NUMBER 13-15-00384-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

GILBERT DELACRUZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

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

After a bench trial, the trial court found appellant Gilbert DeLaCruz guilty of third-degree assault family violence. *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(B) (West, Westlaw through 2015 R.S.) (providing that misdemeanor assault family violence becomes a third-degree felony if, among other things, the defendant was previously convicted of an offense involving family violence). The trial court sentenced DeLaCruz to

twenty-five years in prison because he had previously been finally convicted of two felony offenses, the earliest of which occurred when DeLaCruz was a juvenile. *See id*. § 12.42(d) (West, Westlaw through 2015 R.S.).

By one issue, DeLaCruz contends that his trial counsel rendered ineffective assistance at the guilt-innocence phase of trial. By one cross-point, the State contends that DeLaCruz received an illegal sentence, necessitating a new punishment trial.[1] We affirm, in part, and reverse and remand, in part, for a new punishment trial.

I. BACKGROUND

The State charged DeLaCruz with assault family violence after his girlfriend, Stephanie Acosta, called 911 to report that DeLaCruz assaulted her. Acosta testified at trial, as did the police officer who responded to the 911 call.

At trial, Acosta recanted her allegation that DeLaCruz assaulted her. However, Acosta admitted that she told the responding officer at the scene that DeLaCruz assaulted her. The responding officer testified that, at the scene, Acosta provided the following explanation regarding the assault:

> [Acosta] said that her and her boyfriend or ex were in a vehicle. He wanted to go somewhere else and she wanted to come home. She had kids that she needed to tend to. Apparently, he wanted to go somewhere else. They were in an argument over that, over whether or not they were going to go home once she demanded to be taken home. At that point, he became upset with her and he struck her. She said he struck her once across the face with a closed fist. She had slight redness to her face when we initially made contact with her. She said at that point, she tried to fend him off because he was being aggressive with her. In the midst of the altercation. . . .her right pinkie fingernail came off. So she was bleeding.

[1] The State may raise a cross-point to correct an illegal sentence without filing a separate notice of appeal when, as here, a defendant appeals his criminal conviction. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).

The State proffered and the trial court admitted a recording of Acosta's 911 call, during which Acosta stated that DeLaCruz hit her. The State also admitted a picture of Acosta's bloody fingernail. DeLaCruz testified in his own defense and denied the assault allegation.

After hearing all the evidence, the trial court found DeLaCruz guilty of third-degree assault family violence. The offense was a third-degree felony because DeLaCruz committed a misdemeanor assault against Acosta, a dating partner, and had previously been convicted of an offense involving family violence. *See id.* § 22.01(b)(2)(B).

II. ASSISTANCE OF COUNSEL

By his sole issue, DeLaCruz contends that his trial counsel was ineffective at the guilt-innocence phase of trial. Specifically, DeLaCruz complains of the following alleged omissions by trial counsel, which we have taken directly from his appellate brief:

> (1) [DeLaCruz] was improperly identified by the State without object[ion] by counsel; (2) Counsel failed to object to State's leading questions to [Acosta]; (3) Counsel failed to object to State introducing the 911 tape without proper predicate; (4) Counsel failed to thoroughly cross examine [Acosta] about the assault; (5) Counsel failed to impeach Acosta; (6) Counsel failed to object to the State recalling Acosta; (7) Counsel failed to object to the State invoking the rule after trial ha[d] commenced; (8) Counsel failed to object to 'prejudicial' photographs being introduce[d] without proper predicate; (9) Counsel failed to object [sic] State's prejudicial and leading questions [to Acosta]; (10) Counsel failed to object to evidence "outside the record" being offered by the State; (11) Counsel failed to object to State's repetitive questioning [of Acosta]; (12) Counsel failed to object to narratives and hearsay from State's police witness; (13) Counsel failed to object to State's police witness being used for expert testimony without proper predicate; (14) Counsel failed to object on relevance grounds to the State questions on prior convictions; (15) Counsel failed to object to State's highly prejudicial line of questioning [to DeLaCruz]; (16) Counsel failed to object to State introducing plea deal information; (17) Counsel failed to [object to the] State introducing convictions records. . .; [and] (18) Counsel failed to call additional defense witnesses.

A. Standard of Review

Strickland sets forth a two-prong test for reviewing a claim of ineffective assistance of counsel. *See* 466 U.S. 668, 687 (1984). Under *Strickland's* first prong, a defendant must demonstrate that her counsel's performance was deficient in that it fell below an objective standard of reasonableness. *See id*. To make this showing, the defendant must identify the "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id*. at 690. The reviewing court must then determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*.

Generally, if the record is silent as to why trial counsel engaged in the action being challenged as ineffective, there is a "strong presumption" that counsel's conduct was the result of sound trial strategy, falling within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Id*. at 814.

Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance claim because the record is frequently undeveloped. *See Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012). 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." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Under *Strickland's* second prong, the defendant must demonstrate that counsel's deficient performance was so prejudicial that it deprived him of a fair trial—i.e., a trial whose result is reliable. *See* 466 U.S. at 687. To demonstrate prejudice, the defendant must show that but for his trial counsel's deficient performance, there is a "reasonable probability" that the outcome of the trial would have been different. *Id*. at 694. A "reasonable probability" in this context refers to a "probability sufficient to undermine confidence in the outcome." *Id*.

While *Strickland* sets forth this two-prong test for reviewing a claim of ineffective assistance, "there are a few situations in which prejudice under [*Strickland's*] second prong will be presumed." *Ex parte McFarland*, 163 S.W.3d 743, 752 (Tex. Crim. App. 2005); *see Strickland*, 466 U.S. at 692. One such situation arises when trial counsel "entirely fail[es] to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984). Though few and far between, it does happen. For example, in *Cannon v. State*, trial counsel declared at the outset of trial that he was "not ready for this trial" and that he would "be unable to effectively represent [his] client." 252 S.W.3d 342, 350 (Tex. Crim. App. 2008). The case proceeded to a jury trial, at which

> [trial] counsel declined to participate in jury selection, declined to enter a plea for his client, declined to make an opening or closing argument to the jury, declined to cross-examine any of the State's witnesses, declined to make any objections, declined to offer any defense, declined to request any special jury instructions, and declined to offer any evidence or argument with respect to punishment.

The Texas Court of Criminal Appeals held that trial counsel's inaction, considered as a whole, constructively denied the defendant effective assistance of counsel. *Id*. The Court stated:

> [Trial] counsel, although physically present in the courtroom at all the requisite times, effectively boycotted the trial proceedings and entirely failed to subject the prosecution's case to meaningful adversarial testing. By his refusal to participate, [trial] counsel abandoned his role as advocate for the defense and caused the trial to lose its character as a confrontation between adversaries. Prejudice to the defense is legally presumed.

Id.

B. Analysis

Here, DeLaCruz argues that trial counsel's representation calls for a presumption of prejudice because he entirely failed to subject the prosecution's case to meaningful adversarial testing. We disagree.

Unlike the record in *Cannon*, trial counsel gave no indication at the outset of trial that he was unprepared or that he would be unable to effectively represent DeLaCruz. *Id*. The case was tried to the bench, and the State and DeLaCruz waived opening statement. The State then called two witnesses: Acosta and the responding officer. The record shows that the trial court sustained DeLaCruz's trial counsel's objections to the State eliciting speculation and hearsay testimony from these witnesses on direct examination. The record also shows that trial counsel cogently cross-examined Acosta and the responding officer in an attempt to advance the defensive theory that Acosta was a scorned lover who falsely accused DeLaCruz of assault because DeLaCruz had cheated on her. The record further shows that DeLaCruz testified in his own defense after being admonished by trial counsel on the potential risks of doing so. Finally, the record shows that trial counsel gave a forceful closing statement, which implored the trial court to hold the prosecution to its heavy burden to prove its case beyond a reasonable doubt.

After reviewing the record, we cannot say that trial counsel abandoned his role as advocate for DeLaCruz and entirely failed to subject the prosecution's case to meaningful adversarial testing. *Id*. Therefore, we are not persuaded by DeLaCruz's argument that trial counsel's representation calls for a presumption of prejudice. Having rejected DeLaCruz's presumed-prejudice argument, we will now determine whether DeLaCruz has satisfied his burden to demonstrate ineffective assistance of counsel under *Strickland*'s traditional two-prong test. *Strickland*, 466 U.S. at 687.

DeLaCruz's claim of ineffective assistance is raised on direct appeal, and trial counsel has not been afforded an opportunity to respond to the laundry list of alleged omissions set out above. Because DeLaCruz's ineffective-assistance claim comes to us on a silent record, we must apply a strong presumption that trial counsel's conduct was the result of sound trial strategy and that it fell within the wide range of reasonable professional assistance. *See Thompson*, 9 S.W.3d at 813. To overcome this presumption, DeLaCruz shoulders the burden to demonstrate that trial counsel's conduct was "so outrageous that no competent attorney would have engaged in [it]." *See Goodspeed*, 187 S.W.3d at 392. Although DeLaCruz lists various omissions that he contends constituted ineffective assistance, he fails to explain why any omission was so outrageous that no competent attorney would have engaged in it. Although we liberally construe DeLaCruz's brief, we cannot make his arguments for him. *See Jordan v. Jefferson Cty*., 153 S.W.3d 670, 676 (Tex. App.—Amarillo 2004, pet. denied). Accordingly, we conclude that DeLaCruz has not met his appellate burden to demonstrate ineffective assistance. *See Strickland*, 466 U.S. at 687. We overrule DeLaCruz's sole issue.

III. ILLEGAL SENTENCE

By one cross-point, the State contends that DeLaCruz received an illegal sentence, which calls for a new punishment trial.

Texas Penal Code section 12.42(d) provides that a defendant found guilty of a felony other than a state jail felony must be sentenced to at least twenty-five years in prison if the defendant had previously been finally convicted of two felony offenses. TEX. PENAL CODE ANN. § 12.42(d). DeLaCruz was sentenced to twenty-five years in prison under section 12.42(d) based on the State's allegation that he had previously been finally convicted of two felony offenses, the earliest of which occurred when DeLaCruz was a juvenile. On appeal, the State now concedes that DeLaCruz's juvenile conviction does not qualify as a felony conviction for purposes of section 12.42(d), and therefore, he was sentenced in excess of the maximum authorized by law. We agree. *See id*.; *see also Vaughns v. State*, No. 04-10-00364-CR, 2011 WL 915700, at *4 (Tex. App.—San Antonio Mar. 16, 2011, pet. ref'd) (not designated for publication) ("It is clear the Texas Legislature did not intend for juvenile adjudications to be final felony convictions in order to enhance a sentence under [section 12.42(d)] as a habitual offender"); 43A TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 46:100 (3d ed.) (same). We sustain the State's cross-point.

IV. CONCLUSION

We affirm the portion of the trial court's judgment convicting DeLaCruz of a third-degree felony. However, we reverse the portion of the trial court's judgment sentencing him to twenty-five years in prison and remand the case for a new punishment trial.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

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

Delivered and filed this
22nd day of June, 2017.