TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00720-CR

Jerry John Leshikar, Appellant

v.

The State of Texas, Appellee

**FROM COUNTY COURT AT LAW NO. 2 OF WILLIAMSON COUNTY,
NO. 15-04573-2, HONORABLE LAURA B. BARKER, JUDGE PRESIDING**

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

After Officer Keely Adcock initiated a traffic stop of Jerry John Leshikar and asked Leshikar to submit to field-sobriety testing, Officer Adcock arrested Leshikar for driving while intoxicated, and Leshikar was ultimately charged with that offense. *See* Tex. Penal Code § 49.04(a), (b) (setting out elements of offense and providing that offense is, in general, "a Class B misdemeanor"). A body camera and a camera in Officer Adcock's patrol car captured her interaction with Leshikar between the time of the stop and the time that Leshikar was transported to jail, and audio and visual recordings from the cameras were admitted into evidence during the trial. At the end of the guilt-or-innocence phase, the jury found Leshikar guilty of the charged offense. Leshikar elected to have the trial court assess his punishment, and the trial court determined that Leshikar should be sent to jail for 60 days and rendered its judgment of conviction accordingly. *See id.* § 12.22 (listing permissible punishment range for Class B misdemeanor). In a single issue

on appeal, Leshikar contends that he was denied effective assistance of counsel. We will modify the trial court's judgment of conviction to correct a clerical error and, as modified, affirm the trial court's judgment.

DISCUSSION

In two groups of arguments in a single issue on appeal, Leshikar contends that he "was denied effective assistance of counsel and deprived of his right to a fair trial."

To succeed on an ineffectiveness claim, a defendant must overcome the strong presumption that his trial "counsel's conduct falls within the wide range of reasonable professional assistance" and must show that the attorney's "representation fell below an objective standard of reasonableness . . . under prevailing professional norms" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 689, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). "It will not suffice for Appellant to show 'that the errors had some conceivable effect on the outcome of the proceeding.'" *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 693). "Rather, he must show that 'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Strickland*, 466 U.S. at 695). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

"[A]n appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Evaluations of effectiveness are based on "the totality of the representation," *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013); *see also Davis v. State*, 413 S.W.3d 816, 837 (Tex. App.—Austin 2013, pet. ref'd) (providing that assessment should consider "cumulative effect" of counsel's deficiencies), and allegations of ineffectiveness must be firmly established by the record, *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). Furthermore, even though a defendant is not entitled to representation that is error-free, a single error can render the representation ineffective if it "was egregious and had a seriously deleterious impact on the balance of the representation." *Frangias*, 450 S.W.3d at 136.

In general, direct appeals do not provide a useful vehicle for presenting ineffectiveness claims because the record for that type of claim "is generally undeveloped." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *see also Mallett*, 65 S.W.3d at 63 (stating that "[i]n the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions"). In addition, before their representation is deemed ineffective, trial attorneys should be afforded the opportunity to explain their actions. *Goodspeed*, 187 S.W.3d at 392 (stating that "counsel's conduct is reviewed with great deference, without the distorting effects of hindsight"). If that opportunity has not been provided, as in this case, an appellate court should not determine that an attorney's performance was ineffective unless the conduct at issue "was so outrageous that no competent attorney would have engaged in it." *See Garcia*, 57 S.W.3d at 440.

In his first set of arguments, Leshikar challenges the effectiveness of his trial attorney's representation before and during the trial. Specifically, Leshikar argues that his trial counsel failed to adequately investigate his "mental health issues prior to the beginning of the jury trial," failed to present the issue of his competency to the trial court, "and failed to adequately present any evidence of [his] mental health issues during the guilt/innocence phase of the trial in an effort to explain and/or mitigate his behavior during the arrest." Further, Leshikar contends that there is no reasonable "trial strategy that would support an incomplete investigation" into his "mental health issues" and that "[w]ithout a complete investigation into [his] mental health issues, defense counsel could not have made an educated inquiry into [his] competency or the impact of providing the jury with mitigating evidence."

As support for his arguments that his trial counsel should have investigated his mental health and should have raised the issue of his competency to the trial court, Leshikar notes that several days before the trial, the State filed a motion to increase Leshikar's bond and alleged that Leshikar engaged in inappropriate conduct after he was arrested for driving while intoxicated. In particular, the State alleged that Leshikar "drove past officers and used a hand gesture of shooting at the officer[s] several times"; that he told "a prosecutor that 'it's a dangerous time to be doing this job'"; that Leshikar "was seen filming" a police "officer's wife and children while they were in their family vehicle"; that Leshikar approached Officer Adcock while she was performing "an unrelated traffic stop," called her "'a lying bitch,'" and stated that "there was nothing the officer could do to protect her family"; that Leshikar followed Officer Adcock's parents while they were driving; and that Leshikar attempted to purchase a gun at a gun show. In addition, Leshikar notes that the

trial court increased the bond after considering the State's allegations, that a magistrate issued an order on the same day that Leshikar's bond was increased requiring that a mental-health assessment be performed on Leshikar, *see* Tex. Code Crim. Proc. art. 16.22, and that Leshikar was arrested for stalking and for retaliating against a public servant before the trial at issue in this case. Further, Leshikar highlights statements from his attorney during the punishment phase in which his attorney told the trial court "that there [w]as . . . a mental health study being performed" so that the court could consider that "when assessing sentence" but explained that he did not "know the results of it[] or anything else about" the evaluation. Moreover, Leshikar asserts that the video and audio recordings of his interaction with Officer Adcock shows him "berating and cursing ad nauseum throughout the traffic stop[] and transport to the Williamson County Jail" and highlights that those videos were made available to his attorney over a year before the trial. Leshikar also refers to portions of Officer Adcock's testimony in which she described Leshikar's behavior during the traffic stop as "not normal" and as "belligerent." Finally, Leshikar points to testimony from his father during the punishment phase in which his father stated that Leshikar was suffering from a "mental condition, anxiety[,] and paranoia."

As a preliminary matter, we note that a defendant is incompetent to stand trial only if he does not have "sufficient present ability to consult with [his] lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against" him. *Id.* art. 46B.003(a). Moreover, a "defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." *Id.* art. 46B.003(b); *see Lampkin v. State*, 470 S.W.3d 876, 908 (Tex. App.—Texarkana 2015, pet.

ref'd) (noting that fact that defendant is mentally ill does not necessarily compel conclusion that defendant is incompetent). Similarly, "Texas law . . . presumes that a criminal defendant is sane and that he intends the natural consequences of his acts." *Ruffin v. State*, 270 S.W.3d 586, 591 (Tex. Crim. App. 2008). However, "Texas law . . . excuses a defendant from criminal responsibility if he proves, by a preponderance of the evidence, the affirmative defense of insanity." *Id.* at 591-92; *see also* Tex. Penal Code § 8.01 (explaining that it "is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental illness or defect, did not know that the conduct was wrong").

Turning to Leshikar's arguments in this case, although Leshikar highlights that a magistrate ordered a mental-health evaluation, the record before this Court is silent regarding whether that evaluation was ever performed. Moreover, nothing in the order or in the remainder of the record indicates that Leshikar was unable to consult with his counsel or understand the nature of the proceedings against him. *Cf. Iniquez v. State*, 374 S.W.3d 611, 617 (Tex. App.—Austin 2012, no pet.) (applying prior version of governing statute and explaining that evidence of history of mental illness does not necessarily compel requirement that competency determination be made if it does not show that defendant is not currently capable of communicating with his lawyer or understanding nature of proceedings); *Hobbs v. State*, 359 S.W.3d 919, 925 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (noting that history of mental illness and of being on psychiatric medications is insufficient "to warrant a competency inquiry absent evidence of a present inability to communicate with his attorney or understand the proceedings").

Furthermore, as mentioned above, Leshikar points to his behavior on the night of the arrest that was documented on the audio and video recordings admitted during the trial. Although

the recordings reveal that Leshikar was uncooperative and irritated when the police first interacted with him, his interactions with the police were not inconsistent with someone who was annoyed at having been pulled over by the police and at having been asked to perform sobriety tests. Furthermore, the recordings also show that Leshikar performed the field-sobriety tests as requested and responded to the instructions given by the police during the testing. Although the recordings document that Leshikar used very abusive and threatening language towards Officer Adcock over an extended period of time, the threatening statements were not made until *after* Leshikar completed the field-sobriety testing and *after* Officer Adcock decided to arrest Leshikar and placed him in handcuffs. Moreover, the recordings chronicle Leshikar cooperatively walking to the police car and getting into the police car without incident after he was arrested. In addition, although Leshikar made comments during his encounter with the police indicating that he had mental-health issues, nothing in the recordings indicates that Leshikar was incapable of understanding the misconduct of which he was accused or the events that had transpired. *See* Tex. Penal Code § 8.01. In fact, while riding to the police station, Leshikar made statements demonstrating that he knew that he was being taken to the police station and offering directions.

Although Leshikar correctly points out that his trial counsel was aware of the existence of an order requiring that a mental-health evaluation be performed on him but did not know the results of that testing, the record is silent regarding efforts that his attorney may have engaged in to learn the results or to otherwise investigate Leshikar's mental health and is similarly silent regarding his attorney's reasoning for not raising the issue of Leshikar's competency. *See Mallett*, 65 S.W.3d at 63 (providing that "[w]hen the record is silent on the motivations underlying counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that

counsel's conduct was reasonable"). Moreover, even though the issue of Leshikar's competency was not specifically addressed by the district court during the trial proceedings, we note that the record in this case demonstrates that many of the factors relied on by courts when making competency determinations indicated that Leshikar was competent. Under the Code of Criminal Procedure, competency determinations are based on, among other factors, the ability of the defendant to perform the following:

> (A) rationally understand the charges against the defendant and the potential consequences of the pending criminal proceedings;
>
> (B) disclose to counsel pertinent facts, events, and states of mind;
>
> (C) engage in a reasoned choice of legal strategies and options;
>
> (D) understand the adversarial nature of criminal proceedings;
>
> (E) exhibit appropriate courtroom behavior; and
>
> (F) testify.

Tex. Code Crim. Proc. art. 46B.024(1).

The record before this Court reveals that Leshikar exhibited appropriate courtroom behavior throughout all of the proceedings without a single outburst. Moreover, during the trial, Leshikar answered appropriately when the trial court asked him questions. *See Magic v. State*, 217 S.W.3d 66, 74 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (overruling ineffective assistance-of-counsel claim that trial attorney should have requested competency hearing because defendant, who had been diagnosed as bi-polar, competently interacted with trial court). Prior to the start of the trial, the defendant entered a plea of "[n]ot guilty" after the State read the charges against him and

after the trial court asked what his plea was. In addition, Leshikar affirmatively answered questions from the trial court regarding whether he understood that his punishment would be determined after the guilt-or-innocence phase of the trial was over, whether he understood what punishment might be imposed after the trial court discussed the punishment range for the offense of driving while intoxicated, and whether he understood that he still had "some other cases to dispose of." Moreover, after the guilt-or-innocence phase concluded, the parties discussed the possibility of reaching an agreement on punishment, and Leshikar's trial counsel informed the trial court that the State's offer included a waiver of the right to appeal and that Leshikar rejected the offer by the State. When the trial court verified with Leshikar that he intended to reject the State's offer, Leshikar explained that he did "not want to give up [his] right to appeal." *See State v. Frias*, 511 S.W.3d 797, 814 (Tex. App.—El Paso 2016, pet. ref'd) (noting that defendant "rejected the State's plea recommendation of 45 years' confinement and confirmed to the trial court that he understood what his rejection meant" and reasoning that this, among other factors, weighed "against a finding of incompetence").[1]

[1] In his brief, Leshikar points to two cases in which courts determined that a trial counsel's performance was deficient for failing to conduct a proper investigation. *See Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990); *Conrad v. State*, 77 S.W.3d 424 (Tex. App.—Fort Worth 2002, pet. ref'd). However, unlike this case, those cases involved ineffectiveness claims that were presented after an evidentiary hearing or a hearing on a motion for new trial had been convened. *See Bouchillon*, 907 F.2d at 591, 597 (determining in habeas proceeding after "evidentiary hearing" had been conducted on claims of ineffective assistance that "counsel's lack of investigation after he had notice of [defendant]'s past institutionalization[] fell below reasonable professional standards" and noting that "[i]t must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental problems"); *Conrad*, 77 S.W.3d at 426-27 (deciding after considering testimony presented in hearing on motion for new trial that there was no conceivable "trial strategy that would justify" failing to investigate defendant's mental status at time of offense but concluding that second *Strickland* prong was not met because "there [wa]s no evidence in the record" from hearing on motion for new trial that defendant "was legally insane when the assault occurred").

Furthermore, although Leshikar asserts that his trial counsel was ineffective because his counsel failed to introduce evidence of his mental health in order to explain or mitigate his behavior, his trial counsel may have reasonably determined that evidence pertaining to Leshikar's mental health would not have been admissible during the guilt-or-innocence phase of the trial in light of the statutory provision providing that "proof of a culpable mental state is not required for conviction" of certain offenses, including driving while intoxicated. *See* Tex. Penal Code § 49.11; *see also Lampkin*, 470 S.W.3d at 916 (noting that "the trial court could have excluded" defendant "from presenting" evidence pertaining to his "mental health during guilt/innocence" phase of trial for offense of driving while intoxicated). In addition, as pointed out by Leshikar, his trial counsel did question Leshikar's father about Leshikar's mental health during the punishment phase of the trial and did ask the trial court to consider Leshikar's mental health when assessing punishment.

In light of the undeveloped record before this Court, it is not entirely clear that the first prong of the *Strickland* test could be met here. However, even assuming for the sake of argument that the record before this Court established that the alleged failure to investigate and failure to raise the issue of Leshikar's competency was unreasonable in these circumstances, *see Ex parte Martinez*, 195 S.W.3d 713, 721 (Tex. Crim. App. 2006) (explaining that reasonableness of decision not to investigate must be considered in light of all of circumstances and assessed by applying heavy amount of deference to attorney's decisions), we would still be unable to conclude that the second prong of *Strickland* has been met.

When arguing that the second prong is met because the results of the trial would have been different had his trial counsel performed an investigation of his mental health or

brought the issue of his competency to the trial court's attention, Leshikar asserts that "[i]f a proper investigation had been done" his "trial counsel would have had the time to address competency" and would have been able to present evidence showing that Leshikar's behavior on the night in question could have been caused by something other than intoxication. Further, Leshikar contends that his trial counsel's "failure to present any evidence as to an alternate explanation for [his] behavior, other than intoxication, allowed the [State] to argue that the only reason for [his] behavior must have been intoxication" and to emphasize Officer Adcock's testimony and the recordings of Leshikar's behavior as proof of intoxication.

However, in the absence of any evidence in the record indicating what the results of an investigation of Leshikar's mental health or competency might have revealed, Leshikar's arguments amount to assertions that the failure to investigate had a conceivable effect on the outcome of the trial, which is insufficient to support a claim of ineffective assistance. *See Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002) (cautioning reviewing courts against speculating "about the existence of" mitigating evidence and noting that "[i]neffective assistance of counsel claims are not built on retrospective speculation"); *Straight v. State*, 515 S.W.3d 553, 568 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (explaining that ineffective-assistance claim "based on trial counsel's general failure to investigate" will fail absent "a showing of what an investigation would have revealed that reasonably could have changed the result of the case" and overruling issue because defendant "did not present any evidence regarding what" investigation would have revealed); *Lampkin*, 470 S.W.3d at 910 (determining after reviewing medical records that defendant "cannot demonstrate 'a reasonable probability that he would have been found incompetent to

stand trial if the issue of competency had been raised and fully considered'" (quoting *Ex parte LaHood*, 401 S.W.3d 45, 54 (Tex. Crim. App. 2013))); *Torres v. State*, No. 13-05-00778-CR, 2007 WL 2052649, at *3 (Tex. App.—Corpus Christi 2007, pet. ref'd) (mem. op., not designated for publication) (disagreeing with assertion that failure to request presentence-investigation report was ineffective assistance because "[t]he effect of not requesting a PSI report can only be speculative" and because defendant had to show that "the alleged errors by trial counsel had an adverse affect on the defense"). That conclusion seems particularly warranted regarding Leshikar's competency claims given the information in the record summarized previously indicating that he was competent to stand trial. *Cf. Frias*, 511 S.W.3d at 813-14 (explaining that "the only way" to establish second prong of *Strickland* and show that "the guilt phase of the proceeding would be different is if the defendant proved that he was incompetent to stand trial").

Having determined that Leshikar has not shown that the second prong of *Strickland* has been met in this case, we need not further address the matter of whether his trial counsel provided ineffective assistance of counsel when he did not investigate Leshikar's mental health or raise the issue of Leshikar's competency, but we do emphasize that ineffectiveness challenges are considered in light of "the totality of the representation" provided by the attorney. *See Thompson*, 9 S.W.3d at 813; *see also Simmons v. State*, Nos. 03-11-00229—00230-CR, 2012 WL 3629864, at *4 (Tex. App.—Austin Aug. 22, 2012, pet. ref'd) (mem. op., not designated for publication) (determining that "[t]he critical weakness" in ineffectiveness claim was "its failure to consider the totality of trial counsel's representation"). Moreover, we note that after being appointed and prior to trial, Leshikar's attorney filed a motion to suppress evidence, including the recordings discussed

above, and a motion requesting the State to produce any exculpatory or mitigating evidence. In addition, during the hearing on the motion to suppress, Leshikar's attorney extensively cross-examined the State's witness, Officer Adcock. During her cross-examination, Officer Adcock admitted that although she initiated the traffic stop because Leshikar was speeding, the recordings from her patrol car did not show Leshikar speeding. Further, in his closing arguments at the hearing, Leshikar's attorney argued that there was no evidence of a traffic violation and, therefore, urged the trial court to grant the motion to suppress.

After the suppression hearing, Leshikar's attorney questioned the jury panel during voir dire regarding any potential biases they might have had towards police officers and regarding whether they had ever received a speeding ticket. In addition, Leshikar's attorney discussed how the State had the burden of proving the offense beyond a reasonable doubt and questioned the panel about difficulties in field-sobriety testing, about whether it might be possible for a police officer to mistakenly believe that a driver was intoxicated based on the smell of alcohol emanating from a passenger, and about whether someone might get angry about being arrested. Moreover, after the jury was selected, Leshikar's attorney requested a ruling on his motion in limine asking that the State not mention during the first phase of the trial information contained in the motion to increase bond discussed previously, and the trial court granted the request.

In his opening statement during the guilt-or-innocence phase of the trial, Leshikar's attorney discussed the presumption of innocence and the State's burden. During the trial, Leshikar's attorney objected to testimony from Officer Adcock regarding the use of her radar because there was no "scientific evidence of its reliability." In addition, Leshikar's attorney made successful objections

to portions of Officer Adcock's testimony. During Leshikar's trial attorney's cross-examination of Officer Adcock, Officer Adcock admitted that Leshikar did not change lanes erratically or run a stop sign, that she initiated the traffic stop because Leshikar was speeding, that there is no video evidence of Leshikar speeding, that she did not arrest Leshikar for public intoxication because he was not a danger to himself or others, that it was possible that someone who had been around alcohol might smell like alcohol even though he had not been drinking, that the odor of alcohol that she detected could have been coming from the passenger, that her body camera did not chronicle Leshikar's performance on the horizontal-gaze-nystagmus test, that it was possible that some individuals "have a natural nystagmus," that the walk-and-turn test requires the individual to stand in an atypical position for "[s]everal minutes" while listening to instructions, that Leshikar had a knee brace on during the field-sobriety testing, that injuries could affect an individual's performance on a field-sobriety test, that she asked Leshikar to perform the walk-and-turn test on a surface that was rocky and had potholes, that she did not get a warrant, that some people react negatively to being arrested, and that there were discrepancies in her arrest affidavit and her official offense report regarding the number of cues of intoxication that Leshikar exhibited. In his closing argument, Leshikar's attorney argued that the State did not meet its burden of showing that the stop was permissible, that there was no recording showing that Leshikar was speeding, that Leshikar was frustrated by Officer Adcock continuing to ask him the same question multiple times, that the smell of alcohol is not proof of intoxication, that there was no recording of the nystagmus test, that the nystagmus test is unreliable, that some people have a natural nystagmus, that the sobriety tests required the performance of movements that were unnatural, that Leshikar's knee injury could have affected the results, that

there was no blood-alcohol-concentration testing done because the State did not get a warrant, and that the State's entire case rests on Officer Adcock's opinion that Leshikar was intoxicated.

During the punishment phase, Leshikar's attorney called Leshikar's father to the stand, and Leshikar's father described Leshikar as "[k]ind, giving, respectful . . ., [and] helpful" and stated that Leshikar would not pose a threat to anyone if he was released from jail; that Leshikar has a "mental condition, anxiety[,] and paranoia"; and that Leshikar was just "a week short of graduating [with] a four year degree." When the State cross-examined Leshikar's father, Leshikar's attorney successfully argued that the State should not be allowed to question Leshikar's father regarding the details of additional charges that had been filed against Leshikar. In his closing arguments, Leshikar's attorney urged the trial court to render a punishment for time served.

With the preceding in mind, we conclude that the totality of the representation reflects that Leshikar was provided with effective assistance of counsel during the trial.

In his second set of arguments, Leshikar challenges the effectiveness of his attorney's assistance after the trial was concluded. In particular, Leshikar argues that his "[t]rial counsel, knowing that he did not have criminal appellate experience, failed to withdraw from representing [Leshikar] during a critical period of the appellate process, depriving [Leshikar] of effective assistance of counsel." When presenting this issue, Leshikar contends that his "[t]rial counsel never filed a motion for new trial, nor requested the accompanying hearing." Further, Leshikar notes that several weeks after he filed a pro se notice of appeal, his trial counsel filed a motion to withdraw stating that his trial counsel "does not do criminal appellate work" and asking the trial court "to appoint an attorney with experience in that area." In light of the preceding, Leshikar argues that his

trial counsel continued to represent him "during the most critical stage of the post-conviction time period even though trial counsel did not practice criminal appellate law" and that Leshikar was "constructively denied assistance of counsel" during that time period and was denied the opportunity "to present to the trial court certain matters that could warrant a new trial, and to make a record of those matters for appellate review."

As pointed out by Leshikar, the 30-day period of time "to file a motion for new trial after the date that the trial court imposes or suspends sentence in open court" is a "'critical stage' during which a defendant is constitutionally entitled to effective assistance of counsel in filing a motion for new trial." *Cooks v. State*, 240 S.W.3d 906, 907-08 (Tex. Crim. App. 2007); *see Benson v. State*, 224 S.W.3d 485, 490 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Massingill v. State*, 8 S.W.3d 733, 737 (Tex. App.—Austin 1999, pet. ref'd). However, "where a defendant is represented by counsel during trial, [there is] a rebuttable presumption that this counsel continued to adequately represent the defendant during this critical stage." *Cooks*, 240 S.W.3d at 907; *see Benson*, 224 S.W.3d at 491. Stated differently, "when a motion for new trial is not filed in a case, there is a rebuttable presumption that the defendant was counseled by his attorney regarding the merits of the motion and ultimately rejected the option," and "this presumption will not be rebutted when there is nothing in the record to suggest otherwise." *Prudhomme v. State*, 28 S.W.3d 114, 119 (Tex. App.—Texarkana 2000, order), *disp. on merits*, 47 S.W.3d 683 (Tex. App.—Texarkana 2001, pet. ref'd); *see Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998) (discussing rebuttable presumption when no motion for new trial is filed and noting that "[t]here [wa]s nothing in the record to suggest that the attorney did not discuss the merits of a motion for a new trial with the appellant").

Although Leshikar's trial counsel moved to withdraw from the case and explained in the motion that he wanted to withdraw because his practice area does not include appellate practice, Leshikar's trial counsel did not seek to withdraw until after the period for filing a motion for new trial had passed. *Compare Munoz v. State*, No. 03-10-00547-CR, 2011 WL 2437665, at *2 (Tex. App.—Austin June 15, 2011, no pet.) (mem. op., not designated for publication) (concluding that presumption that defendant, "with the advice of counsel, had previously considered and rejected the option of filing a motion for new trial" was not overcome where there was no evidence that trial counsel moved to withdraw during 30-day period for filing motion for new trial)*, with Cooks*, 240 S.W.3d at 911 (stating that presumption was rebutted where there was evidence "that appellant was unrepresented by counsel during the initial twenty days of the 30-day period" and where appointed appellate counsel asserted "that there was not enough time after her appointment to adequately assist appellant in deciding whether to file a motion for new trial"), *and Garcia v. State*, 97 S.W.3d 343, 348 (Tex. App.—Austin 2003, pet. ref'd) (determining that presumption had been rebutted when trial court allowed appointed counsel to withdraw at time of defendant's sentencing, when appellate counsel was not appointed until well over one month later, and when defendant filed pro se motion for new trial alleging ineffective assistance of counsel). Moreover, Leshikar filed a pro se notice of appeal, which "is evidence that the appellant was informed of at least some of his appellate rights." *See Benson*, 224 S.W.3d at 492; *Munoz*, 2011 WL 2437665, at *2; *see also Benson*, 224 S.W.3d at 491-92 (explaining that "[t]o defeat the presumption, the record must show more than the mere facts that . . . appellant filed a pro se notice of appeal and indigency," that "the trial court appointed appellate counsel after the expiration of the time for filing a motion for new trial," and that appellant

claims on appeal that "he would have complained about ineffective assistance of counsel in a motion for new trial, had one been presented").

In light of the record before this Court, we cannot conclude that Leshikar has rebutted the presumption that his trial counsel represented him effectively during the 30-day period for filing a motion for new trial and that his trial counsel discussed the option of filing a motion for new trial but that Leshikar rejected that option.

For all the reasons previously given, we overrule Leshikar's sole issue on appeal.

Clerical Error in the Judgment

Although Leshikar does not raise this on appeal, we observe that the judgment of conviction in this case contains a clerical error. This Court has the authority to modify incorrect judgments when it has the information necessary to do so. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). The relevant portion of the judgment provides as follows:

> The trial proceeded to the punishment phase where Defendant waived his/her right to have the Court or the jury assess punishment. Both parties having agreed to punishment, the Court returns the following verdict in open court: Confinement in the County jail for **60** days, and a fine of **$0.00**.

The record reveals that there were plea discussions between the parties regarding punishment, but as discussed earlier in the opinion, Leshikar rejected the offer and elected to have the trial court determine his punishment. For those reasons, we modify the language of the judgment to reflect as follows:

> The trial proceeded to the punishment phase where Defendant elected to have the Court assess punishment, and the Court returns the following verdict in open court: Confinement in the County jail for **60** days, and a fine of **$0.00**.

CONCLUSION

Having modified the judgment of conviction and having overruled Leshikar's sole issue on appeal, we affirm the trial court's judgment of conviction as modified.

_____

David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Modified and, as Modified, Affirmed

Filed: August 31, 2017

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