NUMBERS
13-16-00390-CR
13-16-00395-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

WILLIAM DUNCAN McGEE, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 167th District Court
of Travis County, Texas.

MEMORANDUM OPINION

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

Appellant William Duncan McGee challenges his convictions by a jury for the offenses of retaliation and aggravated assault with a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 36.06(c); 22.02(b)(1) (West, Westlaw through Ch. 49 2017 R.S.). We affirm.

I. BACKGROUND[1]

Meghann Nielsen, the complainant in this case, testified that she met and began a relationship with appellant in 2013. According to Meghann, the relationship was a difficult almost from the beginning. Appellant frequently broke into Meghann's apartment and damaged her personal property. On one occasion, appellant pulled Meghann out of her bed, tore off her clothes, and threw her against a wall. Meghann reported appellant's conduct to police several times but never made a formal statement until appellant broke into her apartment and defecated on her bed.

After the bed incident, Meghann informed appellant that she intended to press charges and made a statement to police. Appellant responded with text messages threatening to kill her.[2] Meghann replied that she would show his message to the police detective she spoke with earlier. Appellant sent back: "Good and tell him I'm gonna find his mother and rape her." In a subsequent message, appellant told Meghann he would "then play soccer with [yo]ur head."

A few days later, appellant called Meghann, apologized, and invited her to go swimming with him at the house of his friend, Logan. Meghann agreed. According to Meghann's version of events, she consumed two drinks containing vodka while there and lost consciousness. She testified that she believed that appellant drugged her drink because he had done so before. Her next memory is of waking up in her apartment with appellant punching her in the head multiple times. Appellant eventually stopped the

[1] This case is before the Court on transfer from the Third Court of Appeals pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through Ch. 49 2017 R.S.). We apply the precedent of the transferor court to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

[2] The trial court admitted a copy of these messages obtained from Meghann's phone as State's Exhibit 44.

assault and had penetrative vaginal sex with her without her consent. Appellant's version of events is that Meghann drank to excess at Logan's house, vomited, and became belligerent. Appellant put her into his car and left. As he drove away, she grabbed the steering wheel, forcing him to hit her several times to release it. Appellant then took Meghann back to her apartment and left without having any sexual contact with her.

Meghann testified that she was hospitalized for eight days following the assault. She required twenty-eight stitches on her lip and two surgeries on her jaw, which was wired shut for twenty-two weeks. She also received a tissue graft and underwent numerous other procedures.

The State indicted appellant for retaliation (regarding the text messages), aggravated assault, and aggravated sexual assault. *See id.* §§ 36.06(c); 22.02(b)(1), 22.021 (West, Westlaw through Ch. 49 2017 R.S.). A jury convicted appellant of aggravated assault and retaliation but acquitted him of aggravated sexual assault. During the punishment phase, appellant's counsel cross-examined the State's witnesses but called no mitigation witnesses. The jury assessed concurrent sentences of imprisonment for forty-two years on the aggravated-assault charge and ten years on the retaliation charge.

Appellant filed a motion for new trial alleging, as relevant here, that his trial counsel was constitutionally ineffective for failing to investigate or present mitigation witnesses during the punishment phase. John Carsey, appellant's lead trial counsel, testified at a hearing on the motion that he decided not to put on any mitigation witnesses in part because the State had filed a lengthy notice of intent to introduce evidence of appellant's extraneous offenses and acts. *See* TEX. R. EVID. 404(b). Carsey felt that it would be

unhelpful to appellant for the jury to see mitigation witnesses cross-examined regarding so many other offenses and acts. Such cross-examination could also potentially damage appellant because most of the acts listed in the State's notice had not been mentioned during the guilt-innocence phase of the trial. Rick Flores, Carsey's trial partner, testified that he agreed putting on mitigation witnesses would be unhelpful and could even hurt appellant's chances with the jury. The trial court denied appellant's motion for new trial, and this appeal followed.

II. Discussion

Appellant argues in a single issue that the court abused its discretion in denying his motion for new trial because the record reflects that his trial counsel was constitutionally ineffective.

A. Standard of Review

We review the trial court's ruling on a motion for new trial for an abuse of discretion, reversing only if the ruling was arbitrary or unreasonable. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012) (reviewing an ineffective-assistance issue that was first raised in a motion for new trial as a challenge to the denial of that motion). "Thus, a trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling." *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). In the absence of express findings, as here, we presume the trial court made all necessary findings in support of its ruling. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013).

B. Applicable Law

To establish a claim for ineffective assistance of counsel appellant must show both that (1) his trial counsel's performance was deficient and (2) 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).

To satisfy the deficient-performance prong, the defendant must 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). We review the quality of counsel's performance by the totality of the circumstances that existed at the time of trial without the distorting effects of hindsight. *Id*. As part of this review, we presume that counsel's challenged actions were part of a reasonable trial strategy. *Id*.

To prove the prejudice prong, the defendant must 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.

C. Discussion

Appellant argues that his counsel's performance was obviously deficient because he conducted no mitigation investigation. If counsel had investigated, appellant asserts that he would have discovered multiple witnesses willing to testify to his general good character and redeeming qualities. Appellant asserts that this failure caused him prejudice because it resulted in the jury having nothing but evidence of his crimes when

deciding his punishment.

The State responds that appellant's trial counsel adequately investigated mitigation evidence and made a professionally reasonable decision that putting on mitigation testimony would not benefit appellant and could actually harm him. The State further asserts that appellant has not shown a reasonable possibility that his sentence could have been different but for his counsel's decision.

We agree with the State that the trial court did not abuse its discretion regarding the deficient-performance prong. *Strickland* does not "require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). "But, counsel can only make a reasonable decision to forego presentation of mitigating evidence after evaluating available testimony and determining that it would not be helpful." *Humphrey v. State*, 501 S.W.3d 656, 663 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (internal quotation marks omitted). The record reflects that Carsey spoke to David Roach, a family friend, and appellant's mother, sister, and grandparents about giving testimony on appellant's good character at a bond-reduction hearing earlier in this case. Moreover, Carsey was already very familiar with appellant's background through representing him in a previous criminal case. Carsey was successful in getting that case dismissed in part by gathering multiple letters attesting to appellant's good character.

During his preparation for the sentencing trial in this case, Carsey became concerned that the jury had returned a verdict in a short span of time without asking to review any of the State's 150 exhibits. Carsey inferred this meant that the jury had completely disbelieved appellant's version of events. Furthermore, the State's notice of intent to introduce evidence of extraneous offenses included 182 separate instances of

conduct. The entries in the notice included, but were not limited to, evidence that appellant sold, purchased, and used steroids and other illegal narcotics on multiple occasions, drove while intoxicated, failed to appear for trial in a previous criminal case, attempted to record a woman performing oral sex on him without her knowledge, asked his mother to speak to several potential witnesses in this case and ensure they did not testify for the State, and violated multiple conditions of his bond. Most of this conduct was not mentioned during the guilt-innocence phase of the trial. As a result, Carsey

> thought it would be at a minimum not helpful and possibly harmful to put up a lot of witnesses who were going to say what a wonderful kid he had been or was, that they—you know, regardless of how they knew him, that he was a great kid in school, that he was a great Little League baseball player and did—all of the stuff that normal character witnesses would say, and then to be cross-examined on all of the 404(b) likely and all of the have-you-heards and all of the did-you-knows and shown the pictures, that I just didn't think that would be helpful. On the one hand, they would be faced with saying no, that still didn't change my opinion, which I thought the jury would think would be an affront, or they would change their opinion, which obviously wouldn't help him.

Viewing the record in the light most favorable to the trial court's ruling, the court could have reasonably concluded that Carsey adequately investigated potential mitigating evidence. Even though he was not aware of many of the specific witnesses appellant argues Carsey should have discovered, he knew there were ample witnesses available and willing to testify to appellant's good character and redeeming qualities. Furthermore, the trial court could also have reasonably concluded that Carsey's decision not to present mitigation witnesses was professionally reasonable under the circumstances. The facts of the case already painted a negative picture of appellant; cross-examination of mitigation witnesses regarding the many other crimes and acts in the Rule 404(b) notice could well have made things worse for him. We conclude that the trial court did not abuse its discretion in concluding that appellant did not establish by

a preponderance of the evidence that his trial counsel's representation was deficient. Because it was appellant's burden to establish both prongs of *Strickland*, the trial court did not err in denying his motion for new trial. *See Lopez*, 343 S.W.3d at 142. We overrule appellant's sole 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
22nd day of June, 2017.