NUMBER 13-15-00457-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ROCKLINE KENNEDY, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the Criminal District Court of Jefferson County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Justice Longoria

Appellant Rockline Kennedy challenges his conviction for intoxication manslaughter by three consolidated issues.[1] *See* TEX. PENAL CODE ANN. § 49.08 (West, Westlaw through 2015 R.S.). We affirm.

I. BACKGROUND[2]

The State alleged in the indictment that appellant caused the death of Kristin Paris by operating a motor vehicle while intoxicated and that his intoxication resulted in her death. *See id.* Appellant pled guilty and executed a judicial confession admitting that the allegations against him were true and correct, but decided to go to a jury to assess punishment. The trial court accepted appellant's plea and convicted him of the charged offense. A trial on punishment followed.

The evidence and testimony at the punishment trial established that appellant was the owner of a gentlemen's club named Dream Street located in Beaumont. Several of appellant's employees testified that if he had consumed alcohol at the club during the night, he would often sleep in his truck before driving home. On the night of January 26, 2015, appellant's employees saw him exit the club and climb into his truck between 9:30 and 10:00 p.m. However, appellant's truck was no longer in the parking lot when James Miller, one of his employees, returned to check on him. Shortly afterwards, two drivers called 911 to report that a truck was driving in the wrong direction down the highway. A third driver, Richard Orgeron, testified that he observed a white truck going the wrong way down the same highway. Even though Orgeron was unable to positively identify

[1] We have grouped all of appellant's grounds for his ineffective-assistance-of-counsel claim into a single issue.

[2] This case is before the Court on transfer from the Ninth Court of Appeals in Beaumont pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

appellant as the driver, appellant did not contest that Orgeron or the two 911 callers saw his truck.

Police were called to the scene of the collision on the highway between appellant's truck and Paris's car at approximately 11:30 p.m. that night. Appellant and Paris were transported to the hospital by emergency personnel. Paris died of her injuries in the ICU shortly afterwards. Mary Jacks, a registered emergency room nurse, testified that "nearly every bone" in Paris's body "was crushed." Appellant suffered minor injuries.

Officer Michael Wirfs of the Beaumont Police Department arrived at the hospital to question appellant. He described appellant as emitting a strong odor of alcohol and displaying glassy eyes and slurred speech. According to Officer Wirfs, appellant deliberately urinated on the floor of the treatment room.

Hospital personnel drew a sample of appellant's blood as part of his treatment.[3] Jacks testified without objection that a "blood serum" test performed by the hospital laboratory estimated that appellant's blood alcohol content was .320. The same blood sample was tested several days later by the Jefferson County Crime Lab at the request of the Beaumont Police Department. Emily Esquivel, a forensic scientist at the Jefferson County Crime Lab, testified without objection that a "whole blood" test measured appellant's blood alcohol content at .291.

Witnesses for both the State and appellant testified that appellant treated his employees favorably, contributed substantial sums to charity, was involved in the

[3] The sample drawn from appellant for treatment purposes was the second sample taken from appellant that night. The first sample was drawn at Officer Wirfs' request pursuant to the mandatory blood draw statute after appellant refused to provide a blood sample. *See* TEX. TRANSP. CODE ANN. § 724.012(b) (West, Westlaw through 2015 R.S.). The State acknowledged at trial that any test results from the first blood sample would be inadmissible because of the Texas Court of Criminal Appeals' holding in *State v. Villarreal*, 475 S.W.3d 784, 815 (Tex. Crim. App. 2014), and did not rely on them.

community, and described his good character in general. Several witnesses mentioned that appellant's consumption of alcohol had increased in the months before the collision because of his distress over the death of his brother.

The jury assessed punishment at eighteen years in the Institutional Division of the Texas Department of Criminal Justice and a $10,000 fine. The trial court pronounced sentence in accordance with the jury's verdict, and this appeal followed.

II. DISCUSSION

Appellant asserts under his first two issues that the results of both blood tests were inadmissible and should have been excluded. Under his third issue, appellant asserts three separate grounds for us to conclude that his trial counsel was constitutionally ineffective.

A. Admission of Blood Test Results

Appellant argues in his first and second issues that the trial court erred in admitting the results of the two blood tests. However, appellant did not object to either set of test results. Failure to object waives any error in the admission of evidence. *Holmes v. State*, 248 S.W.3d 194, 200 (Tex. Crim. App. 2008); *see* TEX. R. APP. P. 33.1(a). We hold that appellant did not preserve either of these issues.[4] *See Holmes*, 248 S.W.3d at 200. We overrule appellant's first and second issues.

[4] Appellant argues in a portion of his second issue that Jacks's testimony violated his rights under the Confrontation Clause. He asserts that the second blood sample was also taken for the purposes of investigation and that Jacks was not the hospital analyst who performed the test. *See Bullcoming v. New Mexico*, 564 U.S. 647, 661 (2011) (holding that the Confrontation Clause required that the analyst who performed a test of the alcohol content of a blood sample be made available for cross-examination). He also argues that the blood test results were more prejudicial then probative under Texas Rule of Evidence 403. To the extent appellant intends these arguments as distinct issues, we hold that appellant waived both because he did not object on either ground in the trial court. *See Coutta v. State*, 385 S.W.3d 641, 664 (Tex. App.—El Paso 2012, no pet.) (holding that an objection under Texas Rule of Evidence 403 is waived by failure to object); *Deener v. State*, 214 S.W.3d 522, 527 (Tex. App.—Dallas 2006, pet. ref'd) (reaching the same holding on an issue under the Confrontation Clause).

B. Was Appellant's Trial Counsel Ineffective?

Appellant argues by three sub-issues that his counsel provided ineffective assistance. First, appellant argues that trial counsel was ineffective for failing to object to or otherwise challenge admission of the blood test results. Second, he alleges that as a result of that failure, appellant's plea of guilty was involuntary. His third argument is that the totality of trial counsel's representation demonstrated that he was ineffective.

1. Applicable Law

We evaluate a claim that trial counsel was ineffective under the two-part standard established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To obtain reversal under *Strickland*, a defendant must show by a preponderance of the evidence both that (1) his counsel performed deficiently and (2) the deficient performance prejudiced the defendant's case. *Id.*; *see Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard).

A defendant establishes the deficient-performance prong by showing that his counsel's professional assistance fell below an objective standard of reasonableness. *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012). We evaluate the quality of trial counsel's assistance by reference to the "competence demanded of attorneys in criminal cases as reflected by prevailing professional norms." *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). As part of this analysis, we indulge a strong presumption that counsel's conduct was professionally reasonable and the result of sound trial strategy. *Id.* at 307–08.

A defendant establishes the prejudice prong of *Strickland* by showing that there is a reasonable probability that the result of the trial would have been different but for trial

counsel's errors. *Ex parte Napper*, 322 S.W.3d 202, 248 (Tex. Crim. App. 2010). A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. The "ultimate focus" of the prejudice inquiry is "on the fundamental fairness of the proceeding whose result is being challenged." *Ex parte Saenz*, No. WR-80,945-01, ___ S.W.3d ___, ___, 2016 WL 1359214, at **5–6 (Tex. Crim. App. Apr. 6, 2016) (quoting *Strickland*, 466 U.S. at 696).

An ineffective-assistance claim "must be firmly founded in the record and the record must affirmatively demonstrate the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (internal quotation marks omitted). For this reason, direct appeal is usually an inadequate vehicle for raising an ineffective-assistance claim because the record is frequently undeveloped. *Id.* at 592–93. This is true for the deficient-performance prong because trial counsel usually must be afforded an opportunity to explain his challenged actions before a court concludes that his performance was deficient. *Id.* at 593. If trial counsel has not had such an opportunity, we will not find deficient performance unless the conduct "was so outrageous that no competent attorney would have engaged in it." *Id.*; *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

2. Analysis

a. Failure to Object to Blood Test Results

Appellant argues in his first sub-issue that his trial counsel was ineffective for not

taking a variety of actions to challenge the blood test results. Specifically, appellant argues that trial counsel should have: (1) filed a pretrial motion to suppress; (2) requested a *Kelly/Daubert* hearing outside the presence of the jury to establish the relevance and reliability of the blood evidence; (3) elicited or presented testimony regarding the difference between "blood serum" and "whole blood" tests; (4) conducted discovery regarding the procedures used by both labs; and (5) objected to Jacks's testimony as violating his rights under the Confrontation Clause. Appellant asserts that there can be no imaginable strategic reason for not taking these actions because the blood test results were highly prejudicial. The State responds that trial counsel's actions were consistent with a strategy of accepting responsibility for the offense and attempting to mitigate punishment.

We conclude that even if appellant's trial counsel's performance was deficient, appellant is unable to show a reasonable probability that the punishment verdict would have been more favorable but for the admission of the blood test results.[5] *See Ex parte Rogers*, 369 S.W.3d 858, 864 (Tex. Crim. App. 2012) (holding that to establish prejudice for an error in a sentencing hearing a defendant must show that "the sentencing jury would have reached a more favorable verdict" but for trial counsel's errors). Appellant argues that the blood test results were highly prejudicial because they established his blood alcohol limit was very high at the time of the crash. But even if we assume the results were highly prejudicial, we disagree that the failure to challenge them created a reasonable probability of a lesser sentence. The jury heard other substantial evidence

[5] We address the prejudice prong first because it is dispositive. *See Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011) (holding that there is no particular order in which appellate courts must address the two prongs).

that appellant was heavily intoxicated on the night of the crash: (1) two 911 calls that appellant's truck was driving in the wrong direction on the highway; (2) Richard Orgeron's testimony to the same effect; (3) testimony from the officer who checked on appellant's welfare when he was still trapped in his truck at the scene of the accident that appellant smelled of alcohol; (4) Officer Wirfs' testimony that appellant was belligerent at the hospital and deliberately urinated on the floor; and (5) Jacks' testimony that appellant was "loud and disruptive and cursing and smelled really bad of alcohol." When viewed together, all of the foregoing is strong evidence that appellant was highly intoxicated on the night of the crash.

We hold that appellant has not shown a reasonable probability that the sentencing jury would have reached a more favorable verdict but for his trial counsel's failure to object to the blood test results. *See id*. We overrule appellant's first sub-issue.

b. Voluntariness of the Guilty Plea

Appellant asserts in his second sub-issue that trial counsel's failure to object to the blood test results rendered his plea involuntary. The State responds that the record does not support that appellant's plea was involuntary.

We agree with the State that the record is insufficient to support appellant's argument. A guilty plea must be both voluntary and a knowing and intelligent act done with sufficient awareness of the relevant circumstances and the likely consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Davison v. State*, 405 S.W.3d 682, 686 (Tex. Crim. App. 2013). When a defendant challenges the voluntariness of a plea entered on advice of counsel, the second prong of the *Strickland* test requires the defendant to show a reasonable probability that without counsel's errors "he would not have pleaded

guilty to the charged offense and would have insisted on going to trial." *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010) (internal quotation marks omitted). We cannot conclude that trial counsel performed deficiently without a record demonstrating what role the blood test results played in appellant's decision to plead guilty, or at least what advice trial counsel gave appellant before he pled guilty.[6] *See id*. We overrule appellant's second sub-issue.

c. Totality of Counsel's Representation

In his third sub-issue, appellant argues that several of trial counsel's errors and omissions fatally compromised his strategy of accepting responsibility and attempting to mitigate punishment. Appellant asserts that trial counsel: (1) failed to "put on any real mitigation evidence"; (2) failed to affirmatively establish that appellant was eligible for probation and request that the jury recommend it; (3) failed to establish and emphasize appellant's lack of a criminal history; (4) made harmful and prejudicial comments in his closing argument; and (5) failed to argue for probation or a sentence "on the low end of the punishment range." The State responds that trial counsel put on mitigating evidence and that trial counsel's arguments were strategically reasonable.

We agree with the State. Regarding the issue of mitigating evidence, the decision whether or not to present mitigating evidence or testimony is a matter of trial strategy. *Garza v. State*, 213 S.W.3d 338, 347–48 (Tex. Crim. App. 2007). A decision not to put on mitigating evidence can be part of a reasonable strategy if counsel evaluated the available evidence and determined it would not be helpful. *Lopez v. State*, 462 S.W.3d

[6] Furthermore, given the other evidence against appellant, we cannot say that "no competent attorney" would decide not to object to the blood evidence. *See Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012).

180, 185–86 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Appellant does not dispute that trial counsel presented some mitigating evidence, but he attacks trial counsel's failure to call Pastor Ron Hammond despite knowing appellant wanted him to testify. Appellant argues that Pastor Hammond would have impressed the jury with appellant's remorse for the crash and that appellant's actions that night were not indicative of his character. However, trial counsel's reasons for not calling Pastor Hammond do not appear in the record. Without a record demonstrating trial counsel's reasons, we must presume the decision not to call Pastor Hammond was part of a reasonable trial strategy. *See Garza*, 213 S.W.3d at 348.

The second and third errors alleged by appellant cannot support a finding of deficient performance for the same reason. There is no dispute that trial counsel told the jury during his closing statement that appellant would be eligible for probation if he received a sentence of less than ten years' imprisonment and did not have a prior felony conviction. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(d)(1) (West, Westlaw through 2015 R.S.). It is also undisputed that the State never introduced or attempted to introduce evidence of a prior felony conviction. Appellant seems to argue that trial counsel did not emphasize these factors enough, but what mitigating evidence to emphasize is a matter of trial strategy that we may not second guess. *See Garza*, 213 S.W.3d at 348; *see also Ex parte 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.").

Regarding trial counsel's closing argument and failure to argue for a low sentence, appellant asserts that his trial counsel was ineffective because he effectively gave the

jury "the go-ahead, if not encouraged them, to throw the book at [appellant], which they subsequently did." As support, appellant points to a portion of trial counsel's closing argument where he acknowledged the possibility that the jury would be inclined to impose the maximum punishment in this case and mentioned appellant's "inexcusable" behavior at the hospital. Appellant argues that trial counsel was deficient for these statements and for failing to (1) tell the jury that appellant had changed his life and would likely die in prison if the jury imposed a long sentence and (2) for not directly asking for a more lenient sentence.

We disagree with appellant that these portions of trial counsel's closing argument reflect deficient performance. In addition to mentioning appellant's actions on the night of the crash, trial counsel emphasized the testimony regarding appellant's kindness and generosity towards others, his community involvement, and that he never mistreated his employees. Trial counsel also specifically mentioned that probation was available for those who received a sentence of less than ten years and who had "lived that law-abiding life." When viewed in the context of the entire closing argument, the alleged errors could have been part of a reasonable trial strategy of asking the jury to make a decision based on the whole of appellant's life rather than their emotional reaction to the harm he admitted causing. Whether trial counsel should have ended his argument by saying that he was "not going to tell [the jury] what the punishment should be," instead of asking for a specific sentence, is a strategic choice that we may not second guess. *See Ex parte Jimenez*, 364 S.W.3d at 883; *see also Ex parte Rogers*, 369 S.W.3d at 862 ("Because there are countless ways to provide effective assistance, judicial scrutiny of trial counsel's conduct must be highly deferential." (internal quotation marks omitted)).

We overrule appellant's third sub-issue.

d. Summary

In sum, we conclude that appellant has not demonstrated that his trial counsel provided ineffective assistance or that any ineffective assistance prejudiced him. *See Ex parte Rogers*, 369 S.W.3d at 862. We overrule appellant's third issue.

III. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
4th day of August, 2016.