TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00398-CR

Gary Lee Griffin, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 22ND JUDICIAL DISTRICT
NO. CR-14-0432, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Gary Lee Griffin of the offense of assault on a public servant.[1] The district court rendered judgment on the verdict, assessed punishment at two years' imprisonment and a $2,500 fine, and suspended imposition of the sentence and placed Griffin on community supervision for four years. In two points of error on appeal, Griffin asserts that the evidence is insufficient to support his conviction and that he was denied the effective assistance of counsel during trial. We will affirm the judgment of conviction.

BACKGROUND

The jury heard evidence that on the afternoon of April 9, 2014, firefighters with the Wimberley Volunteer Fire Department responded to a house fire located on Rollingwood Oaks

[1] *See* Tex. Penal Code § 22.01(b)(1).

Drive. One of the firefighters was Assistant Chief Phil Arbogast, who testified that he had the responsibility that day of driving a tanker truck that would transport water from a nearby water source to the scene of the fire, in order to ensure that the firefighters would not run out of water. Arbogast explained that the closest water source to the location of this fire was a creek with a low-water crossing located within a subdivision approximately three miles away from the fire. According to Arbogast, when he arrived at the low-water crossing and began filling his truck with water from the creek, he was approached by a man, later identified as Griffin, the owner of a local construction company, who told Arbogast, "This is private fucking land, and this is private fucking water." Arbogast testified that he turned toward Griffin and replied, "Unfortunately, we have a structure fire. The State owns the water. I've got to get the water back to the fire." Arbogast explained that Griffin then struck him in the neck with enough force that Arbogast "lost [his] footing" and "toppled over backwards" into the creek, where Arbogast became stuck in "a mass of sticks or root balls." Arbogast testified that as he called out for help, Griffin "looked at me, kind of smirked, turned, and walked up the road." Arbogast recounted that he eventually pulled himself out of the creek and called Hays County dispatch for assistance.

Griffin was subsequently arrested and charged with the offense of assaulting a public servant. Based on the above and other evidence, which we discuss in more detail below, the jury found Griffin guilty as charged. The district court rendered judgment on the verdict and placed Griffin on community supervision as noted above. Griffin then filed a motion for new trial, which the district court denied following a hearing. This appeal followed.

ANALYSIS

Evidentiary sufficiency

In his first point of error, Griffin asserts that the evidence is insufficient to support his conviction. Specifically, he claims that the evidence is insufficient to prove that Arbogast, a volunteer firefighter, is a public servant as that term is defined in the Penal Code.

When reviewing the sufficiency of the evidence supporting a conviction, "the standard of review we apply is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[2] "This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts."[3] "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them."[4] "On appeal, reviewing courts 'determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.'"[5] "Thus, '[a]ppellate courts are not permitted to use a 'divide and conquer' strategy for evaluating sufficiency of the evidence' because that approach does not consider the cumulative force

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[2] *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[3] *Id*.

[4] *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

[5] *Murray*, 457 S.W.3d at 448 (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

of all the evidence."[6] "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination."[7]

Additionally, in some cases, "a sufficiency-of-the-evidence issue turns on the meaning of the statute under which the defendant has been prosecuted."[8] "This is because an appellate court must determine what the evidence must show before that court can assess whether the evidence is sufficient to show it."[9] In other words, we must first determine whether "certain conduct"—in this case, assaulting a volunteer firefighter—"actually constitute[s] an offense under the statute with which the defendant has been charged."[10] "That question, like all statutory construction questions, is a question of law, which we review de novo."[11]

"In construing statutes, 'we necessarily focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment.'"[12] "Thus, if the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we

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[6] *Id*. (quoting *Hacker v. State*, 389 S.W.3d 860, 873 (Tex. Crim. App. 2013)).

[7] *Id*. at 448-49 (citing *Hooper*, 214 S.W.3d at 12).

[8] *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015) (citing *Moore v. State*, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012)).

[9] *Moore*, 371 S.W.3d at 227 (citing *Ramos v. State*, 303 S.W.3d 302, 305 (Tex. Crim. App. 2009)).

[10] *Liverman*, 470 S.W.3d at 836.

[11] *Id*. (citing *Johnson v. State*, 423 S.W.3d 385, 394 (Tex. Crim. App. 2014)).

[12] *Whitfield v. State*, 430 S.W.3d 405, 408 (Tex. Crim. App. 2014) (quoting *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)).

ordinarily give effect to that plain meaning."[13] Additionally, because we are construing a provision in the Penal Code, we are mindful that the provision is not to be "strictly construed" but instead "shall be construed according to the fair import of [its] terms, to promote justice and effect the objectives of the code."[14] "The general purposes of [the Penal Code] are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate."[15]

Griffin was charged with the offense of assaulting a public servant. A person commits the offense of assault if the person "intentionally, knowingly, or recklessly causes bodily injury to another."[16] The offense is ordinarily a Class A misdemeanor, except that the offense is a third-degree felony if it is committed against "a person the actor knows is a public servant while the public servant is lawfully discharging an official duty."[17] The Penal Code defines "public servant" as:

> a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties:
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> (A) an officer, employee, or agent of government;

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[13] *Boykin*, 818 S.W.2d at 785 (citing *Smith v. State*, 789 S.W.2d 590, 592 (Tex. Crim. App. 1990)).

[14] Tex. Penal Code § 1.05.

[15] *Id*. § 1.02.

[16] *Id*. § 22.01(a)(1).

[17] *Id*. § 22.01(b)(1).

(B) a juror or grand juror; or

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; or

(D) an attorney at law or notary public when participating in the performance of a governmental function; or

(E) a candidate for nomination or election to public office; or

(F) a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.[18]

Thus, the Penal Code's definition of "public servant" is broad, encompassing not only individuals employed by the government but also, under certain circumstances, private citizens. As this Court has previously explained when construing the definition in the context of a different Penal Code provision incorporating the term:

> "[P]ublic servant" encompasses public officials and employees in every permutation of Texas state or local government, without distinction or limitation regarding branch or department (legislative, executive, judicial), level (county, city, district, etc.), or how the position is selected (elected, appointed, etc.). The definition also extends to certain other persons who provide a specific or limited form of governmental service or function—jurors, grand jurors, attorneys and notaries "participating in performing a governmental function," and arbitrators and other private adjudicators of causes or controversies. Even candidates for public office, others not yet having qualified or assumed their official duties, and persons performing a governmental function under a claim of right come within the definition.[19]

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[18] *Id*. § 1.07(a)(41).

[19] *Ex parte Perry*, 471 S.W.3d 63, 95 (Tex. App.—Austin 2015), *rev'd in part on other grounds*, 483 S.W.3d 884 (Tex. Crim. App. 2016).

Additionally, the definition of "public servant" includes individuals who are "agents of government."[20] "Government" is broadly defined in the Penal Code as "the state; a county, municipality, or political subdivision of the state; or any branch or agency of the state, a county, municipality, or political subdivision."[21] "Agent," although not defined in the Penal Code, has a plain and ordinary meaning of "a person or business authorized to act on another's behalf."[22] Thus, according to the plain language of the statute, Arbogast would meet the definition of a public servant if there was evidence presented from which the jury could have reasonably inferred that he was acting on behalf of government at the time he was assaulted by Griffin.

We conclude that such evidence was presented here. Arbogast testified that he was the Assistant Chief of the Wimberley Volunteer Fire Department. According to Arbogast, the fire department was "contracted by an emergency services district," which Arbogast testified was a government agency and "taxing entity" that was "responsible for [] collecting a set tax rate and then funding a department." Arbogast also testified that the fire department was funded through taxes and that he was "an agent of the fire department." Arbogast explained that at the time of the assault, the department was responding to a residential fire on Rolling Oaks Drive, which Arbogast testified was located "in the Wimberley area." Arbogast further testified that, in order to ensure that there was enough water to fight the fire, he had transported a tanker truck to a low-water crossing at a creek located in a subdivision also within the Wimberley area and proceeded to fill his truck with

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[20] Tex. Penal Code § 1.07(a)(41)(A).

[21] *Id*. § 1.07(a)(24).

[22] *See* Webster's New Universal Unabridged Dictionary 38 (1996).

water from the creek. A photograph admitted into evidence showed that the door of the truck contained the words, "Wimberley Vol. Fire Dept., Hay[s] Co. ESD #4." According to Arbogast, he was assaulted by Griffin as he was pumping water from the creek into the truck. When asked if he was "doing [his] official duties . . . for the fire department" at that time, Arbogast testified, "Absolutely." Additionally, Arbogast testified that at the time of the assault, he was wearing a t-shirt that contained the words, "Wimberley Fire and Rescue" printed on both the front and the back of the shirt. Arbogast also testified that, in response to Griffin's comment to him that the land and water was "private," Arbogast told Griffin, "Unfortunately, we have a structure fire. The State owns the water. I've got to get the water back to the fire." The combined and cumulative force of this evidence, when viewed in the light most favorable to the verdict, would support a finding that, at the time of the assault, Arbogast was an agent of government, specifically the City of Wimberley and / or the emergency services district that funded the fire department.

In arguing that Arbogast was not a public servant, Griffin relies on a related provision in the assault statute that makes it a third-degree felony offense to assault "a person the actor knows is emergency services personnel while the person is providing emergency services."[23] The statutory definition of "emergency services personnel" specifically includes volunteer firefighters.[24] Moreover, the legislative history of this provision suggests that it was enacted out of a concern that the definition of "public servant" did not "clearly include emergency services personnel who, in the

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[23] Tex. Penal Code § 22.01(b)(5).

[24] *See id*. § 22.01(e)(1) ("Emergency services personnel" includes firefighters, emergency medical services personnel as defined by Section 773.003, Health and Safety Code, emergency room personnel, and other individuals who, in the course and scope of employment or as a volunteer, provide services for the benefit of the general public during emergency situations.").

course of their employment or as a volunteer, respond to emergency situations."[25] According to Griffin, the enactment of this provision is the "best indication that Arbogast was not shown to be a public servant."

We disagree. The Legislature's enactment of one provision that applies to volunteer firefighters when they are providing emergency services does not preclude another provision from applying to volunteer firefighters when they are acting as public servants, even if in some cases both provisions could apply.[26] The issue before us is not whether the State could have charged Griffin under the emergency-services-personnel provision but whether the State presented sufficient evidence to prove that Griffin committed the charged offense of assault of a public servant. On this record, based on the evidence summarized above, we conclude that it did.

We overrule Griffin's first point of error.

Ineffective assistance of counsel

In his second point of error, Griffin asserts that trial counsel rendered ineffective assistance. Specifically, Griffin claims that counsel: (1) failed to object either prior to or during trial to the admissibility of statements made by Griffin following what Griffin contends was an unlawful

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[25] *See* House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 495, 80th Leg., R.S. (2007).

[26] We note that in addition to public servants and emergency services personnel, the assault statute also makes it a third-degree felony offense to assault individuals who are in a familial or dating relationship with the assailant, individuals who contract with the government to perform services in correctional facilities, and individuals who are security officers. *See* Tex. Penal Code § 22.01(b)(1)-(5). There is nothing in the statute to suggest that the Legislature intended these provisions to be mutually exclusive.

arrest; (2) failed to argue that a statement made by Arbogast during the incident, which the district court excluded as hearsay, was admissible as an excited utterance and failed to make an offer of proof showing what Arbogast's statement would have been; (3) failed to object to the admissibility of a statement by Tonya Adams, Griffin's fiancee, that Griffin contends was hearsay; and (4) failed to object to the inclusion of a presumption in the jury charge and failed to object to the absence of instructions in the charge explaining the legal effect of the presumption.

Standard of review

"Ineffective-assistance-of-counsel claims are governed by the familiar *Strickland* framework: To prevail, the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense."[27] "An attorney's performance is deficient if it is not within the range of competence demanded of attorneys in criminal cases as reflected by prevailing professional norms, and courts indulge in a strong presumption that counsel's conduct was *not* deficient."[28] "A defendant suffers prejudice if there is a reasonable probability that, absent the deficient performance, the outcome [of the proceeding] would have been different."[29] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[30] "It will not suffice for Appellant to show 'that the errors had some conceivable effect on the outcome of the

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[27] *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

[28] *Id*. at 307-08 (emphasis in original).

[29] *Id*. (citing *Strickland*, 466 U.S. at 694).

[30] *Id*.

proceeding.'"[31] "Rather, he must show that 'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'"[32]

Additionally, this is a case in which the district court already considered Griffin's allegations of ineffectiveness during a hearing on Griffin's motion for new trial, which the district court denied. Accordingly, our analysis also incorporates an abuse-of discretion standard, and we are to reverse "only if the trial judge's opinion was clearly erroneous and arbitrary."[33] A trial court abuses its discretion in denying a motion for new trial "if no reasonable view of the record could support the trial court's ruling."[34] "This deferential review requires the appellate court to view the evidence in the light most favorable to the trial court's ruling."[35] "The appellate court must not substitute its own judgment for that of the trial court and must uphold the trial court's ruling if it is within the zone of reasonable disagreement."[36] "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[37]

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[31] *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 693).

[32] *Id*. (quoting *Strickland*, 466 U.S. at 695).

[33] *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012) (citing *Freeman v. State*, 340 S.W.3d 717, 732 (Tex. Crim. App. 2011); *Gonzales v. State*, 304 S.W.3d 838, 842 (Tex. Crim. App. 2010)).

[34] *Id*. (citing *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007); *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004)).

[35] *Id*. (citing *Charles*, 146 S.W.3d at 208).

[36] *Id*. (citing *Webb*, 232 S.W.3d at 112; *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004)).

[37] *Id*. (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

Warrantless arrest

Griffin first asserts that trial counsel should have objected either prior to or during trial to the admissibility of statements made by Griffin following his arrest. According to Griffin, the warrantless arrest was illegal and therefore the evidence obtained following his arrest should have been excluded.

"Generally, a warrantless arrest is, pursuant to the Fourth Amendment, unreasonable per se unless the arrest fits into one of a 'few specifically defined and well delineated exceptions.'"[38] "A police officer may arrest an individual without a warrant only if probable cause exists with respect to the individual in question and the arrest falls within one of the exceptions set out in Tex. Code Crim. Proc. art. 14.01-14.04."[39] "Probable cause for a warrantless arrest requires that the officer have a reasonable belief that—based on facts and circumstances within the officer's personal knowledge, or of which the officer has reasonably trustworthy information—an offense has been committed."[40] "Probable cause must be based on specific, articulable facts rather than the officer's mere opinion."[41] "We use the 'totality of the circumstances' test to determine whether probable cause existed for a warrantless arrest."[42]

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[38] *Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)).

[39] *Id*.

[40] *Id*. at 901-02.

[41] *Id*. at 902.

[42] *Id*.

We use the same totality-of-the-circumstances test for determining whether the statutory exception was satisfied. The exception at issue in this case is found in article 14.03 of the Code of Criminal Procedure, which provides that "[a]ny peace officer may arrest, without [a] warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony."[43] "The determination of whether a place is a 'suspicious place' is a highly fact-specific analysis."[44] An "important factor" in the analysis is "the time between the crime and the apprehension of the suspect in a suspicious place."[45] "Courts have held homes to be suspicious places when an eyewitness to a suspected crime or breach of the peace followed a suspect to the home afterwards."[46] "Reviewing courts in Texas have consistently used the totality of the circumstances test for deciding whether an arrest is proper under Article 14.03(a)(1)."[47]

In this case, the arresting officer, Deputy David Gamble of the Hays County Sheriff's Office, testified that when he arrived at the scene, approximately three to four minutes after the assault had been reported, he observed Arbogast "standing in front of his marked unit, drenched. He was wearing a gray Wimberley Fire Department T-shirt, I believe blue jeans. Both were completely saturated." Gamble also testified that he had observed evidence that Arbogast had been

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[43] Tex. Code Crim. Proc. art. 14.03(a)(1).

[44] *Dyar v. State*, 125 S.W.3d 460, 468 (Tex. Crim. App. 2003); *Cook v. State*, 509 S.W.3d 591, 604 (Tex. App.—Fort Worth 2016, no pet.).

[45] *Dyar*, 125 S.W.3d at 468.

[46] *Cook*, 509 S.W.3d at 604.

[47] *Dyar*, 125 S.W.3d at 468.

assaulted. Gamble explained, "There [were] red marks on—up and around the neck and collarbone area, and saturated clothing, which indicated he had been pushed into the creek water." After speaking with Arbogast for what he believed was approximately five minutes, Gamble proceeded to Griffin's residence. When asked how far Griffin's residence was from the scene, Gamble testified, "From where the fire truck was parked, you went up a hill probably 50 yards, and then you turned left down the dirt road, and it was the second residence down the—down the dirt road." Gamble explained that as he approached the residence, he encountered Griffin "walking down the sidewalk from his—the front door—I'm assuming the front door of his residence. He had an aluminum can of some sort in one hand and a cell phone in the other." After ordering Griffin to place the items on the ground, out of concern that "they [could] be used as personal weapons," Gamble asked Griffin to explain his version of events. Gamble testified that Griffin told him in response, "Fuck you. Get off my property." Gamble then proceeded to place Griffin in handcuffs. When asked why he did so, Gamble testified, "Based on the fact that the information that I received was that an assault had occurred against a public servant already at this point, therefore, for his safety and mine, I went ahead and detained him where a further assault could not occur against me or—or him." Gamble also testified that he "observed an odor of alcohol emitting from [Griffin's] breath and person" and that Griffin appeared agitated. Gamble walked Griffin to the patrol car of another officer, Deputy Anthony Schafer, and asked Griffin if he had anything in his pockets "that were going to poke, cut, or stick" Gamble. Gamble testified that Griffin responded, "I have my fucking dick in my pants. Would you like for me to shove it up your fucking ass?" Gamble proceeded to place Griffin in the patrol car, pointing a taser at Griffin's chest in an effort "to try to gain

compliance." Gamble then "attempted to gather [Griffin's] side of the story, at which point he decided that he still didn't want to give his side, his account. His only concern was my name and badge number." Gamble added that he "tried to talk to [Griffin] about [the incident], but everything was continuously unclear," including a claim by Griffin that he had tried to assist Arbogast after he had fallen into the water. After speaking with Griffin, Gamble placed him under arrest, believing that Griffin had assaulted Arbogast as Arbogast had claimed.

Additionally, Deputy Schafer testified that prior to the arrest, Griffin "had an odor of alcohol emitting from his breath and person. He was noncompliant. He was very difficult to understand at times, exhibited signs of being belligerent or having trouble staying on . . . the task at hand." Schafer also testified that Arbogast had exhibited signs of assault, specifically, "a slight discoloration, a red line on his clavicle, shoulder, [and] neck area." Finally, Arbogast testified that, "at [Griffin's] house," he had identified Griffin to the officers as the man who had assaulted him.

Considering the totality of the above circumstances, the record supports a conclusion by the district court that Griffin had been found "in a suspicious place and under circumstances which reasonably show that he had been guilty of some felony," specifically assault of a public servant, and that the officers had probable cause to arrest him for that offense. These circumstances included: (1) the short distance between the scene of the assault and Griffin's residence; (2) the short amount of time between the report of the assault and Griffin's apprehension at his residence; (3) Griffin's signs of intoxication, refusal to cooperate, and belligerent behavior toward Deputy Gamble; (4) Arbogast's statements to the officers describing the assault and identifying Griffin as his assailant; (5) the physical evidence tending to corroborate Arbogast's account, including red

marks on his shoulder and neck area and the "complete saturation" of his clothing. Based on this and other evidence, the district court could have reasonably concluded that the warrantless arrest was legal and thus that counsel was not ineffective in failing to object to the evidence obtained as a result of the arrest.[48]

Arbogast's statement

During Griffin's testimony, trial counsel asked Griffin what Arbogast had told him when Griffin first encountered Arbogast at the creek. Griffin testified, "He was very—energetic is not quite the right word—frantic, agitated, and came toward me and said, 'Don't interfere with . . . .'" Before Griffin could finish his answer, the State objected on the basis of hearsay, and the district court sustained the objection. Shortly thereafter, trial counsel again attempted to elicit Arbogast's statement and the district court again sustained a hearsay objection by the State. Griffin asserts that counsel was ineffective in failing to argue that the statement was admissible under the excited-utterance exception to the hearsay rule and in failing to make an offer of proof showing what the statement would have been if it had been admitted. Griffin asserts that counsel was ineffective in failing to do so.

Assuming without deciding that counsel should have argued that the statement was admissible as an excited utterance and made an offer of proof, the district court would not have

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[48] *See Ex parte Jimenez*, 364 S.W.3d 866, 887 (Tex. Crim. App. 2012); *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *Muniz v. State*, 851 S.W.2d 238, 258 (Tex. Crim. App. 1993); *Cadoree v. State*, 331 S.W.3d 514, 529 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *Hollis v. State*, 219 S.W.3d 446, 463 (Tex. App.—Austin 2007, no pet.).

abused its discretion in finding that Griffin failed to show prejudice from the exclusion of the statement. At the hearing on the motion for new trial, Griffin presented no evidence of what Arbogast had said to Griffin following, "Don't interfere with . . . ." Thus, the district court could have reasonably concluded that there was no way to determine the impact, if any, that Arbogast's full statement would have had on the jury. Additionally, the district court could have also concluded that there was no indication in the record that Arbogast's statement, whatever it might have been, would have somehow excused or justified Griffin's assault on Arbogast so as to create a reasonable probability that the jury would have reached a different decision on guilt / innocence. Accordingly, the district court would not have abused its discretion in finding that Griffin had failed to show that there was a reasonable probability that, but for the exclusion of Arbogast's statement, the result of the proceeding would have been different.

Adams's statement

Griffin's fiancee, Tonya Adams, testified during trial that she was an eyewitness to the incident and that Arbogast "just fell off the bridge," without being pushed by Griffin. However, earlier during trial, Deputy Gamble testified without objection that he had spoken with Adams following his arrival on the scene and that Adams had told him that "she didn't observe any of the actions that occurred at the low water crossing" and that her "view was blocked and [she] didn't see anything that happened down at the creek." Griffin asserts that trial counsel should have objected to Gamble's testimony on the basis of hearsay.

At the hearing on the motion for new trial, Griffin asked trial counsel why he did not object to Gamble's testimony. Counsel testified, "Because my strategy was to show that he was dishonest. I knew she was going to testify differently, so that actually was good for us." Counsel added, "Officer Gamble testified to something that was not truthful. I knew that Ms. Adams was going to testify to something different. So I wanted him to testify untruthfully because that would discredit him as a witness, which was my strategy." Counsel also testified that he did not believe he could have accomplished this goal if he had objected to the evidence and the district court had excluded it.

The district court would not have abused its discretion in finding that counsel's strategy did not fall below an objective standard of reasonableness. Gamble had at first expressed uncertainty regarding Adams's statement, testifying, "I don't remember if she told me that she could see [the incident] or not." It was only after reading his offense report to refresh his recollection that Gamble was able to recall his conversation with Adams. Additionally, on cross-examination, Gamble testified that his conversation with Adams was not recorded, even though he had his body microphone on at the time. When asked why the conversation with Adams had not been recorded, when other aspects of the investigation had been recorded, Gamble testified, "I have no idea." Later, counsel elicited the following additional testimony from Gamble:

> Q. Okay. When you're talking to Gary, trying to ID him, or he's trying to ID himself to you, that's when you're talking to Tonya?
>
> A. I had talked to her just—just before that, yes.
>
> Q. Before that. But it's not on camera? It's not recorded?

A. It would have been on my camera, yes.

Q. Right. We don't have that, do we?

A. No, sir.

The record also reflects that counsel extensively questioned Gamble's version of events on other occasions throughout cross-examination. Thus, the district court could have found that trial counsel had pursued a strategy of discrediting Gamble's testimony and that, as part of this strategy, counsel had allowed Gamble to testify to his conversation with Adams so that counsel could later elicit testimony from Gamble that he had failed to record the conversation and was unsure of what she had said. This strategy would not have fallen below an objective standard of reasonableness, the district court could have further found, because counsel could have reasonably concluded that attacking the arresting officer's credibility, particularly on matters involving Gamble's conversations with witnesses at the scene, was important to the defense case. Accordingly, the district court would not have abused its discretion in concluding that Griffin had failed to prove that counsel was ineffective for failing to object to Gamble's testimony.[49]

Jury-charge instructions

As part of the court's charge, the jury was instructed that "[t]he defendant is presumed to have known the person assaulted was a public servant if the person was wearing a distinctive

[49] *See Jimenez*, 364 S.W.3d at 883 ("The mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel.").

uniform or badge indicating the person's employment as a public servant."[50] Griffin asserts that counsel should have objected to the inclusion of this instruction because Arbogast testified that he was wearing a t-shirt and blue jeans rather than a uniform. Griffin further asserts that counsel was also ineffective for failing to object to the absence of a section 2.05(a)(2) instruction in the charge.[51] The absence of such an instruction has the effect of making the presumption mandatory and thus unconstitutional.[52]

Assuming without deciding that counsel should have objected to the inclusion of the presumption in the charge and further objected to the absence of a section 2.05(a)(2) instruction, the

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[50] *See* Tex. Penal Code § 22.01(d).

[51] Section 2.05(a)(2) of the Penal Code provides:

> [I]f the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:
>
> (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;
>
> (B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;
>
> (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and
>
> (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Tex. Penal Code § 2.05(a)(2).

[52] *See Garrett v. State*, 220 S.W.3d 926, 930-31 (Tex. Crim. App. 2007).

district court would not have abused its discretion in concluding that Griffin failed to prove prejudice from counsel's actions. The district court could have reasonably concluded that there was overwhelming evidence in the record tending to show that Griffin knew that Arbogast was a firefighter at the time of the incident. Arbogast testified that he was wearing a t-shirt that contained the words "Wimberley Fire and Rescue" printed on both the front and the back of the shirt. Additionally, at the time Arbogast was pumping water from the creek, he was standing next to a large red tanker truck that contained the words "Wimberley Vol. Fire Dept., Hay[s] Co. ESD #4" on the door. Photographs of the truck were admitted into evidence, and based on the photos, the district court could have found that Griffin would not have mistaken the vehicle for anything other than a fire truck. Moreover, Arbogast testified that he told Griffin immediately prior to the assault, "Unfortunately, we have a structure fire. The State owns the water. I've got to get the water back to the fire." Arbogast's statement, the district court could have reasonably inferred, should have erased any remaining doubts in Griffin's mind as to Arbogast's purpose at the creek. Also, the record reflects that after Arbogast had fallen into the creek, Griffin had returned to his residence and called 911 to report the incident. A copy of the 911 call was admitted into evidence. On the call, Griffin can be heard telling the operator, "We have the fire department with a fucking idiot that is sucking water out of our creek," and he later added that the person who had fallen into the creek "was the fire department." Based on this and other evidence, the district court would not have abused its discretion in concluding that Griffin had failed to prove that there was a reasonable

probability that, but for counsel's failure to object to the alleged errors in jury charge, the result of the proceeding would have been different.[53]

Finally, Griffin asserts that the cumulative effect of counsel's alleged errors caused a breakdown in the adversarial process. However, as we have already explained, the district court would not have abused its discretion in concluding that the errors of which Griffin complains were either matters that were not instances of deficient performance or matters that would not have had a prejudicial effect on the outcome of the proceedings. Moreover, the record of counsel's performance, when considered in its totality, supports a finding by the district court that counsel was acting as an effective advocate for his client by thoroughly cross-examining the State's witnesses and by presenting a defensive theory of the case that was consistent throughout trial and supported by the testimony of defense witnesses. Thus, the district court would not have abused its discretion in concluding that Griffin failed to establish that there was a "breakdown in the adversarial process that our system counts on to produce just results."[54]

We overrule Griffin's second point of error.

CONCLUSION

We affirm the judgment of the district court.

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[53] *See Tottenham v. State*, 285 S.W.3d 19, 34 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

[54] *See Strickland*, 466 U.S. at 696.

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Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: May 19, 2017

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