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

No. 02-21-00167-CR

TERRY LYNN HORNER, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 43rd District Court
Parker County, Texas
Trial Court No. CR21-0430

Before Sudderth, C.J.; Bassel and Womack, JJ.
Memorandum Opinion by Justice Womack

MEMORANDUM OPINION

I. INTRODUCTION

Appellant Terry Lynn Horner was charged with evading arrest or detention with a vehicle. *See* Tex. Penal Code Ann. § 38.04(b)(2)(A). The indictment included two enhancement paragraphs alleging two prior felony convictions, which if proved, would increase Horner's punishment range to imprisonment for life or for any term between twenty-five and ninety-nine years. *See id.* § 12.42(d). Horner pleaded guilty to the offense, pleaded "not true" to the enhancement paragraphs, and elected to have a jury determine his punishment. The trial court found him guilty based on his plea, and following a three-day punishment trial, the jury found both enhancement paragraphs to be true, and it assessed Horner's punishment at seventy-five years' confinement. The trial court sentenced him accordingly.

Horner raises nine points on appeal. In his first point, he argues that his trial counsel overrode his autonomy—in contravention of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018)—by conceding the enhancement allegations despite his expressed desire to plead "not true" to those allegations. In his second through ninth points, Horner argues that he was denied the effective assistance of counsel during his trial and that the errors committed by his trial counsel had a cumulative harmful effect on the jury's verdict. With respect to his first point, we will hold that Horner has not preserved his *McCoy* complaint and that he has not presented us with a sufficient record to support such a complaint. With respect to his second through ninth points, we will hold that

Horner has not proven by a preponderance of the evidence that his trial counsel's representation was deficient. Accordingly, we will affirm.

II. BACKGROUND

Around midnight on April 25, 2021, Horner was driving his vehicle on Highway 199 in Springtown. Around that same time, Deputy Antonio Jimenez with the Parker County Sheriff's Office observed that Horner's vehicle had an obstructed tag and had no license plate lights. Deputy Jimenez initiated a traffic stop on Horner's vehicle. But rather than stop his vehicle, Horner attempted to flee from Deputy Jimenez. A car chase—which lasted approximately an hour and a half—ensued. During that chase, Horner's vehicle reached speeds of over one hundred miles per hour; he failed to stop at stop signs and red lights on multiple occasions; and during parts of the chase, he drove the wrong direction in lanes of travel. Horner eventually lost control of his vehicle, and he jumped out of it and took off running before his vehicle had come to a stop. Deputy Jimenez followed Horner on foot and ordered him to stop, but Horner did not comply. Deputy Jimenez then deployed his taser on Horner, and Horner was placed under arrest.

Horner was later indicted for evading arrest or detention with a vehicle, enhanced by two prior felony convictions. The first enhancement paragraph alleged that Horner had previously been convicted of the felony offense of possession of a controlled substance with intent to deliver on January 5, 2016, in the 415th District Court of Parker County. The second enhancement paragraph alleged that Horner had

previously been convicted of the felony offense of burglary of a habitation on July 14, 1998, in the 271st District Court of Wise County.

Horner later signed a written plea agreement in which he indicated that he intended to plead guilty to the offense of evading arrest or detention with a vehicle and "not true" to the enhancement paragraphs. That written plea agreement also indicated that Horner wanted a jury to assess his punishment.

Horner's punishment trial took place over three days in November 2021. On the first day of trial—just before voir dire—Horner indicated in open court that he wished to plead guilty to the underlying offense and to plead "not true" to the enhancement paragraphs. On the second day of trial—just prior to opening statements—Horner once again stated in open court that he wished to plead "not true" to the enhancement paragraphs.

During the evidentiary portion of Horner's trial, the State called three witnesses: (1) Deputy Jimenez, (2) Detective Ryan Urbanek of the Lake Worth Police Department, and (3) Officer Beth Turnbow of the Parker County District Attorney's Office. We need not detail these witnesses' respective testimonies to resolve this appeal. We simply note that (1) Deputy Jimenez testified regarding his attempt to stop Horner's vehicle and regarding the subject car and foot chases that ensued; (2) Detective Urbanek testified regarding a stop he had made on Horner's vehicle in 2020 while Detective Urbanek was employed as an officer with the Boyd Police Department, explaining that during that stop, he had discovered methamphetamine in

Horner's vehicle and that Horner had been arrested for the manufacture or delivery of a controlled substance stemming from that incident; and (3) Officer Turnbow testified as the State's fingerprint expert, offering testimony regarding numerous exhibits offered by the State that related to Horner's various prior convictions.[1] Horner did not call any witnesses to testify on his behalf.[2]

The jury ultimately found both enhancement paragraphs to be "true," and it set his punishment at seventy-five years' confinement. The trial court sentenced Horner accordingly. This appeal followed.

III. DISCUSSION

A. Horner's *McCoy* Complaint

In his first point, Horner argues that his trial counsel overrode his autonomy—in contravention of *McCoy*—by conceding the enhancement allegations despite his expressed desire to plead "not true" to those allegations.

1. Applicable Law

In *McCoy*, the United States Supreme Court reversed the defendant's conviction for capital murder and remanded the case to the trial court when the defendant's trial

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[1]We will give more detail regarding Officer Turnbow's testimony and the exhibits offered by the State to prove Horner's prior convictions during our discussion of Horner's third through sixth points.

[2]Horner testified, outside of the presence of the jury, for the limited purpose of stating that he was invoking his right to remain silent and that he did not want to call any witnesses.

counsel conceded the defendant's guilt over his clear objections to the contrary. 138 S. Ct. at 1512. The Supreme Court held that "[w]hen a client expressly asserts that the objective of 'his defen[s]e' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (emphasis removed). It further held that counsel's admission of a client's guilt over the client's express objection is structural error. *Id.* at 1511.

As to the preservation of a *McCoy* complaint, the Texas Court of Criminal Appeals has stated that "a defendant cannot simply remain silent before and during trial and raise a *McCoy* complaint for the first time after trial." *Turner v. State*, 570 S.W.3d 250, 276 (Tex. Crim. App. 2018). The court noted that a defendant faced with a *McCoy* issue should not be expected to object with the precision of an attorney, holding that a defendant makes a *McCoy* complaint with "sufficient clarity when he presents 'express statements of [his] will to maintain innocence.'" *Id.* (quoting *McCoy*, 138 S. Ct. at 1509).

2. The Complained-Of Concessions by Horner's Trial Counsel

As noted above, Horner pleaded "not true" to the enhancement paragraphs both in writing and in open court. Horner complains on appeal that his trial counsel overrode his autonomy by conceding the enhancement allegations despite his express plea of "not true," pointing to statements made by his trial counsel in voir dire, opening statements, and closing arguments.

During voir dire, Horner's trial counsel acknowledged that Horner "has a criminal history." Counsel stated that he was not "making a judgment that the criminal history should automatically qualify [Horner] for any particular punishment," noting that the jury would "have to decide what weight to give that criminal history."

During opening statements, Horner's trial counsel again stated that Horner "has a criminal history." Counsel, however, told the jury that the enhancement paragraphs had yet to be proven, noting that Horner's punishment range would be enhanced "only if the State of Texas is able to prove beyond a reasonable doubt that the penitentiary sentences that they claim that [Horner] endured are admissible as evidence. . . . But that's not said and done at this point." Counsel further told the jury that he and Horner would "fight" the enhancement allegations.

During closing argument, Horner's trial counsel stated,

> I'm not going to spend any time really on the four options that you really have. True, true; not true, not true; true as to one, true as to the other. I think I know where you're going. I think I understand the proof in regard to -- in regard to the enhancement provisions. I'm not suggesting what you should do; but I think that if it's your decision, that there is -- there's proof to support your decision.
>
> . . . .
>
> The law mandates that it's a long time in this circumstance. It's not like Mr. Horner is likely to be walking out of here. Number 1, he pled guilty. Number 2, he's got sufficient evidence to do so. He's been in the penitentiary twice in sequential order. So, you're probably going to start at 25 in all likelihood. I wish you weren't. I wish you had only one allegation there, but there's not. Probably going to start at 25.
>
> . . . .

> Twenty-five years. That's more time than he's spent for the total of his life in jail or prison because you know those were short sentences relatively. So, give him 25 years, all right?

3. Analysis

As to Horner's *McCoy* complaint, the State argues, among other things,[3] that Horner has failed to preserve this complaint and that the record does not support his complaint because it is silent as to Horner's objectives. We note that these two grounds—preservation and record development with respect to a *McCoy* complaint—are intertwined. *See Turner*, 570 S.W.3d at 276 (noting that the State had argued both that the defendant had failed to preserve his *McCoy* complaint and that the record was insufficient to show a *McCoy* violation and that "the preservation and record development claims in this case are interrelated").

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion sufficiently stating the specific grounds, if not apparent from the context, for the desired ruling. Tex. R. App. P. 33.1(a)(1); *Montelongo v. State*, 623 S.W.3d 819, 822 (Tex. Crim. App. 2021). Further, the party must obtain an express or implicit adverse trial-court ruling or object to the trial

[3]The State also argues that Horner's *McCoy* complaint fails because the issue of what arguments to pursue during sentencing, including whether to concede a defendant's prior convictions, is a trial-management issue rather than an issue of a client's autonomy. But because we will hold that Horner has failed to preserve his *McCoy* complaint and that the record does not support such a complaint, we need not address this alternative argument. *See* Tex. R. App. P. 47.1.

court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Dixon v. State*, 595 S.W.3d 216, 223 (Tex. Crim. App. 2020).

Here, Horner complains about statements made by his trial counsel during voir dire, opening statements, and closing arguments. But Horner never raised any objection or complaint to the trial court regarding these statements. Further, after the State had rested, Horner was called for the limited purpose of stating that he was invoking his right to remain silent and that he did not want to call any witnesses. At no point during that testimony did Horner complain about his trial counsel's conduct. And while Horner filed a motion for new trial, it made no complaint regarding the *McCoy* issue he now raises on appeal.[4]

Our record thus consists of Horner's pleas of "not true" to the enhancement paragraphs and his remaining silent while his trial counsel made the complained-of statements during voir dire, opening statements, and closing arguments. Because the record does not reflect a clear expression from Horner that he wished to maintain his innocence regarding the enhancement allegations, we hold that he has not preserved his *McCoy* complaint. *See Renteria v. State*, No. 05-22-00808-CR, 2023 WL 4446337, at *3 (Tex. App.—Dallas July 11, 2023, no pet.) (mem. op., not designated for

[4]Horner's motion for new trial simply argued that "[t]he verdict in this case is contrary to the law and the evidence." Apart from raising no complaint regarding Horner's *McCoy* issue, his motion for new trial also raised no complaint regarding ineffective assistance of counsel. The trial court did not sign an order on Horner's motion for new trial, and it has been overruled by operation of law.

publication) ("Because appellant did not express a desire to maintain his innocence as soon as he was provided with all the information relevant to his plea, we conclude he failed to preserve a *McCoy* issue for our review."); *Martinez v. State*, No. 13-18-00621-CR, 2020 WL 4381997, at *5 (Tex. App.—Corpus Christi–Edinburg July 30, 2020, pet. ref'd) (mem. op., not designated for publication) ("Texas does not require a trial court to address a claim of *McCoy* error until it is brought to its attention."); *see also Turner*, 570 S.W.3d at 276–77.

We likewise hold that Horner's *McCoy* complaint fails because the record is silent as to his desire to maintain his innocence as to the enhancement allegations. In *Stephenson v. State*, No 02-22-00101-CR, 2023 WL 4630638 (Tex. App.—Fort Worth July 20, 2023, no pet. h.), we recently dealt with a similar situation where the record was silent as to a client's desire to maintain his innocence. There, the defendant was charged with, among other things, sexual assault of a child under the age of seventeen. *Id.* at *1. Despite the defendant's plea of not guilty to that offense, his trial counsel conceded that the defendant had impregnated one of the sexual-assault victims. *Id.* at *7.

In rejecting the defendant's *McCoy* complaint raised on appeal, we held that the defendant had made no express statements of his will to maintain his innocence. *Id.* We noted that counsel's concession that the defendant had impregnated the victim was "repeated numerous times and at different stages throughout the trial, and [the defendant] did not object in any of those instances." *Id.* We further noted that the

defendant had "even testified outside the presence of the jury at one point, giving him a prime opportunity to notify the trial court of the complaints he now makes on appeal." *Id.* Ultimately, we rejected the defendant's *McCoy* complaint, holding, "We cannot presume a *McCoy* error based on a silent record. Because there were no express statements of [the defendant's] desire to maintain his innocence, he has not presented a sufficient record to sustain his *McCoy* complaint." *Id.* at *8.

Similarly, and as noted above in our discussion relating to preservation, Horner did not object when his trial counsel made the complained-of statements during voir dire, opening statements, and closing arguments. Moreover, Horner had a prime opportunity to raise a complaint regarding the statements made by his trial counsel during voir dire and opening statements when he testified outside the presence of the jury, yet Horner made no such complaint. Because we cannot presume a *McCoy* error based on a silent record, we hold that Horner has not presented a sufficient record to support his *McCoy* complaint. *See Stephenson*, 2023 WL 4630638, at *8; *Candelaria v. State*, No. 08-20-00007-CR, 2021 WL 1419459, at *3 (Tex. App.—El Paso Apr. 14, 2021, pet. ref'd) (not designated for publication) ("*McCoy* is violated and reversal is required only upon a showing that a defendant has expressly stated his will to maintain innocence. In the instant case, [the appellant] did not expressly state his will to maintain innocence . . . . As such, we cannot find *McCoy* was violated.") (citation omitted). We overrule Horner's first point.

B. Horner's Complaints of Ineffective Assistance of Counsel

In his second through ninth points, Horner argues that he was denied effective assistance of counsel during his trial and that the errors committed by his trial counsel had a cumulative harmful effect on the jury's verdict.

1. Standard of Review and Applicable Law

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). A reviewing court need not address both deficiency and prejudice if the appellant makes an insufficient showing on one component, nor must a reviewing court address deficiency and prejudice in any particular order. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

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*

id. 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.

2. Horner's Second Point

In his second point, Horner argues that he was denied the effective assistance of counsel when his trial counsel conceded the enhancement allegations and admitted that Horner had a criminal record. Horner argues that "there is no conceivable reasonable strategy to admit or concede to [his] criminal history or the truth of the enhancement allegations." We disagree.

Here, Horner's trial counsel stressed during voir dire and closing arguments the importance of Horner's taking responsibility for his actions. Admitting to the enhancement allegations and Horner's criminal past fits in with that theme. Owning up to a defendant's past in an effort to lessen the likely penalty is "an appropriate trial strategy." *Rodriguez v. State*, 459 S.W.3d 184, 196 (Tex. App.—Amarillo 2015, pet. ref'd); *see also Martin v. State*, 265 S.W.3d 435, 443 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding that eliciting testimony as to a defendant's prior convictions can be a matter of trial strategy if the prior convictions are admissible). Thus, because we can imagine a reasonable trial strategy for Horner's trial counsel's actions, we will not find his conduct to be deficient. *See Brantley v. State*, No. 02-19-00349-CR, 2021 WL 3679239, at *2 (Tex. App.—Fort Worth Aug. 19, 2021, pet. ref'd) (mem. op., not designated for publication) ("If counsel's reasons for his conduct do not appear in the record and if there is at least the possibility that the conduct could have been a legitimate trial strategy, we defer to counsel's decisions and deny relief on an ineffective-assistance claim on direct appeal."). We overrule Horner's second point.

3. Horner's Third Point

In his third point, Horner argues that he was denied the effective assistance of counsel when his trial counsel failed to object to Officer Turnbow as an expert witness. Specifically, Horner argues that his trial counsel should have objected to Officer Turnbow's testimony under Texas Rule of Evidence 702 and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), because "Officer Turnbow gave no

testimony about the method generally applied in fingerprint comparison, or what technique she applied in this case." *See* Tex. R. Evid. 702 (concerning testimony by expert witnesses); *Kelly*, 824 S.W.2d at 573 (stating that the proponent of scientific evidence must prove, among other things, that the technique applying the underlying scientific theory was properly applied in the case).

We note, however, that the record reflects that Officer Turnbow gave testimony regarding the method she generally applied in fingerprint comparison. She testified that she would take the document that she needed to analyze and see "what finger ha[d] been printed" on the document; that she would place an "inked card next to the fingerprint on the document" and would "compare the minutia in the print and make a count of how many likenesses there [were]"; and that she "generally lik[ed] to have around eight points of identification that match[ed]." Officer Turnbow also testified that she had worked as a fingerprint identification expert for "close to 30 years" and that she had testified in court on "[m]any occasions," including testifying in the subject trial court. Despite that testimony, Horner maintains that his trial counsel still should have objected to Officer Turnbow as an expert witness because "[s]he did not discuss what the 'minutia' of a fingerprint are, and how she – as an expert – is able to identify matching identifiers" and because it was unclear what technique Officer Turnbow applied in this case.

We do not find that Horner's trial counsel was deficient for failing to raise objections to Officer Turnbow as an expert witness because he may have had a

reasonable trial strategy for not objecting. First, he may have decided not to object to Officer Turnbow as an expert witness so as not to emphasize her qualifications. Second, he may have decided not to object so as not to undermine a strategy that Horner had accepted responsibility for his actions. Third, given Officer Turnbow's lengthy history as a fingerprint identification expert, Horner's trial counsel could have surmised that she and the State would have easily cleared up any issues relating to the reliability of her testimony, and, thus, he would save the jury time and potentially avoid damaging testimony to Horner's case by not objecting.[5] *See Junell v. State*, 607 S.W.3d 410, 415 (Tex. App.—Texarkana 2020, pet. ref'd) ("Counsel's decision not to object to [the expert's] qualifications is a reasonable trial strategy given the great discretion imbued in the trial court to determine expert qualification."); *see also Menefield*, 363 S.W.3d at 593 (holding that trial counsel "should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective"). We overrule Horner's third point.

[5]Moreover, in the event that Horner's trial counsel had objected to Officer Turnbow as an expert witness, it is possible—if not likely—that Officer Turnbow would have been able to address Horner's concerns through further testimony. Thus, even if Horner's trial counsel was deficient by failing to object to Officer Turnbow as an expert witness, Horner has not demonstrated prejudice. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (requiring a showing that counsel's errors were so serious that they deprived the defendant of a fair trial).

4. Horner's Fourth Point

In his fourth point, Horner argues that he was denied the effective assistance of counsel when his trial counsel did not object to or move to strike Officer Turnbow's expert testimony on the grounds that she offered merely conclusory opinions without any specialized or scientific foundation for her opinions. Specifically, Horner complains that while Officer Turnbow testified that his fingerprints matched those found in ten of the State's exhibits,[6] her testimony was "conclusory and offered no underlying basis for her opinion" because she had "merely testified that she [had] compared the exhibits to [Horner's] known prints, and they [had] matched."

Texas Rule of Evidence 705 permits an expert witness to state her opinion without first testifying to the underlying facts or data supporting her opinion. Tex. R. Evid. 705(a). That Rule also provides that the expert may be required to disclose those facts or data on cross-examination and that, in a criminal case, an adverse party must be permitted to take an expert witness on voir dire outside the jury's presence regarding the underlying facts or data supporting the expert's opinions. Tex. R. Evid. 705(a), (b). "An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion." Tex. R. Evid. 705(c).

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[6]Those exhibits contained certified copies of judgments and sentences for the convictions relating to the enhancement paragraphs, as well as other convictions pertaining to Horner.

While recognizing that Rule 705(a) "permits an expert to state her opinion without first testifying to the underlying facts or data supporting them," Horner argues that his trial counsel "should have objected to Officer Turnbow's insufficient testimony[] and should have requested a hearing outside of the presence of the jury" pursuant to Rule 705(b). Horner contends that his trial counsel was deficient because he did not make such an objection or request such a hearing. We disagree.

Horner's trial counsel may have had a reasonable trial strategy for not objecting to this testimony or requesting a hearing outside the jury's presence. Similar to our reasons offered with respect to Horner's trial counsel's conduct challenged in Horner's third point, Horner's trial counsel may have decided that he did not want to emphasize the fingerprint testimony pertaining to Horner's prior convictions; he may have decided not to object to this evidence or request a hearing so as not to undermine a strategy that Horner had accepted responsibility for his actions; and he may have surmised that Officer Turnbow and the State could have easily cleared up her "conclusory" testimony, potentially with more damning testimony.[7] As the record is silent as to Horner's trial counsel's reasons for not objecting to this testimony or

[7]In the event that Horner's trial counsel had objected to Officer Turnbow's "conclusory" testimony or had asked for a hearing outside of the jury's presence, it is possible—if not likely—that Officer Turnbow would have been able to address Horner's concerns through further testimony. Thus, even if Horner's trial counsel was deficient by failing to object to Officer Turnbow's "conclusory" testimony and by failing to request a hearing outside the jury's presence, Horner has not demonstrated prejudice. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

asking for a hearing, we will not presume that he was deficient. *See Junell*, 607 S.W.3d at 415; *see also Menefield*, 363 S.W.3d at 593. We overrule Horner's fourth point.

5. Horner's Fifth and Sixth Points[8]

In his fifth point, Horner argues that he was denied the effective assistance of counsel when his trial counsel did not object to or move to strike evidence of certain of Horner's alleged prior convictions that had been offered by the State without tying them to Horner. Specifically, Horner complains that State's Exhibits 35A, 36A, and 41A[9] were admitted without defense objection "despite a complete lack of supporting evidence tying them to [him]." In his sixth point, Horner argues that he was denied the effective assistance of counsel when his trial counsel failed to make proper objections to evidence of certain of Horner's prior convictions that were not properly tied to him. Specifically, Horner complains that, while his trial counsel did make

[8]In their respective briefs, the parties have addressed Horner's fifth and sixth points together, and we do the same.

[9]State's Exhibit 35A was a certified copy of a pen packet pertaining to the allegation in the first enhancement paragraph, State's Exhibit 36A was a certified copy of a pen packet pertaining to the allegation in the second enhancement paragraph, and State's Exhibit 41A was a certified copy of a judgment and sentence pertaining to a 2010 order for deferred adjudication for driving with an invalid license with a previous conviction.

certain objections to State's Exhibits 39A and 47,[10] his trial counsel failed to make the appropriate objection that the exhibits were not sufficiently linked to Horner.

To establish that a defendant has been convicted of a prior offense, the State must establish, beyond a reasonable doubt, that a prior conviction exists and that the defendant is linked to that conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). "No specific document or mode of proof is required to prove these two elements." *Id.* The State may prove these two elements "in a number of different ways," including with "documentary proof (such as a judgment) that contains sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted." *Id.* at 921–22.

Having reviewed the record and the complained-of exhibits, we cannot say that Horner's trial counsel was deficient for failing to object to the exhibits due to a lack of a link to Horner. In this regard, all of these exhibits were linked to Horner by his name and unique State ID Number (SID).[11] Officer Turnbow testified that a SID is a number assigned to "a particular individual." The SID listed on those exhibits is the same SID listed on State's Exhibits 32 and 34, which Officer Turnbow linked to Horner through fingerprints. Accordingly, because Horner's SID linked the

[10]State's Exhibit 39A was a certified copy of a judgment and sentence relating to a 2010 conviction for driving with an invalid license, and State's Exhibit 47 was a certified copy of a pen packet relating to a 1996 conviction for burglary of a building.

[11]State's Exhibits 35A and 47 were further linked to Horner by including photographs depicting him.

complained-of exhibits to him, we cannot say that his trial counsel was deficient by failing to object to those exhibits based on a purported lack of a link. *See Gonzales v. State*, No. 05-19-00719-CR, 2020 WL 1672554, at *3 (Tex. App.—Dallas Apr. 6, 2020, no pet.) (mem. op., not designated for publication) (holding that inclusion of defendant's SID on complained-of exhibit was sufficient to prove his prior conviction); *Johnson v. State*, No. 02-17-00382-CR, 2019 WL 4309171, at *10 (Tex. App.—Fort Worth Sept. 12, 2019, pet. ref'd) (mem. op., not designated for publication) ("The trial court had sufficient evidence to link [the challenged exhibits to the defendant] without the necessity of matching his fingerprints to the judgments in those exhibits based on his name and unique state identification number, which . . . tied all of his unchallenged convictions to him."); *see also Wilson v. State*, No. 05-17-01191-CR, 2018 WL 4767154, at *2 (Tex. App.—Dallas Oct. 3, 2018, no pet.) (mem. op., not designated for publication) (holding that trial court did not err by admitting documents of prior convictions where person convicted had same name, birth date, and SID as defendant).

Moreover, Horner's trial counsel was never given the opportunity to explain why he did not object to these exhibits based on the purported lack of a link to Horner, and we will not presume that his actions were deficient based on a silent record. *See Burdick v. State*, No. 02-11-00171-CR, 2012 WL 4010415, at *5 (Tex. App.—Fort Worth Sept. 13, 2012, no pet.) (mem. op., not designated for publication) ("Because the record here is silent as to [c]ounsel's reason for failing to object, we are

constrained to hold that [a]ppellant has failed to rebut the presumption that [c]ounsel acted reasonably."). Additionally, Horner has not demonstrated that the outcome of his case would have been different if his trial counsel made Horner's desired objections to these exhibits. *See Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. We overrule Horner's fifth and sixth points.

6. Horner's Seventh Point

In his seventh point, Horner argues that he was denied the effective assistance of counsel because his trial counsel failed to object when the prosecutor published State's Exhibits 32–47 to the jury. Specifically, Horner argues that, when publishing those exhibits, the prosecutor "did not merely read from the documents" but that she "highlighted certain portions, summarized their contents in her own words, explained the significance of the exhibits, and told the jury which portions to take note of."

Once a document has been admitted into evidence, a party may publish the document by reading it into evidence. *Acevedo v. State*, 255 S.W.3d 162, 171 (Tex. App.—San Antonio 2008, pet. ref'd). The manner and means of the presentation of documentary evidence to a jury is best left to the sound discretion of the trial court. *Wheatfall v. State*, 882 S.W.2d 829, 838 (Tex. Crim. App. 1994). "Counsel is permitted 'endless variations on methods of presentation,' and 'in the presentation of this evidence to the jury, counsel or a witness may use extra verbiage to ease the transition of the recitation of a document to verbal communication.'" *Butcher v. State*, No. 03-08-00063-CR, 2009 WL 1024964, at *3 (Tex. App.—Austin Apr. 14, 2009, no pet.)

(mem. op., not designated for publication) (quoting *Wheatfall*, 882 S.W.2d at 838 n.9). Counsel oversteps her role and assumes the role of a witness only where she "transform[s] the statements from a recitation of the admitted document to argument." *Wheatfall*, 882 S.W.2d at 838 n.9.

Having reviewed the complained-of portion of the record, we cannot say that the prosecutor's reading of selected portions of State's Exhibits 32–47 transformed her role into that of a witness. *See id.* Indeed, Horner does not explain in his brief what information was conveyed by the prosecutor beyond that which was actually included in the document so as to transform the prosecutor's role, and we fail to see that such information was conveyed. *See Butcher*, 2009 WL 1024964, at *4 (holding that trial court acted within its discretion in permitting prosecutor to read portions of pen packet to jury when "[n]othing in the prosecutor's statement . . . convey[ed] information beyond that actually included in the document"). Accordingly, Horner's trial counsel was not deficient by failing to object to the publication of State's Exhibits 32–47.

Moreover, Horner has not demonstrated that the failure to object was not part of his trial counsel's strategy. His trial counsel may have thought that raising an objection would highlight Horner's prior convictions or that the prosecutor's reading of selected portions of the exhibits was preferable to her reading the exhibits in their entirety. Thus, as the record is silent for why Horner's trial counsel failed to object, we cannot say that his trial counsel was deficient. *See Telepak v. State*, No. 08-16-

00104-CR, 2017 WL 4546258, at *8 (Tex. App.—El Paso Oct. 12, 2017, no pet.) (not designated for publication) (holding that appellant failed to demonstrate that her counsel was deficient for not objecting to publication of exhibit where she failed to prove that her counsel's lack of objection was not part of trial strategy). We overrule Horner's seventh point.[12]

7. Horner's Eighth Point

In his eighth point, Horner argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the State's closing argument that purportedly commented on his exercise of his right not to testify. Specifically, Horner argues that his trial counsel should have objected to the following comment made by the prosecutor during closing argument:

> Terry Horner has given y'all each and every justification for a life sentence. Y'all should start your deliberations at life; and any redeeming quality or factor that you've heard about for Terry Horner, you can deduct from life. And y'all don't know of anything.

A comment by a prosecutor that refers to a defendant's failure to testify violates the privilege against self-incrimination. *Canales v. State*, 98 S.W.3d 690, 695 (Tex. Crim. App. 2003). To violate a defendant's rights, the comment "must clearly refer to the accused's failure to testify." *Id.* An indirect or implied reference to a defendant's failure to testify does not violate the defendant's privilege against self-

[12]Even if Horner's counsel was deficient with respect to this point, Horner has not explained—let alone proven—how he was prejudiced by his counsel's failure to object. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

incrimination. *Id.*; *see Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001). ("It is not sufficient that the language might be construed as an implied or indirect allusion."). Rather, "[t]he test is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify." *Bustamante*, 48 S.W.3d at 765. In applying this standard, a reviewing court should consider the context in which the comment was made. *Id.*

In reviewing the record and the context in which the prosecutor's comment was made—during closing arguments at Horner's punishment trial in which no witnesses testified on his behalf—we cannot conclude that the comment was manifestly intended or would necessarily lead the jury to believe that it was a statement concerning Horner's failure to testify. A prosecutor is entitled to comment on a defendant's failure to produce testimony from sources other than himself when it is relevant to a disputed issue. *Harris v. State*, 122 S.W.3d 871, 884 (Tex. App.—Fort Worth 2003, pet. ref'd). Here, the appropriate sentence to impose on Horner was a disputed issue to be decided by the jury, and testimony regarding Horner's redeeming qualities was relevant to that issue. *See Sims v. State*, 273 S.W.3d 291, 295 (Tex. Crim. App. 2008) (stating that relevant punishment evidence includes, but is not limited to, evidence of the defendant's character). Therefore, Horner's trial counsel was not deficient by failing to object to the prosecutor's comment. *See Harris*, 122 S.W.3d at 884.

Moreover, the prosecutor's comment did not clearly refer to Horner's failure to testify, but it merely suggested that the jury did not hear about any of Horner's redeeming qualities. Such an indirect reference does not amount to an impermissible comment on his right to testify. *See Smith v. State*, No. 03-07-00392-CR, 2009 WL 2058915, at *11 (Tex. App.—Austin July 14, 2009, pet. ref'd) (mem. op., not designated for publication) ("Even if the prosecutor's argument could be considered an indirect reference to [the defendant's] failure to testify at the punishment phase, such indirect reference does not amount to an impermissible comment on [the defendant's] right not to testify."); *Carrillo v. State*, No. 13-01-649-CR, 2004 WL 34857, at *8 (Tex. App.—Corpus Christi–Edinburg Jan. 8, 2004, pet. ref'd) (mem. op., not designated for publication) (holding that prosecutor's comment "did not clearly refer to [the defendant's] failure to testify, but merely suggested that [he] may be the only one who knew exactly what happened").

Even if we were to assume that the prosecutor's comment was improper, Horner's trial counsel may have thought that objecting to the comment would draw the jury's attention to Horner's failure to testify and the lack of mitigating evidence presented on his behalf. *See Morris v. State*, No. 06-09-00147-CR, 2010 WL 1644739, at *6 (Tex. App.—Texarkana Apr. 23, 2010, no pet.) (mem. op., not designated for publication) (holding that "even if counsel believed the trial court's comment was damaging, counsel may have taken the position that to lodge an objection would have served little purpose except to draw the jury's attention to [the defendant's] failure to

testify or the lack of mitigating evidence, thereby magnifying its significance"). And without a record containing Horner's trial counsel's explanation for his failure to object to the prosecutor's statement, we cannot say that his performance was deficient. *See id.* ("[A]bsent a record containing counsel's explanations [for his failure to object to the trial court's comment on the defendant's right to testify], we will not find deficient performance."). We overrule Horner's eighth point.

8. Horner's Ninth Point

In his ninth point, Horner argues that the errors committed by his trial counsel, even if not harmful standing alone, have a cumulative harmful effect which casts significant doubt on the jury's verdict. But, as we have already explained, Horner's trial counsel was not deficient. Thus, Horner's cumulative-error complaint lacks merit because there is no error to cumulate. *See Baugus v. State*, No. 02-22-00015-CR, 2023 WL 3370718, at *16 (Tex. App.—Fort Worth May 11, 2023, pet. ref'd) (mem. op., not designated for publication) ("Baugus's cumulative-error complaint lacks merit because there is no error to cumulate."); *Bell v. State*, No. 02-18-00244-CR, 2019 WL 1967538, at *9 (Tex. App.—Fort Worth May 2, 2019, pet. ref'd) (mem. op., not designated for publication) ("Bell argues that even if each of his previous points do[es] not constitute harm sufficient for reversal, their cumulative effect does . . . . But his individual points either do not demonstrate reversible error or do not show that he was harmed. Therefore, there is no error to cumulate."). We overrule Horner's ninth point.

IV. CONCLUSION

Having overruled Horner's nine points, we affirm the trial court's judgment.

/s/ Dana Womack

Dana Womack
Justice

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

Delivered: September 7, 2023