In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00091-CR

MICHAEL JAMES CARSON, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 271st District Court
Wise County, Texas
Trial Court No. CR20449

Before Birdwell, Bassel, and Womack, JJ.
Memorandum Opinion by Justice Birdwell

MEMORANDUM OPINION

Appellant Michael James Carson appeals his conviction for felony possession of a controlled substance. He contends that the trial court erred in admitting two sets of incriminating statements made while he was in custody and without *Miranda* warnings. But with regard to the first set of statements, he did not preserve error, and he was not in custody at any rate. As for the second set of statements, Carson received exactly the relief he requested—the statements were not admitted—and he presents nothing for our review.

Carson also contends that he received ineffective assistance of counsel because his trial counsel made several costly mistakes. But the record does not support most of his contentions, and to the limited extent that his contentions find record support, these supposed faults do not establish deficient representation and prejudice. We therefore affirm.

I. BACKGROUND

Officer Brody Brown was working the night shift on January 16, 2017, when he saw a car with a broken stop lamp around 2:15 a.m. He conducted a traffic stop and found Carson in the driver's seat, with two passengers. One of the passengers, Shawn Ingram, informed Officer Brown that he had an outstanding warrant for a parole

violation.[1] After confirming the warrant, Officer Brown handcuffed Ingram and asked him whether he had anything dangerous in his possession. Ingram said he did, and Officer Brown found a syringe in his pocket. There was a crystalline residue around the tip of the syringe, which Officer Brown knew to be consistent with intravenous methamphetamine use.

Based on Ingram's warrant and the syringe, Officer Brown believed he had probable cause to search the vehicle. He asked the other occupants—Carson and a woman named Cheryl Piano—to identify which items belonged to them. Carson identified a black backpack in the trunk as his. Inside the backpack, Officer Brown found two bottles containing a viscous liquid. He opened a bottle and smelled the "fruity chemical odor" of GHB.[2] Officer Brown offered Carson the opportunity to drink out of the bottle, and Carson declined. He placed Carson under arrest. Testing confirmed that the bottles together contained 288.99 grams of GHB.

Carson was indicted for possession of a controlled substance in Penalty Group 1 in an amount of 200 grams or more but less than 400 grams, a felony of the first degree. *See* Tex. Health & Safety Code Ann. §§ 481.102(9), .115(e). After the close of the

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[1]Around this time, another officer arrived on the scene. This officer did not testify at trial.

[2]"GHB" refers to gamma hydroxybutyric acid, a Penalty Group 1 controlled substance often "used as a date rape drug." *Collins v. State*, 2-07-171-CR, 2008 WL 163550, at *1 & n.2 (Tex. App.—Fort Worth Jan. 17, 2008, no pet.) (per curiam) (mem. op., not designated for publication) (citing Tex. Health & Safety Code Ann. § 481.102(9)).

evidence, the jury found Carson guilty as charged. Carson pleaded true to habitual-offender enhancements, and the trial court sentenced Carson to fifty years' confinement. *See* Tex. Penal Code Ann. § 12.42(d).

II. CUSTODIAL INTERROGATION

In his first issue on appeal, Carson contests the admission of two sets of incriminating statements he made to Officer Brown. Carson says these statements were the product of custodial interrogation, and because he did not receive *Miranda* warnings beforehand, the statements should have been excluded.

In the first set of incriminating statements, Carson admitted that the backpack containing the GHB belonged to him. But Carson did not preserve error with regard to these statements. At pretrial, Carson made an oral motion to suppress his custodial statements, and the motion was carried with the case. When a trial court does not rule on a motion to suppress and carries it with the trial, the defendant generally must object each time any evidence subject to the motion is offered in order to preserve error. *Gonzalez v. State*, 563 S.W.3d 316, 320 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (citing *Palacios v. State*, 319 S.W.3d 68, 72 (Tex. App.—San Antonio 2010, pet. ref'd)). Carson did not object when these statements were offered at trial.

Regardless, Carson again raises the topic of custody in later issues, in which he contends that his trial counsel was ineffective for failing to adequately pursue exclusion of his custodial statements. Because Carson's later issues also call for an analysis of

whether he was in custody, we will proceed to determine whether he was in custody as if he had preserved this argument.

The need for *Miranda* warnings arises only when a person is in custody. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). The matter of whether Carson was in custody when he was interrogated by Officer Brown is a mixed question of law and fact that does not turn on credibility or demeanor, and we therefore conduct (1) a deferential review of the trial court's factual assessment of the circumstances surrounding the interrogation and (2) a de novo review of its ultimate legal determination of whether Carson was in custody. *See State v. Saenz*, 411 S.W.3d 488, 494 (Tex. Crim. App. 2013).

Generally, a routine traffic stop does not place a person in custody for *Miranda* purposes, *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012), because such a stop is typically "temporary and brief" and occurs in a less coercive atmosphere than a stationhouse interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 437–39, 104 S. Ct. 3138, 3149 (1984). But a traffic stop may escalate into custody when formal arrest ensues or when a detainee's freedom of movement is restrained to the degree associated with a formal arrest. *Ortiz*, 382 S.W.3d at 372. In making this determination, the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement comparable to formal arrest, given all the objective circumstances. *Id.* We evaluate the question of custody on a case-by-case basis. *Id.* Under this objective test, the arresting officer's undisclosed, subjective beliefs are not taken into

consideration. *Id.* at 372–73. If the officer manifests his belief to the detainee that he is a suspect, however, then the officer's view becomes relevant to the determination of whether a reasonable person in the detainee's position would believe he is in custody. *Id.* at 373.

There is no "bright-line" rule that separates custody from mere detention, but several factors help distinguish the two, including the amount of force displayed, the duration of a detention, the efficiency of the investigative process, whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent, and any other relevant factors. *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008).

Ortiz demonstrates a situation when many of these factors coalesced, escalating a traffic stop from detention into custody. There, Officer Jason Johnson stopped a car with Mexican license plates and asked the driver (Ortiz) to step out of the car. *Ortiz*, 382 S.W.3d at 369. When questioned separately, Ortiz and his wife gave inconsistent statements about their destination, and Ortiz indicated he was on probation for cocaine possession. *Id.* at 369–70. Officer Johnson called for back-up. *Id.* at 370. He asked Ortiz, "How much drugs are in the car?" *Id.* He then requested and received Ortiz's consent to search his person and the car. *Id.* When back-up officers arrived, they patted down Ortiz's wife and, while doing so, handcuffed her. *Id.* The back-up officers indicated to Officer Johnson that they had found something illicit while patting down Ortiz's wife, at which point Officer Johnson handcuffed Ortiz. *Id.* Officer Johnson

asked Ortiz, "What kind of drugs does your wife have?" *Id.* At that point, Ortiz made incriminating statements. The court held that the accretion of these circumstances—that Officer Johnson twice expressed his suspicion that Ortiz possessed drugs; that the back-up officers signaled that Mrs. Ortiz possessed something illegal; and that Ortiz and his wife were separately questioned, patted down, handcuffed, and surrounded by three officers—amounted to custody. *Id.* at 375.

Ortiz offers a useful counterpoint for this case, because the factors that the *Ortiz* court relied upon are lacking here. Unlike the three-officer show of force in *Ortiz*, here, one officer handled most of the investigation, and he was joined later by only one other officer. *See id.* at 374. Unlike *Ortiz*, Carson was not patted down or handcuffed before he made the contested statements. *See id.* And unlike *Ortiz*, where the officers pointedly asked Ortiz about the quantity and kind of drugs he had, here Officer Brown did not express any such suspicions, much less suspicions that were directed specifically at Carson. *See id.* at 373–75. Rather, Officer Brown asked both Carson and the other occupant of the vehicle to identify which items in the car were theirs, presupposing only that they had belongings, not drugs.

Other factors also weigh against custody, including the duration of detention, the efficiency of the investigative process, and whether the suspect was transported to another location. *See Sheppard*, 271 S.W.3d at 291. Less than thirty minutes elapsed between the time Officer Brown initiated the stop and the time the GHB was discovered, and there is every indication that Officer Brown used this time to efficiently

pursue his investigation and manage the scene. *See Hauer v. State*, 466 S.W.3d 886, 891 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that circumstances including a well-spent thirty-minute detention did not transform a traffic stop into custody). The entirety of the investigation took place in the gas station parking lot where Carson was initially pulled over.

Based on all the objective circumstances, a reasonable person in Carson's position would not perceive the detention to be a restraint on his movement comparable to formal arrest. *See Ortiz*, 382 S.W.3d at 372. He was not in custody, and his first set of incriminating statements is not subject to exclusion for want of *Miranda* warnings. *See* 384 U.S. at 444, 86 S. Ct. at 1612.

Carson next contends that the trial court committed error with regard to a second set of custodial statements, during which Carson identified the content of the bottles. But this testimony was never brought before the jury. As the State approached a related subject during its examination of Officer Brown, Carson objected that the challenged statements should be excluded as the product of an unwarned custodial interrogation. After an off-the-record discussion, the State indicated that it would withdraw its question, and the State did not subsequently ask any questions concerning these statements. Carson obtained the very relief he sought, and he fails to present anything further for our review. "It is well settled that when appellant has been given all the relief he requested at trial, there is nothing to complain of on appeal." *Cook v. State*, 858

S.W.2d 467, 473 (Tex. Crim. App. 1993); *Ashire v. State*, 296 S.W.3d 331, 343 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

The first set of incriminating statements was properly admitted (even if error had been preserved), and the second set was not admitted at all. We therefore overrule Carson's first issue.

III. INEFFECTIVE ASSISTANCE

In his second, third, and fourth issues, Carson argues that he received ineffective assistance of counsel. He raises a laundry list of complaints concerning what he sees as his trial counsel's faulty decisions. But as we explain, Carson offers no authority or record support for the majority of these complaints. Of the few complaints that find purchase in the record, none establish deficient performance and prejudice.

The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel. *Ex parte Scott*, 541 S.W.3d 104, 114 (Tex. Crim. App. 2017); *see* U.S. Const. amend. VI. To establish ineffective assistance, an appellant must prove 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); *Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999). The record must affirmatively demonstrate that the claim has merit. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In evaluating counsel's effectiveness under the deficient-performance prong, we review the totality of the representation and the particular circumstances of the case to determine whether counsel provided reasonable assistance 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; *Thompson*, 9 S.W.3d at 813–14. Our review of counsel's representation is highly deferential, and we indulge a strong presumption that counsel's conduct was not deficient. *Nava*, 415 S.W.3d at 307–08.

An appellate court may not infer ineffective assistance simply from an unclear record or a record that does not show why counsel failed to do something. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012); *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 did not have that opportunity, we should not conclude that counsel performed deficiently unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308. Direct appeal is usually inadequate for raising an ineffective-assistance-of-counsel claim because the record generally does not show counsel's reasons for any alleged deficient performance. *See Menefield*, 363 S.W.3d at 592–93; *Thompson*, 9 S.W.3d at 813–14.

Carson offers what we understand as seven reasons why his trial counsel was ineffective. Carson begins with an argument similar to the one raised in his first issue: counsel should have objected to the incriminating statements he made while in custody

and without *Miranda* warnings, and counsel should have filed a motion in limine and a motion to suppress in order to prevent the jury from being exposed to these statements. However, as we explained in the preceding section, Carson was not in custody when he made the first set of incriminating statements, and these statements were therefore admissible despite the lack of *Miranda* warnings. The failure to object to proper questions and admissible testimony is not ineffective assistance. *Ex parte Jimenez*, 364 S.W.3d 866, 887 (Tex. Crim. App. 2012). Moreover, counsel successfully dissuaded the State from asking any questions concerning the second set of incriminating statements, and we do not see how this accomplishment could suggest deficient performance. This complaint is without merit.

Second, Carson argues that counsel was ineffective when he failed to object to "continuous" leading questions during the State's examination of Officer Brown. However, Carson fails to identify any specific questions that were leading, and we decline to comb the record for him. *See Wyatt v. State*, 23 S.W.3d 18, 28 (Tex. Crim. App. 2000) (overruling claim of ineffective assistance because "Appellant does not specifically point out any of the 'numerous' leading-question violations allegedly committed by the State"). Moreover, "some leading questions are acceptable at the trial court's discretion," *id.*, and "there may be strategic reasons for not objecting to leading questions." *Barto v. State*, Nos. 13-13-00384-CR through 13-13-00386-CR, 2014 WL 895511, at *6 (Tex. App.—Corpus Christi–Edinburg Mar. 6, 2014, pet. ref'd) (mem. op., not designated for publication). Without specific examples of leading, Carson has

done nothing to show (1) that there were leading questions; (2) if there were in fact leading questions, that they were the type of leading questions that would be objectionable; or (3) if they were in fact objectionable, that counsel would not have had a valid strategic reason for declining to object to them. This complaint is without merit.

Third, Carson contends that trial counsel should have objected when the State asked about Carson's identification of the bag containing the GHB as his. But Carson does not offer any specific grounds on which counsel should have objected to this material. "To satisfy the first prong of *Strickland*, Appellant must identify the specific objection which should have been made and provide authority in support of his argument that the objection would have been meritorious." *Mallet v. State*, 9 S.W.3d 856, 867 (Tex. App.—Fort Worth 2000, no pet.). Without such grounds, the failure to object does not tend to show deficient performance. This complaint is without merit.

Fourth, Carson lodges multiple short grievances that relate to his own contradictory testimony during the punishment phase of trial. When Carson took the stand, trial counsel asked him to explain the circumstances of the offense. He initially testified that he did not know that Ingram had the GHB:

> Q. Let's talk about the offense that you were convicted of here last week. Did you know these people that you were in the car with?
>
> A. I knew Cheryl Piano. I didn't really know the guy in the back.
>
> Q. Okay. Mr. Ingram?
>
> A. Yes, sir.

Q. All right. Did you know that he had drugs on him?

A. No, sir.

Q. Did you know he had any needles on him?

A. No, sir.

But as the State drew out on cross-examination, Carson's testimony that he did not know the GHB was in the car contradicted the information that he had previously supplied to probation officers for purposes of his pre-sentence investigation report ("PSI"):

Q. Okay. Did you—you told [probation officers] that you didn't know that Ingram had a syringe on him; is that right?

A. That's correct.

Q. But you did say that you knew about the GHB in the car; is that right?

A. No.

Q. Well, in the report that they issued based upon your version it says that you reported that it was not your GHB but that it belonged to Ingram but that you were aware that the GHB was in the vehicle because you purchased it for Mr. Ingram. Do you remember that?

A. Yes, sir.

Q. And is that true?

A. Yes, sir.

Q. Okay. So now, under oath, you're telling the Court that what you just said under oath was not true, correct?

A. Yes.

Q. Okay. In fact, you had known about the GHB because you purchased it for Mr. Ingram, correct?

A. Correct.

Carson raises a series of related grievances concerning counsel's handling of this testimony. At one point, Carson says that "[a]lthough Appellant has a right to testify on his own behalf, trial counsel should have advised Appellant against testifying after seeing Appellant's contradictory and harmful statements." At another point, Carson argues, "If Appellant insisted on testifying, trial counsel should have advised him against it on the record." At yet another point, Carson contends, "Trial counsel also should have adequately prepared Appellant to give testimony consistent with his prior statements and the evidence in the case." Finally, Carson ventures that when counsel elicited this testimony, it demonstrated that counsel was unaware of the content of the PSI report. Each of Carson's grievances is one sentence long, made without citation to any legal authority, and offered without record support for the factual suppositions within.

For our purposes, the lack of record support is particularly important, because Carson is projecting these suppositions onto a silent record. The PSI report does not appear in the record, and the record says nothing as to whether counsel advised Carson against testifying (especially testifying inconsistently with the PSI report) or whether Carson nonetheless "insisted on testifying." The record says nothing concerning how counsel prepared Carson to testify or what counsel's level of awareness was concerning

the content of the PSI report. Counsel simply asked Carson to explain the offense in his own words, and the record bears no indication that counsel knew those words would materially differ from the account that Carson previously gave for the PSI report.

In the face of a silent record, Carson has not overcome the presumption that his counsel acted within the wide range of professional competence, as is shown by *McCowan v. State*, No. 05-98-00816-CR, 2000 WL 688279, at *5 (Tex. App.—Dallas May 26, 2000, no pet.) (not designated for publication). There, the appellant was charged with possession of a firearm by a felon, and he testified during the guilt–innocence phase that he was not aware the firearm was in his truck. *Id.* at *1. During the punishment phase, though, appellant changed his story and admitted that he knew the firearm was in the vehicle. *Id.* at *5. On appeal, appellant contended counsel was ineffective for allowing him to change his own story during punishment. *Id.* The court disagreed, reasoning that the record was "silent as to the motivation behind counsel's action," which left open the possibility that counsel might have been acting according to a valid trial strategy. *Id.* "Without a record showing counsel's rationale, appellant cannot overcome the presumption that his counsel was competent." *Id.* Similarly, here, without a record showing counsel's underlying strategic motives, his level of knowledge, or his interactions with Carson, we cannot say that simply asking Carson to explain the offense was so outrageous that no competent attorney would have engaged in it. *See Gibbs v. State*, Nos. 14-03-00934-CR, 14-03-00935-CR, 2004 WL 2222927, at *2 (Tex. App.—Houston [14th Dist.] Oct. 5, 2004, pet. ref'd) (not designated for publication)

(holding that appellant had not shown his counsel was ineffective in allowing him to make "inconsistent statements" during his punishment testimony about whether he was guilty of the offense in the first place, despite his guilty plea; "[i]n the face of a silent record, we are not to speculate on counsel's strategy, level of knowledge, or what he told his client"). This complaint is without merit.

Fifth, Carson maintains that counsel was deficient for failing to object to the content of the PSI report and for failing to ensure that the PSI appeared in the appellate record. Carson contends that if the PSI were in the record, then it would show prejudice and he "might have" been able to raise still other issues on appeal. But this argument defeats itself. Without the PSI report or testimony to approximate its content, we have no record to show whether these PSI-related deficiencies prejudiced Carson, and an allegation of prejudice must be firmly founded in the record. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). To wit, in *Aranda v. State*, we rejected a claim that counsel was ineffective for failing to ensure that a reporter's record was made because, without the reporter's record, there was no record to show whether that failure caused prejudice under the second prong of *Strickland*. *See* Nos. 2-08-119-CR, 2-08-120-CR, 2009 WL 279489, at *3 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (mem. op., not designated for publication) (collecting cases applying similar reasoning); *accord Young v. State*, 425 S.W.3d 469, 473 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). Carson is in a better position than the appellant in *Aranda*, because unlike the reporter's record there, Carson's PSI report exists, and he may incorporate it into the

record if he elects to pursue habeas relief. But for purposes of this appeal, Carson comes out on the wrong side of a catch-22: to the extent that the counsel may have been deficient in failing to make a record concerning the PSI report, the lack of a record deprives Carson of the ability to show that he was prejudiced by any deficiencies concerning the PSI report. This complaint is without merit.

However, to a limited extent, the record of the punishment hearing offers a glimpse into the PSI because the State asked a few questions about its content. On cross-examination, the State asked Carson if he used GHB on almost a daily basis, as he said in his PSI interview. Carson agreed. The State also asked Carson, "[Y]ou said during the PSI that up until November [sic] of 2017 when this offense was committed and you were arrested that you were using—also using cocaine on a regular basis; is that right?" Carson said, "In my past."

Thus, sixth, Carson argues that trial counsel should have objected when the State cross-examined him about this content from the PSI. However, Carson does not identify any specific objection that should have been made or provide authority to support any objection. *See Mallet*, 9 S.W.3d at 867. We therefore have "no basis for finding deficient performance on this unsupported allegation." *See Rodriguez v. State*, 329 S.W.3d 74, 84 (Tex. App.—Houston [14th Dist.] 2010, no pet.). This complaint is without merit.

Seventh, and finally, Carson contends that counsel was deficient for failing to put on further mitigating evidence. He does not point to any specific mitigating

evidence that should have been introduced. But he speculates that such evidence must exist; he argues, "It seems unlikely that Appellant knows no one who could testify on his behalf or has no demonstrable redeeming actions or qualities to mitigate the negatives presented by the state and Appellant's own counsel." But because Carson does not explain "what mitigating evidence his trial counsel should have proffered, we cannot possibly find that a failure to proffer such evidence constituted ineffective assistance." *See Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992); *see also Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002) (cautioning against "retrospective speculation" "about the existence of further mitigating evidence"). This complaint, too, is without merit.

Having found no merit in Carson's complaints concerning the effectiveness of his trial counsel, we overrule his second, third, and fourth issues.

IV. CONCLUSION

We affirm the trial court's judgment.

/s/ Wade Birdwell

Wade Birdwell
Justice

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Tex. R. App. P. 47.2(b)

Delivered: May 7, 2020