81TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00810-CR

Saffa Bell, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 331ST JUDICIAL DISTRICT
NO. D-1-DC-17-904028, HONORABLE DAVID CRAIN, JUDGE PRESIDING

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

Saffa Bell was charged with sexually assaulting an individual who was given the pseudonym Tom Jones during the trial. *See* Tex. Penal Code § 22.011 (setting out elements of offense and specifying that offense is, in general, second-degree felony). The indictment also contained two enhancement paragraphs alleging that Bell had previously been convicted of burglary with the intent to commit theft and burglary with the intent to commit sexual assault. At the end of the guilt-or-innocence phase, the jury found Bell guilty of the charged offense. Bell elected to have the district court assess his punishment. During the punishment hearing, the district court found the enhancement allegations to be true, sentenced Bell to life imprisonment, and rendered its judgment of conviction. *See id.* § 12.42(c)(2) (mandating that defendant be sentenced to life imprisonment for some felony convictions if defendant has previously been convicted of certain types of felony offenses). On appeal, Bell challenges the sufficiency of the evidence supporting his conviction, asserts

that the district court erred when it imposed his sentence, and argues that his trial counsel provided ineffective assistance of counsel. We will modify the district court's judgment of conviction to correct a clerical error and affirm the judgment as modified.

BACKGROUND

As set out above, Bell was charged with sexually assaulting Jones. During the guilt-or-innocence phase, the State called various witnesses to the stand, including Jones; B.S., who is Jones's wife; Officer C.W., who is Jones's sister; and Jennifer Ellis, who was Bell's neighbor.[1] In addition, the State called to the stand the following two sexual-assault-nurse examiners who examined Jones: Heather Brand and Jennifer Kilmer. Further, several law-enforcement officials involved in the investigation testified, including Officer Sheldon Banta, who responded to a 911 call on the night in question; Detective Mary Proctor, who talked with Jones when he was being treated after the alleged assault; Nick Pierce and Dana Baxter, who performed testing on samples of Jones's blood and urine; and Caitlin Lott, who performed forensic DNA testing on swabs taken from Jones's body. Finally, the State introduced recordings taken from the body cameras of the investigating officers as well as a copy of a recording between Bell and his brother while Bell was in jail.

In his testimony, Jones explained that he temporarily moved out of town after being hired by Don Kahn to perform a construction job and that he stayed at one of Kahn's properties while working on the job. In addition, Jones testified that Bell also worked for Kahn, that Bell and Jones worked together, that they socialized, and that Bell was staying in a house nearby. Regarding

[1] In this opinion, we will refer to Jones's family members by their initials.

the events leading up to the alleged incident, Jones related that he took one Adderall pill in the morning and one around noon in accordance with his customary usage, that he went to the store after work to pick up something to make for dinner and to pick up some scotch, that he ate dinner and had a one-ounce drink of scotch with dinner, that Bell asked him to come over to play music together, and that he went to Bell's house around 8:00 p.m. and brought his harmonica and his bottle of scotch. Further, Jones testified that he drank scotch while at Bell's house and that he drank between six and seven ounces of scotch throughout the evening, but Jones denied drinking any wine coolers that night. Additionally, Jones recalled that at some point in the evening, Bell told Jones that he should try one of Bell's margaritas, that Jones drank "maybe three or four sips of" the margarita, and that he started to feel "fuzzy" about twenty to thirty minutes after drinking some of the margarita.

When describing how he was feeling, Jones stated that he "felt extremely tired, like just out of the blue, like you have to go to bed now" and described the intensity of the sensation as something that he had "never experienced" before. Moreover, Jones testified that he believed that Bell had given him some type of drug without Jones's knowledge that affected his ability to control his conduct.

Regarding the incident in question, Jones testified that he found a bedroom in the house, laid on the bed, and lost consciousness. Next, Jones testified that he woke up and found that Bell had placed Jones's penis inside Bell's mouth without Jones's consent and that Bell was "performing fellatio" on Jones. Moreover, Jones recalled that he still felt disoriented and dizzy when he woke up.

When discussing the events that occurred after waking up at Bell's home, Jones related that he managed to run from Bell's house to a neighbor's home seeking help. Furthermore, Jones testified that the neighbor stated through the door that he was calling the police, that Jones told the neighbor that was what he wanted the neighbor to do, and that he sat on the neighbor's porch. Regarding the events that occurred after the police arrived, Jones explained that he was taken to the hospital, that he could not answer many of the questions asked by the medical personnel treating him because he could not remember basic information about himself, and that he was taken to SafePlace. Further, Jones testified that while he was at SafePlace, he initially refused to cooperate with the exam that one of the SafePlace employees tried to perform because he was so angry about what Bell had done. Next, Jones related that he checked himself out of SafePlace and went back to the place that he was staying to wait for members of his family to arrive. Additionally, Jones testified that his sister convinced him "to do things the right way . . . through the court system" and to go back to SafePlace so that a forensic exam could be completed.

After Jones finished testifying, his sister, Officer C.W., was called to the stand and explained that she received a phone call from Jones early in the morning, that Jones "was very frantic and scared," that he was talking rapidly, that she had never heard her brother sound like that before, that she told Jones to cooperate with the police officers, and that she drove to see Jones. Similarly, Jones's wife, B.S., testified that she received a call from Jones around 8:00 p.m. saying that he was going to Bell's house, that she received another phone call from him around 3:00 a.m., that he seemed out of it during the second call, that she had never heard him sound that way, that he did not sound that way when he was drunk, that he called her by her maiden name even though

they had been married for some time, that he told her that he "had been drugged and sexually abused," and that she drove to meet Jones. Regarding what happened when she arrived in town, B.S. said that Jones "was walking in a very bizarre way," that he smelled like formaldehyde and not alcohol, that he fell asleep for a while, and that he initially did not recognize her or other members of his family when he woke up.

In addition to calling Jones's family members to the stand, the State also called Bell's neighbor, Ellis. In her testimony, Ellis explained that around 1:00 to 1:30 a.m. on the night in question, Jones repeatedly knocked on her door, rang her doorbell, asked to be let inside the house, and asked her to turn on her lights. Further, Ellis described Jones as being out of it and as acting strangely, and she related that his eyes were "huge," that he had a high level of energy, that he seemed to be dancing, and that he sat down in front of her house. In addition, Ellis stated that she called the police and that Jones quickly ran when the police arrived.

Next, the State called various law-enforcement personnel to the stand. In his testimony, Officer Banta explained that he responded to a 911 call, that Jones ran into the road towards Officer Banta when Officer Banta drove past Ellis's house, that Officer Banta "noticed a slight odor of alcoholic beverage" when interacting with Jones, that Jones was talking rapidly, that he repeated himself, that "his pupils were very dilated," and that Jones's pupil dilation and behavior were not consistent with someone who was intoxicated from alcohol. Further, Officer Banta testified that he later interacted with Jones at the hospital, that Jones could not remember the names of his family members, that Jones was confused and disoriented, and that Officer Banta drove Jones to SafePlace.

During his testimony, two recordings from Officer Banta's body camera were admitted into evidence and played for the jury. In the first recording, Jones is seen approaching

Officer Banta, indicating that he wanted to file a complaint, and stating that Bell drugged Jones and sexually assaulted Jones. On the recording, Jones appears to be mentally altered, and Jones has difficulty answering Officer Banta's questions. Further, the recording captures Jones asking Officer Banta to thank Ellis and her husband for calling the police because that was what he wanted them to do. In addition, the recording chronicles Officer Banta commenting on how large Jones's pupils were and documents Jones stating that he drank scotch and beer during the evening. The second recording shows Officer Banta go to Bell's home and repeatedly knock on the door, but the recording documents that Bell never came to the front door.

After Officer Banta finished testifying, Detective Proctor was called to the stand. In her testimony, Detective Proctor testified that she talked with Jones at SafePlace, that Jones displayed a range of emotions from sad to angry that something had happened to him, that Jones stopped cooperating at one point because he was frustrated with having to retell the incident and with the speed of the investigation, that Jones said that Bell put something in Jones's drink, and that Bell placed Jones's penis in Bell's mouth. In addition, Detective Proctor explained that as part of her investigation she obtained a buccal sample from Bell. Furthermore, Detective Proctor recalled that when the police searched Bell's home, they found a harmonica and other items belonging to Jones and found the ingredients for making margaritas. Finally, Detective Proctor related that Jones stated during their initial conversation that he drank some wine coolers and some whiskey that night.

Regarding the examinations performed by the sexual-assault-nurse examiners, Brand testified that she attempted to perform an exam on Jones but that he "continually interrupted" and could not stay focused. When describing his demeanor, Brand testified that Jones was angry

"and was very upset about the assault that had occurred." Next, Brand explained that Jones could not stay awake long enough for her to proceed with the exam or for him to consent to the exam and that he had difficulty standing up straight. Further, Brand related that she believed that Jones was impaired, that Jones's behavior indicated that he had consumed a depressant, and that he was too impaired to have sexual intercourse.

Concerning the second examination, Kilmer testified that Jones returned to Safeplace hours after the alleged offense, that she performed a sexual-assault-forensic exam on Jones, that she swabbed his penis and his anus, and that Jones told her that Bell gave him a drink that caused him to feel sedated, that he went to a bedroom to sleep, and that he woke up and saw Bell "performing fellatio" on him. In addition, Kilmer related that she obtained a sample of his blood and urine around 11:00 a.m.

Regarding the forensic testing performed on samples of Jones's blood and urine, Pierce testified that he performed alcohol-concentration tests on the samples, that the blood test showed that Jones had an alcohol-concentration level of 0.067, that the urine test showed that Jones had an alcohol-concentration level of 0.088, and that if the samples were collected at approximately 11:00 a.m., then the alcohol level at the time that the police arrived at Ellis's home would have been between 0.167 and 0.367 depending on how well Jones's body was able to filter out alcohol. Next, Baxter testified that she tested the samples of Jones's blood and urine for the presence of drugs other than alcohol and that the testing showed a positive result for opiates and amphetamines in Jones's blood and showed the presence of morphine in Jones's urine. Further, Baxter testified that Adderall will produce a positive result for amphetamines; that morphine is an opiate; that

opiates are depressants similar to alcohol; that opiates can cause someone to feel drowsy, confused, and dizzy; that opiates can cause someone's pupils to contract; that it takes between 15 and 45 minutes for someone to feel the effects from an opiate when it is absorbed by the stomach; and that consuming alcohol with an opiate will create "an additive effect," meaning that the depressive effects will be enhanced.

Concerning the DNA testing performed on samples taken from Jones and Bell, Lott testified that she tested the swab taken from Jones's penis, that DNA found in the sample "was only from a single individual," that Jones was eliminated as a contributor of the DNA, that Bell could not be excluded as "a possible contributor of the DNA in that profile," that the odds of "[o]btaining this profile is 661 quadrillion times more likely if the DNA came from . . . Bell than if the DNA came from an unrelated, unknown individual." Further, Lott explained that the DNA testing was consistent with saliva being deposited through oral sex.

In addition to the testimony and recordings discussed above, a recording of a conversation between Bell and his brother while Bell was in jail was admitted into evidence and played for the jury. On the recording, Bell states that Jones drank a lot of scotch on the evening in question, that Jones started getting aggressive, that Jones stated that he wanted to take Bell's job away from him, that Jones passed out, and that Bell decided to leave the house for a few hours in order to ride his bike and allow Jones time to recover.

At the end of the guilt-or-innocence phase of the trial, the jury found Bell guilty of sexually assaulting Jones, and Bell elected to have his punishment assessed by the district court.

During the punishment phase, the State introduced into evidence pen packets from two prior convictions for an individual with Bell's same name, including a prior conviction from

1989 for burglary of a habitation with the intent to commit sexual assault. Additionally, the State called Joe Nichols to the stand, and he testified that he works as an investigator for the district attorney's office, that he has received specialized training regarding fingerprint identification, that he compared the fingerprints present in the pen packets for the prior convictions to Bell's fingerprints, and that the two sets of fingerprints matched Bell's fingerprints.

Following Nichols's testimony, the district court found the two enhancement allegations to be true. Further, the court explained that because one of the prior convictions was for burglary of a habitation with the intent to commit sexual assault, the Penal Code mandated that Bell be sentenced to life imprisonment in the current case. Accordingly, the district court rendered its judgment of conviction and sentenced Bell to life imprisonment.

DISCUSSION

On appeal, Bell presents three issues challenging the sufficiency of the evidence supporting his conviction for sexual assault, arguing that the district court erred by relying on the enhancement allegation when assessing his sentence, and asserting that his trial counsel provided ineffective assistance of counsel. We will address those issues in the order briefed.

Sufficiency of the Evidence

Under a legal-sufficiency standard of review, appellate courts view the evidence in the light most favorable to the verdict and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When performing this review, an appellate court must bear in mind that

it is the factfinder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make "reasonable inferences from basic facts to ultimate facts." *Id.*; *see also* Tex. Code Crim. Proc. art. 36.13 (explaining that "jury is the exclusive judge of the facts"). Moreover, appellate courts must "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." *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). Furthermore, appellate courts presume that conflicting inferences were resolved in favor of the conviction and "defer to that determination." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). In addition, courts must bear in mind that "direct and circumstantial evidence are treated equally" and that "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor" and "can be sufficient" on its own "to establish guilt." *Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

In reviewing the legal sufficiency of the evidence supporting a conviction, appellate courts consider "*all* evidence that the trier of fact was permitted to consider, regardless of whether it was rightly or wrongly admitted." *Demond v. State*, 452 S.W.3d 435, 445 (Tex. App.—Austin 2014, pet. ref'd) (emphasis added). The evidence is legally insufficient if "the record contains no evidence, or merely a 'modicum' of evidence, probative of an element of the offense" or if "the evidence conclusively establishes a reasonable doubt." *Kiffe*, 361 S.W.3d at 107 (quoting *Jackson*, 443 U.S. at 320). Furthermore, reviewing courts "measure the sufficiency of the evidence by the so-called hypothetically correct jury charge, one which accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." *See DeLay v. State*, 465 S.W.3d 232, 244 n.48 (Tex. Crim. App. 2014).

Regarding the offense at issue, the Penal Code specifies that an individual commits the offense if he "causes the sexual organ of another person, without the person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." Tex. Penal Code § 22.011(a)(1)(C). Further, the Penal Code specifies that sexual assault "is without the consent of the other person if . . . the other person has not consented and the actor knows the other person is unconscious or physically unable to resist," if "the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring," or if "the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge." *Id.* § 22.011(b)(3), (5), (6).

When challenging the sufficiency of the evidence, Bell emphasizes the evidence establishing that Jones had taken two Adderall tablets on the same day that he went to Bell's home, that Jones had been drinking before he arrived at Bell's home, that Jones continued to drink scotch and beer while at Bell's home, and that Jones had several sips of a margarita. Further, Bell notes that although forensic testing indicated that Jones had morphine in his system, no morphine was discovered at Bell's home. Additionally, Bell asserts that Jones's testimony revealed that he had trouble recalling the details of the evening before falling asleep and that the portion of his testimony in which he denied drinking wine coolers was inconsistent with Detective Proctor's testimony. Moreover, Bell surmises that the testimony from Ellis describing Jones's behavior on the night in question was inconsistent with someone who had taken or been given a depressant because she described him as hyperactive with high amounts of energy and as not slurring his speech or otherwise acting drunk. Further, Bell observes that Ellis testified that Jones ran away when the police arrived,

which Bell contends was more consistent with someone engaged in criminal activity than someone who had been the victim of a crime.

Additionally, Bell highlights that when the police executed a search warrant on Bell's home several days after the alleged offense, the police found several items belonging to Jones, including a harmonica, and Bell contends that the recovery of these items was an indication that a crime did not occur because "[a] criminal would get rid of these objects, unless, of course, no crime had occurred." Next, Bell suggests that the evidence suggests that Jones may have intentionally placed himself "in a mental state that allowed him to engage in sexual activity that he may otherwise not have been inclined to engage in." In addition, Bell refers to the recording of the jailhouse conversation between Bell and Bell's brother in which Bell stated that Jones had become very aggressive, that Jones acted like he wanted to take Bell's job, that Jones passed out, and that Bell left the house at that point to allow Jones to recover, and Bell insists that the recording, particularly the portion indicating that Jones wanted to take Bell's job away, "provides another possible motive for . . . Jones's actions." Finally, Bell contends that the evidence is insufficient because the DNA testing performed did not reveal any DNA from Jones even though the swabs were taken from Jones's body, and Bell insists that the test results demonstrate "the unreliability of the DNA evidence."

Although Bell points out that evidence was presented during the trial that Jones consumed alcohol and Adderall on the day in question and that Jones may have been intoxicated at the time of the alleged offense as proof that Bell did not spike the margarita with some type of drug, the evidence and testimony presented at trial indicated that Jones took two Adderall as part of his regular daily routine, that he took the second one more than twelve hours before the alleged assault,

that he started feeling strangely about a half hour after trying one of Bell's margaritas at Bell's instruction, that the amount of time between when Jones drank the margarita and started feeling strangely was consistent with the amount of time that would pass before someone who took an opiate would feel the effects, and that Jones fell asleep in one of the bedrooms in Bell's home. Furthermore, Jones's wife explained that Jones was not acting like he was drunk. Moreover, Jones testified that when he woke up, Bell was performing oral sex on him without his consent and that Jones ran from the house shortly thereafter seeking help, and testimony from Jones's family members, from investigating police officers, and from one of the sexual-assault-nurse examiners demonstrated that Jones made that same claim to them shortly after the alleged assault.

Moreover, although testimony was introduced indicating that Jones seemed hyperactive, that testing performed on Jones's blood indicated the presence of a stimulant, and that the dilation of his pupils was consistent with someone who had taken a stimulant, Brand testified that Jones was having a difficult time staying awake during the first forensic examination, was too impaired to engage in consensual sexual intercourse, and was behaving in a manner suggesting that he had been given a depressant. Additionally, Baxter explained that the positive result for amphetamines could have been caused by Jones taking Adderall, that the test results also indicated the presence of an opiate, and that opiates can make someone disoriented, confused, and tired. Consistent with that description, Officer Banta described Jones as confused and disoriented, and Jones testified that he felt "fuzzy" and extremely tired and could not remember personal information about himself. Similarly, B.S. described Jones as being "out of it," as being unable to recognize members of his family, and as being tired.

Furthermore, although Ellis testified that Jones ran from her house when the police arrived, Officer Banta testified that Jones was coming towards his car after he accidentally drove past Ellis's home, and the recording from Officer Banta's body camera is consistent with that testimony and shows that Jones was attempting to engage with the police. Regarding the DNA testing, Lott explained that the testing performed on the swab of Jones's penis revealed a single DNA source, that Bell's DNA could not be excluded as the source of the DNA, and that the DNA profile found on Jones's penis is 661 quadrillion times more likely to have come from Bell than another unrelated individual. Moreover, Lott testified that although an individual's own DNA can show up as a DNA contributor when a swab is taken of that person's skin, that does not happen in every case. Along those same lines, Lott explained that the fact that no DNA from Jones was found in the sample indicated that a "fairly robust source" of foreign DNA was deposited on Jones's penis, which was consistent with saliva being transferred during oral sex.

Given our standard of review and in light of the record before this Court as well as the reasonable inferences that can be made from that record, we must conclude that a rational jury could have concluded that Bell caused Jones's penis to penetrate Bell's mouth without Jones's consent by causing the act to occur knowing that Jones was unconscious or unable to resist, by causing the act to occur knowing the Jones was unaware that the sexual activity was happening, or by causing the act to occur after intentionally impairing Jones's ability to "apprise or control" his conduct by "administering" a substance to Jones without his knowledge. *See* Tex. Penal Code § 22.011(a)(1)(C), (b)(3), (5), (6). To the extent that Bell suggests that the evidence could also support conflicting inferences, we must conclude that the jury resolved those inconsistencies in favor of Bell's conviction

and defer to that determination. Accordingly, we conclude that the evidence was legally sufficient to support Bell's conviction for sexual assault and overrule his first issue on appeal.

Enhancement Allegations

In his second issue on appeal, Bell urges that the district court abused its discretion when it assessed his punishment. *See Tapia v. State*, 462 S.W.3d 29, 46 (Tex. Crim. App. 2015) (explaining that "[a] trial judge is given wide latitude to determine the appropriate sentence in a given case"); *Jones v. State*, Nos. 03-17-00720—00721-CR, 2018 WL 2437378, at *8 (Tex. App.—Austin May 31, 2018, pet. ref'd) (mem. op., not designated for publication) (stating that under abuse-of-discretion standard of review, trial court's ruling will be considered abuse of discretion only if it lies outside zone of reasonable disagreement or is unreasonable or arbitrary).

When presenting this issue, Bell notes that the district court found to be true the second enhancement allegation regarding a prior conviction for burglary with intent to commit sexual assault. Further, Bell asserts that "[g]iven that 28 years ha[ve] passed between the original offense and the instant offense, the statute giving rise to th[e prior] conviction may have [had] fewer or simply different elements than the current 2017 statute under which [he] was convicted of the current offense." Moreover, in light of the preceding, Bell contends that the district court should have but did not compare the elements of the two statutes or issue findings of fact and conclusions of law setting out whether the elements for the two offenses "were the same," and Bell insists that the district "court's failure to issue factual findings harmed [his] constitutional right to pursue adequate appellate review." For these reasons, Bell contends that we should "remand the case to the [district] court so that" the district court can issue the findings and conclusions that Bell insists

were necessary. *See* Tex. R. App. P. 44.4; *see also State v. Cullen*, 195 S.W.3d 696, 698 (Tex. Crim. App. 2006) (explaining that "Rule 44.4 authorizes the court of appeals to remand the case to the trial court" for entry of findings of fact and conclusions of law "so that the court of appeals is not forced to infer facts from an unexplained ruling").

As an initial matter, we note that it is not entirely clear that Bell has preserved this complaint for appellate review. *See* Tex. R. App. P. 33.1 (setting out requirements for preserving issue for appellate consideration). During the punishment hearing, Bell presented no argument on the grounds summarized above and made no objection to the propriety of district court's consideration of the enhancement allegation for punishment purposes other than urging the district court to find the allegation not true. In addition, although Bell moved to dismiss the enhancement before the start of trial, Bell did so on the ground that the indictment from the prior offense was defective, and the district court denied the motion.

Regardless, we do not believe that the case law that Bell points to in this issue supports his assertion that the district court's reliance on the prior burglary conviction for sentencing purposes was improper or that the district court should have issued findings of fact and conclusions of law in this case. When presenting this issue on appeal, Bell primarily relies on *Mathis v. United States*, 136 S. Ct. 2243 (2016). In that case, Mathis was assessed a mandatory statutory sentence under the Armed Career Criminal Act ("ACCA"), which "imposes a 15-year mandatory minimum sentence on certain federal defendants who have three prior convictions for a 'violent felony,' including 'burglary, arson, or extortion.'" *Id.* at 2247 (quoting 18 U.S.C.A. § 924(e) (West 2015)). When deciding whether a conviction was for a violent felony, federal courts would "compare

the elements of the crime of conviction with the elements of the 'generic' version of the listed offense—*i.e.*, the offense as commonly understood" and would conclude that a "prior crime qualifies as an ACCA predicate if, but only if, its elements are the same, or narrower than, those of the generic offense." *Id.* For example, to see whether a prior felony conviction under federal or state law constituted a conviction for burglary, the conviction must have the same elements as the "generic" version of burglary, meaning "an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." *Id.* at 2248 (quoting *Taylor v. United States*, 495 U.S. 575, 598 (1990)). Ultimately, the Supreme Court determined that "[b]ecause the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence." *Id.* at 2257. Relying on the analysis from *Mathis*, Bell contends that "the statute under which a defendant is previously convicted must adequately match the elements of the statute in the jurisdiction which later seeks to enhance the defendant's sentence" and that "when there are different or additional elements required to establish the second offense, the prior conviction cannot be used to enhance the instant offense."

We do not believe that the analysis from *Mathis* is applicable to the issue presented in this appeal. In *Mathis*, the ACCA required an initial determination regarding whether a prior conviction qualified as a violent felony under the ACCA, which necessitated an examination of the elements of the statute from the prior offense. In contrast, for prior Texas offenses, section 12.42 of the Penal Code simply requires a showing that a defendant has been previously convicted of one or more felony offenses. *See* Tex. Penal Code § 12.42(a), (b), (c)(1), (d). Although subsection 12.42(c)(2) provides that the punishment for certain types of felonies is automatically assessed at life

imprisonment if the defendant was previously convicted of one of several enumerated types of felony offenses in Texas, *see id.* § 12.42(c)(2), the enhancement requirements are satisfied when it is shown that the defendant was previously convicted of one of those felony offenses.

Moreover, to the extent that Bell is suggesting that the statutory elements for the sexual-assault conviction forming the basis of this appeal should be compared to the sexual-assault statute in effect for his 1989 burglary conviction because the burglary conviction involved an allegation that he intended to commit sexual assault, nothing in the language of section 12.42 or the opinion from *Mathis* persuades us that some type of element comparison between the statute governing a prior conviction and the statute in effect for the current offense is required before a prior Texas felony offense may serve as a felony enhancement under section 12.42 of the Penal Code. This conclusion is buttressed by the fact that the prior conviction serving as an enhancement allegation need not involve the same type of criminal activity for which a defendant is currently being tried. Further, we have not been pointed to any other governing statutes or case law indicating that the type of comparison suggested by Bell is required or that a trial court is obligated to issue findings of fact and conclusions of law pertaining to that comparison.

In light of the language of section 12.42, of the absence of authority requiring the type of comparison suggested by Bell, and of the portion of the record documenting that the district court explained that it found both enhancements true and that it was using the conviction for burglary with the intent to commit sexual assault for assessing punishment, we cannot conclude that the district court abused its discretion by applying the enhancement allegation for punishment purposes or otherwise erred by failing to issue findings of fact and conclusions of law. *Cf. Nino v. State*,

No. 13-00-00399-CR, 2001 WL 958069, at *2 (Tex. App.—Corpus Christi Aug. 23, 2001, pet. ref'd) (not designated for publication) (noting that "the purpose of requiring the court to file findings and conclusions . . . is to allow the appellate court to review the propriety of the trial court's ruling" and concluding that trial court did not err by failing to make findings and conclusions when record shows that "there [wa]s no need for written findings of fact and conclusions of law to be made").

For all of these reasons, we overrule Bell's second issue on appeal.

Effectiveness of Counsel

In his final issue on appeal, Bell contends that his trial counsel provided ineffective assistance of counsel by failing to request findings of fact and conclusions of law during the punishment phase regarding the district court's use of the enhancement allegation as discussed in the previous issue. Accordingly, Bell contends that he was denied "the right to have a 'meaningful review' of the legality of his sentencing," that his trial attorney's omission "fell below an objective standard of reasonableness," and that the his sentencing "would have been different but for counsel's deficient performance."

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). 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; *see also Blount v. State*, 64 S.W.3d 451, 455 (Tex. App.—Texarkana 2001, no pet.) (explaining that even if "counsel's actions . . . seem imprudent in hindsight, it is not for us to second-guess her strategy").

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 v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (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 this case, no motion for new trial was filed, and no allegations of ineffective assistance were presented to the district court. Accordingly, Bell's trial attorney has not been afforded the opportunity to explain his reasons for not requesting findings of fact and conclusions of law pertaining to the enhancement allegation. *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"); *Villalobos v. State*, No. 03-13-00687-CR, 2015 WL 5118369, at *5 (Tex. App.—Austin Aug. 26, 2015, pet. ref'd) (mem. op., not designated for publication) (stating that, in general, without record evidence regarding attorney's strategy, appellate courts "cannot speculate as to whether a valid strategy existed, and thus [an] appellant cannot rebut the strong presumption of reasonable assistance"). More importantly, as set out in the previous issue, the statutory scheme governing enhancements does not suggest that the type of comparison urged by Bell for prior Texas felony convictions is required. For these reasons, we are unable to conclude that Bell's trial attorney's failure to request findings of fact and

conclusions of law pertaining to that comparison fell below an objective standard of reasonableness under prevailing professional norms.

Even assuming for the sake of argument that the types of findings and conclusions suggested by Bell were required and that Bell's attorney's failure to request them was unreasonable under the circumstances present here, we are still unable to conclude that the second prong of *Strickland* has been met. "Because the only remedy available on appeal to a defendant upon a trial court's failure to file mandatory findings of fact and conclusions of law is a remand for the entry of such findings and conclusions, a defendant's contention of ineffective assistance of counsel on direct appeal based on counsel's failure to request findings and conclusions must fail." *Chavez v. State*, 6 S.W.3d 56, 64 (Tex. App.—San Antonio 1999, pet. ref'd). Accordingly, "[a] defendant cannot show that the result of the proceedings would have been different had counsel made such request." *Id.*

For all of these reasons, we overrule Bell's third issue on appeal.

Clerical Error

Although Bell does not raise this on appeal, we observe that the judgment of conviction contains a clerical error. The judgment reflects that the offense level in this case was a first-degree felony. Although the punishment range was enhanced in this case due to Bell's prior burglary conviction, *see* Tex. Penal Code § 12.42(c)(2), the actual offense level for the assault charged in this case is a second-degree felony, *see id.* § 22.011(f) (providing that sexual assault is, in general, second-degree felony); *see also Ford v. State*, 334 S.W.3d 230, 234 (Tex. Crim. App. 2011) (explaining that section 12.42 of Penal Code "increases the punishment level only").

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). Accordingly, we modify the judgment to reflect that Bell was convicted of a second-degree felony.

CONCLUSION

Having modified the district court's judgment to reflect that Bell was convicted of a second-degree felony and having overruled Bell's three issues on appeal, we affirm the district court's judgment of conviction as modified.

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David Puryear, Justice

Before Justices Puryear, Goodwin, and Bourland

Modified and, as Modified, Affirmed

Filed: August 31, 2018

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