Tex. Penal Code Ann. § 22.01(a), (b) (West Supp. 2016). The trial court assessed his punishment at 180 days' confinement, probated for twenty-four months, and assessed a fine of \$500. In two points,

¹See Tex. R. App. P. 47.4.

Cole argues that the State made an improper comment on his failure to testify and that he received ineffective assistance of counsel when his trial counsel failed to object to the comment. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2015, Elizabeth Wolf was driving to a Wal-Mart in Grand Prairie when she received a phone call from Cole, her friend. Cole asked to meet with Wolf because “he was having some issues and just felt like he needed a friend to speak with.” Cole met Wolf at Wal-Mart, and Wolf got into Cole’s vehicle. Cole said he needed gas, so he drove to a nearby gas station. Wolf testified that Cole’s demeanor was “[v]ery standoff[ish] . . . like something was bothering him.”

Wolf noticed that the inside of Cole’s vehicle was “very dirty” and had “crumbles of deodorant” on the stick shift, the back seat, and the floor. Wolf asked Cole why there was deodorant all over his vehicle, and Cole became “frustrated and angry” that Wolf had asked about the deodorant. Wolf asked Cole to take her back to her vehicle, and Cole drove back to the Wal-Mart parking lot. Wolf said that as she exited Cole’s vehicle, he choked her with both of his hands. The choking lasted approximately thirty seconds, and then Cole threw her out of the vehicle. She landed “face down onto the concrete.” Cole exited the vehicle, stepped on Wolf’s glasses that had come off when she fell to the ground, and told her to be quiet because she was causing a scene.

Wolf used her cell phone to take pictures of Cole leaving the scene. While he was driving away, Cole's vehicle ran over Wolf's foot. Wolf photographed her neck and foot to document her injuries.²

Three days after the incident, Cole and Wolf exchanged numerous text messages in which Cole apologized for his actions. Cole told Wolf, "I'm deeply sorry that I took out that frustration [on] you, I lost my job [and] was stress[ed] and I just exploded." In explaining his actions, Cole stated, "I just need[ed] you to worry about my personal issues rather than talk about why deodorant is in my seat when I clearly explain[ed] to [you] why, I was a ticking time bomb at that moment in my life." Cole later stated, "I had no reason to put my hands on [you]," and "I hate what I did to hurt [you]."

During closing argument, Cole's attorney attacked Wolf's credibility and argued that the State had not met its burden of proof. During the State's rebuttal closing argument, the prosecutor stated:

How do you know that the State met [its] burden beyond a reasonable doubt? Thank goodness for women like Elizabeth Wolf. Thank goodness for women who are assaulted and think, I don't think anybody's going to believe me and because I don't think anyone's going to believe me, I'm going to take pictures. I'm going to make sure that I have proof so that if I ever have to come and sit in front of six people, I'm going to have the photos to prove that what I said happened is what happened. This picture was taken while Elizabeth was laying on the ground after having [Cole] hold her up by her neck for at least 30 seconds. And I want you all to really think

²We have reviewed the photos of Wolf's neck and foot. The photos of her neck show redness and abrasions at the bottom of the neck. The photo of Wolf's foot shows an abrasion on her left big toe.

about that. *He can't say that it wasn't him* because she laid on the ground after being choked by him and took photos of him, and we brought these photos to court for you today. [Emphasis added.]

Cole did not object to this argument. The jury found Cole guilty of assault causing bodily injury, and the trial court assessed his punishment. This appeal ensued.

III. THE ALLEGED COMMENT ON COLE'S FAILURE TO TESTIFY

In his first point, Cole complains that the prosecutor improperly commented on his failure to testify when she said, "He can't say that it wasn't him because she . . . took photos of him." Cole admits that he did not object to this comment.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt v. State*, 407 S.W.3d 259, 262–63 (Tex. Crim. App. 2013). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

Even if the prosecutor's comment here could be construed as an improper comment on Cole's failure to testify, Cole forfeited such a complaint by failing to

object to the comment in the trial court. See *Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004) (holding appellant did not preserve complaint of improper jury argument because he did not object to the comment in the trial court); *Wead v. State*, 129 S.W.3d 126, 130 (Tex. Crim. App. 2004) (holding court of appeals erred by considering appellant’s complaint of improper comment regarding his failure to testify when appellant did not raise such complaint in the trial court). We overrule Cole’s first point.

IV. COLE’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

In his second point, Cole argues that he received ineffective assistance of counsel because his attorney did not object to the comment made by the prosecutor alleged to constitute a comment on Cole’s failure to testify.

A. Standard of Review

To establish ineffective assistance of counsel, an appellant must show by a preponderance of the evidence that his counsel’s representation was deficient and that the deficiency prejudiced 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.

B. The Record Does Not Establish Ineffective Assistance of Counsel

Here, Cole’s complaint of ineffective assistance of counsel is based solely on the fact that his attorney did not object to—or ask for an instruction to

disregard or ask for a mistrial based on—the comment made by the prosecutor during final closing argument that “[h]e can’t say that it wasn’t him because she . . . took photos of him.” Cole did not, however, file a motion for new trial complaining of ineffective assistance of counsel. Thus, the record is silent as to Cole’s attorney’s trial strategy in failing to object to the comment. Generally, a silent record that provides no explanation for counsel’s actions will not overcome the strong presumption of reasonable assistance. See *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003); *Edwards v. State*, 280 S.W.3d 441, 445 (Tex. App.—Fort Worth 2009, pet. ref’d). As noted above, trial counsel “should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.” *Menefield*, 363 S.W.3d at 593.

One vague statement exists in the record that possibly could be construed as a comment on Cole’s failure to testify—“[h]e can’t say it wasn’t him because she . . . took photos of him.” The prosecutor’s statement that Cole could not say that he was not the perpetrator was thus tied to the fact that Wolf photographed the perpetrator, Cole, not to the fact that Cole did not testify. To the extent the prosecutor’s statement could be construed as a comment on Cole’s failure to testify, Cole’s counsel could have reasonably concluded that an objection would emphasize the photos taken by Wolf. See *Orellana v. State*, 489 S.W.3d 537, 550 (Tex. App.—Houston [14th Dist.] 2016, pet. ref’d) (holding counsel’s failure to object to prosecutor’s comment on defendant’s failure to testify may have constituted trial strategy); *Betancourt v. State*, No. 12-11-00240-CR, 2013 WL

396157, at *6 (Tex. App.—Tyler Jan. 31, 2013 pet. ref'd) (mem. op., not designated for publication) (holding counsel's failure to object to prosecutor's lone comment regarding defendant's refusal to answer police questions may have constituted trial strategy); *Ahmadi v. State*, 864 S.W.2d 776, 783 (Tex. App.—Fort Worth 1993, pet. ref'd) (holding counsel's failure to object to testimony regarding postarrest silence may have constituted trial strategy). In any event, Cole's attorney's failure to object to the comment was not "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308.

Based on the record before us, in light of the strong presumption of reasonable professional assistance by defense counsel, and in the absence of any opportunity for defense counsel to explain his strategy for not objecting to the complained-of comment, we cannot say that Cole has met his burden of showing by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms. *See Thompson*, 9 S.W.3d at 813; *Edwards*, 280 S.W.3d at 445. Because Cole has not satisfied the deficient-performance prong of *Strickland*, we overrule his second point.

V. CONCLUSION

Having overruled Cole's two points, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

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

DELIVERED: June 29, 2017