NUMBER 13-16-00153-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

RODOLFO SAENZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 370th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

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

Appellant Rodolfo Saenz appeals his conviction for the murder of Raul Garza in four consolidated issues. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (West, Westlaw through Ch. 49, 2017 R.S.). We affirm.

I. BACKGROUND

On January 31, 2015, Garza was working at the house of Genarao Fuentes laying a concrete floor for a storage unit. Appellant, Fuentes's next-door neighbor, was seated outside near the fence separating their properties drinking whiskey and beer. At one point, appellant invited Fuentes and Garza to drink with him. Later, one of appellant's nephews came out of the house to tell him that appellant's wife wanted him inside. When appellant started to go into the house, the other men teased him for being too controlled by his wife. Appellant shot Garza once with a handgun. Garza died the next morning during emergency surgery.

Deputies with the Hidalgo County Sheriff's Department responded to the incident and found appellant still seated outside, drinking alcohol. Appellant continued to drink until he was transported to the Sheriff Department's headquarters. Once there, appellant gave a statement through an interpreter admitting to pulling out the gun but claimed that he fired into the air. Appellant insisted that he did not intend to shoot Garza and speculated that the bullet ricocheted off of something. The pistol used to shoot Garza was never recovered.

The State charged appellant by indictment with murdering Garza. *See id.* The State filed a notice of intent to use certain extraneous offenses and bad acts during its case in chief and the punishment phase. Specifically, the State alleged in its notice that appellant: (1) committed the offense of illegally crossing into the United States on December 1, 2011; (2) was convicted of being illegally present in the United States while in possession of a firearm and received a ten-month sentence in federal prison; (3) was subsequently convicted of illegal reentry after removal and received a seventy-month

sentence in federal prison; and (4) continued drinking as soon as he returned to his residence after the shooting in this case. The State filed a separate notice stating its intent to use the firearm-possession offense to enhance the applicable punishment range. The case was tried to a jury, which returned a verdict of guilty.

During the trial on punishment, the trial court admitted without objection a certified copy of the judgment for the firearm-possession offense. Appellant confirmed during cross-examination that he was convicted of both offenses.

Appellant's daughter, Greysa Saenz, testified that appellant was a positive example for his children. The State asked her on cross-examination whether appellant's son had recently been arrested for aggravated assault. The trial court sustained appellant's relevance objection before she could answer. Appellant's counsel did not request that the court instruct the jury to disregard the question.

The jury found the enhancement paragraph to be true and assessed punishment at seventy years' imprisonment in the Texas Department of Criminal Justice—Institutional Division and a $10,000 fine. Appellant filed a motion for new trial asserting only that the verdict was contrary to the law and the evidence. The motion for new trial was overruled by operation of law, and this appeal followed.

Appellant argues in four issues that we should reverse his sentence and remand for a new punishment hearing because: (1) the prosecutor's questions during the punishment trial regarding appellant's alleged lack of remorse violated the privilege against self-incrimination in the Texas Constitution; (2) the court's punishment charge omitted the extraneous-offense instruction required by section 3(a)(1) of article 37.07 of the Texas Code of Criminal Procedure, *see* TEX. CODE CRIM. PROC. ANN. art. 37.07,

§ 3(a)(1) (West, Westlaw through Ch. 49, 2017 R.S.); (3) the punishment charge did not instruct the jury on the essential elements of each extraneous offense alleged by the State; and (4) appellant's trial counsel provided constitutionally ineffective assistance.[1]

II. PRIVILEGE AGAINST SELF-INCRIMINATION

Appellant expressed regret for the shooting during his testimony at the punishment hearing. The State later cross-examined appellant regarding his behavior after returning to his house from the Sheriff's Department and suggested that it showed a lack of remorse. Appellant argues in his first issue that the prosecutor's questions infringed on his privilege against self-incrimination secured by the Texas Constitution. *See* TEX. CONST. art. I, § 10; *see also Sanchez v. State*, 707 S.W.2d 575, 579–80 (Tex. Crim. App. 1986) (observing that the state constitutional protection against self-incrimination applies from the moment of arrest). The State responds that appellant waived this issue by failing to object in the trial court.

We agree with the State. Preserving a complaint for review requires the complaining party to make a timely and specific objection and obtain a ruling on that objection. TEX. R. APP. P. 33.1(a); *Daniel v. State*, 485 S.W.3d 24, 35 (Tex. Crim. App. 2016). Almost all error, even most constitutional errors, may be waived by failure to object. *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014). Appellant does not contest that he did not object on this ground in the trial court. We hold that appellant has waived this issue by his failure to object. *See Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004) (holding a self-incrimination issue under Article I, section 10 of the Texas Constitution is waived without a proper objection); *see also Larios v. State*,

[1] We have grouped all of appellant's allegations of ineffective assistance of counsel into a single issue.

No. 13-15-00022-CR, 2015 WL 9487107, at *4 (Tex. App.—Corpus Christi Dec. 29, 2015, no pet.) (mem. op., not designated for publication) (same). We overrule appellant's first issue.

III. JURY CHARGE ERROR

Appellant argues in his second and third issues that the court erred when it omitted from the punishment jury charge: (1) the extraneous-offense instruction required by Article 37.07, § 3(a)(1) of the Texas Code of Criminal Procedure; and (2) the statutory essential elements of each of the extraneous offenses alleged by the State.

A. Applicable Law

Courts analyze a jury-charge issue under a two-step process, first deciding whether there was error in the charge and, if error exists, analyzing the error for harm. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). The amount of harm necessary to warrant reversal depends on whether the error was preserved for appeal. *Id.* When, as here, the defendant did not object to the jury charge, error is reversible only if it was egregiously harmful. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

B. Extraneous-Offense Instruction

Appellant argues that it was error for the court to fail to instruct the jury that it could not consider any of the extraneous offenses or bad acts alleged by the State unless it found beyond a reasonable doubt that the offenses or acts were attributable to him. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (allowing the jury to consider "any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held

criminally responsible"). The State does not contest that the instruction should have been included in the charge.[2]

1. Absence of the Extraneous-Offense Instruction was Error

We agree with appellant that the punishment charge should have included an extraneous-offense instruction. The State's burden of proof for extraneous offenses imposed by article 37.07, § 3(a)(1) is "law applicable to the case" which the court must include in the charge regardless of any objections or requests by the parties. *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). We conclude the absence of the instruction in the punishment charge in this case was error. *See Huizar*, 12 S.W.3d at 484; *Orellana v. State*, 489 S.W.3d 537, 543 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

2. The Error was not Egregiously Harmful

Appellant did not object to error in the charge, so we may not reverse unless he suffered egregious harm from the error. *See Villarreal*, 453 S.W.3d at 433. Jury charge error is egregiously harmful if it "affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016). In analyzing the record for egregious harm we consider the entirety of the jury charge, the state of the evidence, the arguments of counsel, and any other relevant information revealed by the record as a whole. *Id.* To warrant reversal, our review of the entire record must show that the appellant suffered actual rather than theoretical harm from the error. *Taylor v. State*, 332 S.W.3d 483, 489–90 (Tex. Crim.

[2] The State does contest that the allegation appellant immediately resumed drinking alcohol after returning was an extraneous bad act and asserts that it was actually same-transaction contextual evidence. *See generally Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). We assume without deciding that it was an extraneous bad act.

App. 2011). "Egregious harm is a difficult standard to meet, and such a determination must be made on a case-by-case basis." *Marshall*, 479 S.W.3d at 843.

We agree with the State that appellant did not suffer egregious harm from the absence of an extraneous-offense instruction in the jury charge. As we discussed in greater detail above, an extraneous-offense instruction would have directed the jury that it could not consider any of the extraneous offenses and bad acts unless it found beyond a reasonable doubt that those offenses and acts were attributable to him. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1). The absence of this instruction means that the "defendant has no safeguard against a jury applying a lesser standard of proof" to the extraneous offenses. *Orellana*, 489 S.W.3d at 543. That danger is not present here regarding the firearm-possession offense because the State alleged the same offense under the enhancement paragraph. The charge specifically informed the jury that it could not find the enhancement paragraph to be true unless it found beyond a reasonable doubt that appellant had been convicted of that offense. The jury found the enhancement paragraph to be "true," and we must presume the jury followed its instructions. *See Crenshaw v. State*, 378 S.W.3d 460, 467 (Tex. Crim. App. 2012).

Regarding the illegal entry and the illegal reentry offenses, appellant did not contest that he was involved in either one of them. *See Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008) (observing that reviewing the state of the evidence includes a focus on the contested issues). During the State's cross-examination, appellant admitted he entered the country illegally and was later convicted for reentering the country after serving his sentence for the firearm offense. Appellant denied that he

continued drinking after returning to his house, but his wife testified that he refused to go to bed because he wanted to drink a beer.

The extraneous offenses came up briefly during the closing arguments on punishment. Appellant's counsel urged the jury to thoroughly question whether the State had proven the firearms offense for purposes of the enhancement paragraph. Counsel did not, however, contest the accuracy of the certified copy of the judgment of conviction in the record or attempt to refute appellant's admission that he was involved. Instead, counsel asked the jury for mercy and to consider a lower range of punishment. In its second closing, the State reminded the jury about the judgment of conviction on the firearm offense and appellant's admission to it and asserted that the other extraneous offenses showed appellant had a pattern of committing crimes.

The State alleged three extraneous offenses and one bad act. We presume the jury found the firearm offense to be true beyond a reasonable doubt, *see Crenshaw*, 378 S.W.3d at 467, and appellant did not contest he committed the other two offenses. Appellant denied drinking alcohol after he returned from giving his statement, but his wife testified without objection that he told her he would drink a beer before going to bed. Based on this record, we conclude the absence of the extraneous-offense instruction did not cause egregious harm because it did not affect the very basis of the case, deprive appellant of a valuable right, or vitally affect a defensive theory. *See Marshall*, 479 S.W.3d at 843. We overrule appellant's second issue.

C. Essential Elements of the Extraneous Offenses

Appellant argues in his third issue that the trial court should have included the essential elements of each of the extraneous offenses in the charge. He asserts that this

absence left the jury with no information regarding what exactly the State was required to prove beyond a reasonable doubt before the jury could consider those offenses in assessing punishment. The State responds that such an instruction was not required because the beyond-a-reasonable-doubt standard in article 37.07, § 3(a)(1) does not apply to the essential elements of an extraneous offense.

We agree with the State. The Texas Court of Criminal Appeals held in *Haley v. State* that section 3(a)(1) does not necessarily require the State to prove beyond a reasonable doubt that appellant committed a crime, only that the alleged acts "are attributable to the defendant." 173 S.W.3d 510, 515 (Tex. Crim. App. 2005). The Court explained that the burden of proof should "be applied to a defendant's involvement in the act itself, instead of the elements of a crime necessary for a finding of guilt." *Id.* In other words, the jury is required to find that he was involved in the underlying act, not that he was guilty of the offense. *Id.*; *Gomez v. State*, 380 S.W.3d 830, 838 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). We conclude the trial court did not err in not including the essential elements of the alleged extraneous offenses in the jury charge. *See Haley*, 173 S.W.3d at 515; *Gomez*, 380 S.W.3d at 838. We overrule appellant's third issue.

IV. Ineffective Assistance of Counsel

Appellant argues in his fourth issue that his trial counsel provided constitutionally ineffective assistance on multiple occasions during the punishment trial.

A. Applicable Law

Success on a claim of ineffective assistance of counsel requires an appellant to show both that his trial counsel's performance was deficient and that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Hernandez v. State*,

726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard). Failure to make either showing by a preponderance of the evidence defeats an ineffective-assistance claim. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

The deficient-performance prong requires an appellant to show that the quality of his trial counsel's representation fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688. An objective standard of reasonableness is defined by the professional norms for defense counsel prevailing at the time of trial. *Ex parte Bryant*, 448 S.W.3d 29, 39 (Tex. Crim. App. 2014). In deciding whether counsel was ineffective, we review the totality of the circumstances as they existed at the time of trial without the distorting effects of hindsight. *Id.* Our review of counsel's representation is highly deferential, and we indulge a strong presumption that his conduct was the result of a professionally reasonable trial strategy. *Id*.

The prejudice prong requires the appellant to show a "reasonable probability" that the result of the proceeding would have been different but for counsel's unprofessional errors. *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012). "A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial." *Strickland*, 466 U.S. at 694.

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). 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 counsel usually must be afforded an opportunity to explain

the reasons behind his challenged actions before a court may find him ineffective. *Id.* at 593. If counsel has not been given that opportunity, we should not find deficient performance unless the challenged conduct was "so outrageous no competent attorney would have engaged in it." *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

B. Discussion

Appellant argues that three of his trial counsel's omissions were each independently sufficient to establish deficient performance: (1) trial counsel did not object to the State's questions regarding appellant's lack of remorse after the shooting and ask for an instruction to disregard; (2) trial counsel did not ask the court to instruct the jury to disregard the prosecutor's question about the arrest of appellant's son; and (3) counsel did not ask the court to include an extraneous-offense instruction in the charge. Appellant further argues that the cumulative effect of these omissions satisfy the prejudice prong of *Strickland* even if they do not reach that level individually. The State responds that appellant has not overcome the presumption that his trial counsel performed competently or shown that his counsel's omissions caused him prejudice.

We agree with the State regarding the deficient-performance prong. In the absence of an explanation of his strategy from appellant's trial counsel, we may not find deficient performance unless the challenged conduct was so outrageous that no competent attorney would have engaged in it. *See id.* Assuming that an objection to the State's questions regarding appellant's lack of remorse would have been meritorious, counsel could still have reasonably thought that an objection would have further emphasized appellant's initial refusal to admit he even pointed the weapon at Garza. *See*

Haagensen v. State, 346 S.W.3d 758, 766 (Tex. App.—Texarkana 2011, no pet.) (holding that a failure to object to hearsay and evidence of extraneous bad acts could have been part of a trial strategy to avoid emphasizing them). Similarly, counsel could have thought that asking for an instruction to disregard the question regarding the arrest of appellant's son could have emphasized the impression that appellant was a criminal influence on his children. *See Agbogwe v. State*, 414 S.W.3d 820, 838 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("It is reasonable to conclude, however, that, after the trial court sustained the objection, defense counsel decided that seeking an instruction to disregard Ozoh's testimony would only bring further attention to it.").

Regarding the failure to ask for an extraneous-offense jury instruction, appellant's counsel could have reasonably thought such an instruction would not assist appellant. As we discussed above, appellant pled "not true" to the punishment-enhancement paragraph alleging the firearms offense, and his counsel suggested to the jury that the State had not proven it. Nevertheless, appellant admitted to that offense and all of the others included in the State's notice on cross-examination. In these circumstances, counsel could have concluded that an extraneous-offense instruction would serve only to emphasize the extraneous offenses and acts to the jury. *See id*.

We conclude that each of trial counsel's challenged omissions could have been the result of a professionally reasonable trial strategy.[3] Appellant has not proven the

[3] Appellant further asserts in a sub-issue that even if we find that his counsel's errors were not individually prejudicial, the "cumulative effect of all defense counsels' deficient performance" rise to the level of prejudice for purposes of *Strickland*. We reject appellant's argument because appellant did not establish that any part of his trial counsel's performance in this case was deficient. There is no error in the record of this case to cumulate. *See Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009) ("Though it is possible for a number of errors to cumulatively rise to the point where they become harmful, we have never found that 'non-errors may in their cumulative effect cause error.'") (quoting *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999)).

deficient-performance prong of *Strickland*, and we need not consider the prejudice prong. *See Lopez*, 343 S.W.3d at 142. We overrule appellant's fourth issue.

V. 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
20th day of July, 2017.