NUMBER 13-16-00542-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

BRIAN DAVID SUMLER, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 13th District Court of Navarro County, Texas.

MEMORANDUM OPINION

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

Appellant Brian David Sumler appeals his conviction for obstruction based on a Facebook message that Sumler sent to the complainant, Acashia Kacho, after she contacted police. By his first two issues, Sumler argues that the trial court abused its discretion in admitting evidence of extraneous bad acts: a series of threatening

messages that Sumler previously sent to Kacho. Sumler argues that the messages had no probative value other than an impermissible propensity-inference and that the messages created a great risk of unfair prejudice. By his third issue, Sumler asserts ineffective assistance of counsel. We affirm.

I. BACKGROUND[1]

A Navarro County grand jury indicted Sumler for one count of obstruction, a felony of the third degree. *See* TEX. PENAL CODE ANN. § 36.06(c) (West, Westlaw through Ch. 49, 2017 R.S.). The subject of the obstruction charge was a note that Sumler sent to Kacho via Facebook: "I didnt [sic] deserve what you did. I'm so hurt. Drop that ridiculous charge before you get into trouble" [hereinafter the "the note"]. It is undisputed that Sumler sent the note some point after Kacho contacted police to pursue a separate set of charges against him. The State prosecuted Sumler on the theory that the note was a threat meant to dissuade Kacho from serving as a witness against him—a chargeable offense under the obstruction and retaliation statute. *See id.* § 36.06(a).

The primary subject of Sumler's appeal concerns an earlier series of Facebook messages in which Sumler threatened to kill Kacho [hereinafter the "prior messages"]. The prior messages were sent between the evening of Friday, July 10 and the afternoon of Sunday, July 12, 2015, and they were introduced along with Kacho's testimony explaining the events of that weekend.

A. Kacho's Testimony

[1] This case is before the Court on transfer from the Tenth Court of Appeals in Waco pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through Ch. 49, 2017 R.S.). Because this is a transfer case, we apply the precedent of the Tenth Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

Kacho testified that she met Sumler roughly twelve years prior to the events of this case and Sumler was possibly the father of Kacho's daughter. However, the two had sparing contact in the intervening decade until Sumler contacted Kacho in late 2014 or early 2015. At that time Kacho was married to Jeff Laplante, but she divorced him after she renewed her relationship with Sumler. Kacho testified that Sumler became possessive and obsessed. In the spring of 2015, Kacho relocated from Garland, Texas to Kerens, Texas, where she lived with her mother and children, in part because of her desire to be further from Sumler. However, during the weekend of July 10–12, she invited Sumler to her house in Kerens.

Kacho testified that when Sumler arrived, she told Sumler that she had aborted a pregnancy she conceived with Sumler and that she was working as a dominatrix. Kacho also told Sumler that she was leaving to go to dinner with Laplante because she was trying to repair her relationship with him. According to Kacho, Sumler "snapped":

> He was very desperate. He threw himself on his knees and he started scratching his own face. He was looking . . . up at me begging me to love him. Begging me to marry him and be with him and only him. And I told him I had to go. I had a dinner to attend with my ex-husband because we were trying to make our relationship work. And he couldn't handle it. And so he pushed me back on the bed and he started gouging my eyes. Then he picked up a pillow and tried to smoother [sic] me. And he told me if I made any move, if I, if I struggled, if I said anything he would kill my kids and he would kill my family.

Kacho later testified that, during this encounter, Sumler sexually assaulted her.

B. The Prior Messages

The prior messages reveal that Kacho invited Sumler to come to her house on Saturday, July 11, but he instead came to her house on Friday, July 10. Kacho told Sumler that she had to leave because she had other plans.

In the prior messages from Friday night and early Saturday morning, Sumler expressed anguish at not knowing where Kacho was and a belief that Kacho was spending the night with Laplante. In particular, Sumler wrote, "You are staying the night with another man. You fucked another man. You will pay for this." Sumler then apologized and repeatedly expressed his love, concern, and desire to marry Kacho. It appears from the prior messages that Sumler returned to Kacho's house that night and observed she was not there, prompting many messages asking where she spent the night. The following day, Kacho responded, "I told you not to come last night. You scared my mom and [my son]. At this point, I just want you to leave me alone." Kacho then denied that she was seeing anyone else. Sumler continued to plead with Kacho, sending several dozen messages over the course of the day on Saturday.

However, at 9:47 p.m. on Saturday, Sumler began to send messages which showed—and Kacho's testimony confirmed—that Sumler was following Kacho as she drove down the highway at high speed toward Laplante's residence. Sumler threatened to run Kacho off the road and to follow her to Laplante's residence and kill them both. Kacho wrote Sumler that she loved him and denied sleeping with Laplante, and she implored Sumler to stop. After Kacho arrived at Laplante's residence, Sumler vividly and repeatedly threatened to kill Kacho, Laplante, and himself with a gun. In total, Sumler sent over 170 messages between 9:47 p.m. on Saturday and noon on Sunday, many of which contained threats. On Sunday morning, Kacho then wrote Sumler that she was getting her nails done and would be on the way back to her house soon. Sumler

continued to threaten and implore Kacho, and at 12:24 p.m. on Sunday, Sumler wrote Kacho that he was at her house. At 3:57 p.m., Kacho wrote, “Leave now!”

C. Events of Sunday, July 12

Kacho’s mother, Tamara Pitts, testified that on Sunday afternoon, Sumler came to the house with flowers. The conversation between Sumler and Pitts grew heated. Pitts testified that she attempted to call 911, but Sumler knocked the phone out of her hand. Pitts retrieved the phone and began to text Kacho about the situation. Kacho called the police.

Deputy Rick Jamison of the Navarro County Sheriff’s Department testified that he was dispatched to a disturbance caused by a man with a gun. When he arrived, he saw Sumler standing on Kacho’s front lawn, arguing with Pitts, who was standing inside the front porch door. Deputy Jamison arrested Sumler and found that he did not have a gun.

D. Subsequent Events & the Note

Captain Jeremy Phillips of the Navarro County Sheriff’s Department testified that he spoke with Kacho after Sumler’s arrest to discuss potential charges. Captain Phillips referred Kacho to the Kerens Police Department to pursue charges related to terroristic threat and sexual assault.

Officer Don Covey of the Kerens Police Department testified that he spoke with Kacho on Wednesday, July 15, whereupon she printed off Sumler’s prior messages for his review. Based on the information Kacho provided, Officer Covey stated there was “an indication of a potential charge that . . . could arise” and that Kacho would be a prospective witness.

Kacho testified that after her July 15 conversation with police, Sumler began to send more Facebook messages, and the first message Sumler sent was the note—"I didnt deserve what you did. I'm so hurt. Drop that ridiculous charge before you get into trouble"—which was soon followed by thirty messages professing his love. It is undisputed that police were investigating Kacho's allegations when Sumler sent the note.

In November 2015, a Navarro County grand jury indicted Sumler for the offense of obstruction, alleging that on or about July 11, 2015, Sumler threatened to harm Kacho by an unlawful act (assault) in order to prevent or delay her service as a prospective witness. At trial, the State's theory of the case was that Sumler committed obstruction by sending the note as a threat to dissuade Kacho from serving as a witness against him. The State sought to introduce the prior messages as evidence of the intent behind the note, arguing that Sumler's prior threats to kill Kacho helped show the animus behind the word "trouble" as used in the phrase "Drop that ridiculous charge before you get into trouble."

Sumler argued that the note was not a threat, but instead showed his concern that Kacho might get into trouble for filing a false charge concerning sexual assault and that, if anything, the note was an expression of Sumler's emotional pain, not a threat made out of a desire to prevent testimony. Sumler objected to the admission of the prior messages, arguing that they had no probative value except as an impermissible character-inference and that they had great potential for unfair prejudice. The trial court overruled Sumler's objections and admitted the prior messages.

After the close of the State's case, Sumler rested without presenting any evidence. The jury found Sumler guilty of obstruction, and the trial court assessed punishment at ten years' confinement. This appeal followed.

II. OBJECTIONS TO ADMISSION OF PRIOR MESSAGES UNDER RULES 403 & 404(b)

By his first two issues on appeal, Sumler argues that the trial court abused its discretion in admitting the prior messages and overruling his objections to that evidence under rules 403 and 404. *See* TEX. R. EVID. 403–404.

A. Standard of Review & Applicable Law

We review a trial judge's decision on the admissibility of evidence under an abuse of discretion standard, and the decision will not be reversed if it falls within the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

1. Obstruction

Under the obstruction and retaliation statute, a person commits the offense of obstruction if the person intentionally or knowingly threatens to harm another by an unlawful act to prevent or delay the service of another as a (A) public servant, witness, prospective witness, or informant; or (B) person who has reported or who the actor knows intends to report the occurrence of a crime. TEX. PENAL CODE ANN. § 36.06(a)(2). Black's Law Dictionary defines "threat" as a "communicated intent to inflict harm or loss on another or another's property . . . ." *Threat*, BLACK'S LAW DICTIONARY (10th ed. 2014). Texas courts have applied this definition to the penal code in the absence of a statutory definition. *Wilkins v. State*, 279 S.W.3d 701, 704 (Tex. App.—Amarillo 2007, no pet.) (interpreting "threat" in the obstruction and retaliation statute); *see Gillette v. State*, 444

S.W.3d 713, 723 (Tex. App.—Corpus Christi 2014, no pet.) (op. on reh'g) (terroristic threat statute).

Under the controlling precedent of the Tenth Court of Appeals, obstruction is a result-oriented offense, and the gravamen of the offense is the intent to harm and prevent or delay another as a public servant, witness, prospective witness, or informant. *Brock v. State*, 495 S.W.3d 1, 10 (Tex. App.—Waco 2016, pet. ref'd).[2] Obstructive or retaliatory intent may be inferred from an accused's acts, words, or conduct. *Id.* at 16 (citing *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. [Panel Op.] 1982)).

Under the statute, a threat does not have to be direct. *Wilkins*, 279 S.W.3d at 704; *Davis v. State,* 890 S.W.2d 489, 491 (Tex. App.—Eastland 1994, no writ) (upholding a jury's finding that appellant threatened CPS employee based on appellant's statements that he had a criminal mind, that he might just do anything, and that he was "thinking like George Lott," who had recently made headlines for committing murder); *see Cover v. State*, 913 S.W.2d 611, 618 (Tex. App.—Tyler 1995, pet. ref'd) (upholding a finding of threat based on inmate's letter reminding a witness that inmate would be "out in 2 years," mentioning witness's children, and ending "[H]ow is your home behind those apartments Ray? Comfortable? Well I hope I don't see you soon Ray—but who knows what the future may hold. This place can really turn a heart to stone . . . .").

2. Rule 404(b)

An extraneous offense is not admissible as character evidence to show the accused acted in conformity with his character and committed an offense. TEX. R. EVID.

[2] *But see Lindsey v. State*, No. 13-09-00181-CR, 2011 WL 2739454, at *5 (Tex. App.—Corpus Christi July 14, 2011, no pet.) (mem. op., not designated for publication).

404(b)(1). Under rule 404(b)(1), the opponent may object on the basis that the evidence has no value other than showing propensity based on bad character. *See Rankin v. State*, 974 S.W.2d 707, 718 (Tex. Crim. App. 1998) (op. on reh'g); *Almaguer v. State*, 492 S.W.3d 338, 353 (Tex. App.—Corpus Christi 2014, pet. ref'd) (op. on reh'g).

However, under rule 404(b)(2), extraneous-offense evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2). Determining the admissibility of evidence offered under rule 404(b)(2) will almost always involve a balancing inquiry under rule 403. *Castaldo v. State*, 78 S.W.3d 345, 350 (Tex. Crim. App. 2002) (per curiam); *see Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990) (op. on reh'g) (en banc).

3. Rule 403

Under rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. Rule 403's phrase "probative value" refers to the evidence's inherent force in making the existence of a material fact more or less probable, coupled with the proponent's need for that evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006); *Amspacher v. State*, 311 S.W.3d 564, 573 (Tex. App.—Waco 2009, no pet.). "Unfair prejudice" refers to a tendency to suggest decision on an improper basis, commonly an emotional one. *Gigliobianco*, 210 S.W.3d at 641. Evidence might be unfairly prejudicial if, for example, it arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence. *Id.*; *Newland v. State*, 363

S.W.3d 205, 208 (Tex. App.—Waco 2011, pet. ref'd). "Misleading the jury" refers to a tendency of evidence to be given undue weight by the jury on other than emotional grounds. *Gigliobianco*, 210 S.W.3d at 641. For example, "scientific" evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence. *Id.*

Trial courts should favor admission in close cases, in keeping with the presumption of admissibility of relevant evidence. *Montgomery*, 810 S.W.2d at 389; *Almaguer*, 492 S.W.3d at 353. Rule 403 gives the trial court considerable latitude to assess the courtroom dynamics, to judge the tone and tenor of the witness's testimony and its impact upon the jury, and to conduct the necessary balancing. *Johnson v. State*, 263 S.W.3d 405, 427 (Tex. App.—Waco 2008, pet. ref'd) (quoting *Winegarner v. State*, 235 S.W.3d 787, 791 (Tex. Crim. App. 2007)).

B. Discussion

1. Rule 404(b)(1)

By his first issue, Sumler contends that the prior messages have no probative value other than to suggest that Sumler acted in conformity with his character under rule 404(b)(1). *See Rankin*, 974 S.W.2d at 718. We disagree.

Evidence of extraneous bad acts may have legitimate probative value in showing the intent behind the charged conduct. *See* TEX. R. EVID. 404(b)(2). We find multiple cases citing this rule to conclude that evidence of a past threat had legitimate probative value in showing the intent behind a charged threat. *See Sewell v. State*, 629 S.W.2d 42, 44–46 (Tex. Crim. App. [Panel Op.] 1982) (upholding, in an obstruction case, the admission of appellant's previous threats to burn the complainant's child if complainant

spoke to police as probative of the intent behind a recent threat to throw acid on complainant's child if she did not drop charges against appellant).

For instance, in *Cochran v. State*, an inmate was convicted of retaliation for an ominous but ambiguous letter he sent to a reporter who twice served as a witness against him in previous cases. 783 S.W.2d 807, 808–09 (Tex. App.—Houston [1st Dist.] 1990, no pet.). The letter proclaimed that the inmate would "forever love [her] to the end of time" for putting him away, that he understood that the reporter "did what [she] had to do," but apologized: "i am sorry that i am going to do what i want to do for now on and what that is i will only no [sic]. you fuck over me real bad . . . and like hell if I am going to forget that." *Id.* at 810. In interpreting the intent behind the letter, the *Cochran* court found legitimate probative value in the appellant's three-year history of explicit death threats against the reporter. *See id.*; *Davis*, 890 S.W.2d at 493 (holding in a retaliation-by-threat case that evidence of "extraneous threats was admissible to show appellant's" hostile intent); *see also Gillette*, 444 S.W.3d at 718–19, 734–35 (reviewing a terroristic threat conviction for a veteran's public expression of desire to lash out against the government using an AK-47, and finding probative value in the veteran's previous letter to his congressman threatening to begin "offensive combat preparations against the federal government").

Applying similar reasoning here, it would not be unreasonable for the trial court to conclude that the prior messages helped demonstrate the intent behind the ambiguous note, *see Cochran*, 783 S.W.2d at 810, and that the prior messages therefore had permissible probative value under rule 404(b)(1). *See Rankin*, 974 S.W.2d at 718a.

Sumler's argument does not demonstrate an abuse of discretion, and we overrule his first issue.

2. Rule 403 & 404(b)(2)

By his second issue, Sumler contends that any probative value of the prior messages was substantially outweighed by their harmful potential for unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. *See* TEX. R. EVID. 403; *Castaldo*, 78 S.W.3d at 350. To assess Sumler's argument, we evaluate whether the trial court abused its discretion in balancing (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco*, 210 S.W.3d at 641–42.

a. Probative Force

Again, many cases have found prior threats to have probative value in determining whether the charged conduct was intended as a threat, as discussed *supra*. *See Sewell*, 629 S.W.2d at 46; *Gillette*, 444 S.W.3d at 734–35; *Davis*, 890 S.W.2d at 493; *Cochran*, 783 S.W.2d at 810. Here, the prior messages vividly expressed Sumler's desire to kill Kacho and also narrated his conduct as he waited outside her ex-husband's residence, which further conveyed an intent to harm Kacho. As the State argued, the prior messages helped define the dynamics of the relationship between Kacho and Sumler

and the mental context in which Sumler sent the note. This context would have been a useful aid in interpreting the meaning and intent behind the ambiguous note. *See Cover*, 913 S.W.2d at 618; *Davis,* 890 S.W.2d at 491; *Cochran*, 783 S.W.2d at 810. It certainly was not unreasonable for the trial court to conclude that Sumler's prior threats had probative impact on the meaning of the note, darkening the word "trouble" with harmful intent. *See* TEX. R. EVID. 404(b)(2).

It should be noted that the intent conveyed by the prior messages—threatening Kacho in order to stop her from choosing another man—was different from the intent that is alleged here: threatening Kacho to dissuade her from serving as a witness. *Cf. Sewell*, 629 S.W.2d at 46 (upholding admission of extraneous threat in part because the previous "threats were made . . . for the similar purpose of preventing or punishing the threatened individual for giving information to the police" and were "sufficiently similar" to accurately bear on the charged intent); *Cochran*, 783 S.W.2d at 810 (comparable). However, any dissimilarity of intent is "important" only as it "bear[s] on the relevancy and probative value of the offered extraneous offenses." *Cantrell v. State*, 731 S.W.2d 84, 90 (Tex. Crim. App. 1987) (en banc); *see also Plante v. State*, 692 S.W.2d 487, 493 (Tex. Crim. App. 1985) (en banc) ("[S]uch a high degree of similarity is not required when the purpose of the proof is to show intent."). Despite any dissimilarity, the prior messages had probative value. The first factor weighs in favor of admissibility.

b. Need for the Evidence

In evaluating the proponent's need for the evidence, we consider: (1) whether the proponent has other available evidence to establish the fact of consequence that the evidence is relevant to show; (2) the strength of the other evidence; and (3) whether the

fact of consequence is related to an issue that is in dispute. *Erazo v. State*, 144 S.W.3d 487, 495–96 (Tex. Crim. App. 2004); *Montgomery*, 810 S.W.2d at 390.

Here, intent was the primary issue in dispute. *See Erazo*, 144 S.W.3d at 495–96. To support its theory of intent, the State offered other evidence which played a similar probative role as the prior messages. Pitts testified that Sumler was obsessed with Kacho; and that on the Sunday prior to sending the note, Sumler was angry, unstable, and yelling, and that he physically prevented Pitts from calling 911. Kacho testified that she feared Sumler and had taken steps to limit his involvement with her and her family. According to Kacho, Sumler nevertheless persisted, sometimes aggressively, including a violent sexual assault and in-person threats to kill her family as recently as a week prior to the note. To whatever extent Sumler's prior messages shed a probative light on the intent behind the note, Pitts's and Kacho's testimony served a similar function.

Nevertheless, none of this testimony was as persuasive on the issue of intent as Sumler's prior threats via Facebook—the same medium that he used to send the note. The second factor weighs in favor of admissibility.

c. Unfair Prejudice

We agree with Sumler that the admission of the prior messages introduced a risk of unfair prejudice. The numerous threats, as well as the uncharged conduct that Sumler narrated in those messages, had potential to inflame the jury and evoke a desire to punish Sumler unrelated to any intent behind the word "trouble." There is also a possibility that the prior messages, if viewed in the wrong light, could foster an improper character inference. *See Werner v. State*, 412 S.W.3d 542, 547 (Tex. Crim. App. 2013) (discussing the related policies behind the compulsory severance rule). We further

agree with Sumler that this risk of prejudice was slightly heightened by the State's comments during closing argument, which seemed to frame the prior messages as an indication of bad character:

> It's not someone else that he texts. It's her. You're going to get into trouble. Trouble from *a man who makes consistent persistent threats* who has terrorized her over time. *She knows what he is. She knows what he can do.* She knows about the relationship. She knows what trouble means. And she's rational and reasonable coming to that conclusion.

(Emphasis added).

The third factor of unfair prejudice weighs against admissibility.

d. Remaining Factors

Sumler does not argue that the prior messages had any potential to inject confusion into the case or mislead the jury, and we find none. The messages were clearly comprehensible, and they required only one witness—Kacho—to authenticate and fully explain. This evidence did not "create a side issue that . . . unduly distract[s] the jury," but was instead woven into the cloth of the main issue itself. *See Reeves v. State*, 969 S.W.2d 471, 490 (Tex. App.—Waco 1998, pet. ref'd). As to misleading the jury, neither party presented expert testimony, and the prior messages themselves did not expose the jury to any area of specialized knowledge that they were not equipped to process. *See Gigliobianco*, 210 S.W.3d at 641.

Similarly, Sumler does not contend that the prior messages caused undue delay through a cumulative presentation. Instead, the trial court could have reasonably anticipated that the unique content of the prior messages could be presented efficiently. The prior messages were compiled in a single exhibit, the State presented only selected

portions of the messages, and their presentation consumed only a portion of a single afternoon as part of a three-day trial. *See id.* These factors add nothing to the scales.

e. Summary

The admission of the prior messages offered clear probative value and satisfied a modest need, but also introduced a risk of undue prejudice. The balance of these factors requires us to uphold the trial court's exercise of discretion, especially in view of the presumption of admissibility of relevant evidence. *See Montgomery*, 810 S.W.2d at 389.

Rule 403 requires the exclusion of evidence only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001). We do not believe that, on balance, this case presents a disparity that demonstrates an abuse of discretion. *See id.*; *Tillman*, 354 S.W.3d at 435. We overrule Sumler's second issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

By his third issue, Sumler argues his trial counsel "prevented" Sumler from testifying and from calling witnesses to testify in his defense. Sumler cites a letter he wrote to the trial court following trial, in which he explained:

> Had I been allowed by my atourney [sic] to call upon my witnesses, I would have proved that Mrs. Acashia Kacho was coming to spend weekends at my home the following month after my original arrest in July 2015. We were in the middle of reconciling our relationship, and I was not angry when I sent the text message in question and I sincerely meant 'trouble with the law,' as I believed she would be in trouble with the law for filing false charges.

The letter further indicates that Sumler regretted following his trial counsel's advice, though it does not reflect what that advice may have been or the reasoning behind it.

A. Applicable Law

To establish a claim of ineffective assistance of counsel, the record must affirmatively demonstrate trial counsel's ineffectiveness. *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011). A record on direct appeal will generally not be sufficient to show that counsel's representation was so deficient as to satisfy this burden. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003) (en banc). An application for a writ of habeas corpus is the more appropriate vehicle to raise ineffective assistance of counsel claims. *Id.*

To demonstrate ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) the appellant was prejudiced as a result of counsel's errors, in that, but for those errors, there is a reasonable probability of a different outcome. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016). The objective standard of reasonableness is defined by prevailing professional norms at the time of trial. *Ex parte Bryant*, 448 S.W.3d 29, 39 (Tex. Crim. App. 2014). However, because of the difficulty of assessing attorney conduct in hindsight, and because one defensive theory for a crime may work with one attorney and jury but not another, there is a presumption that the trial attorney's performance conformed to prevailing professional norms at the time of trial—i.e., that the challenged action "might be considered sound trial strategy." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

B. Discussion

Here, the ineffective assistance claim is raised on direct appeal, and trial counsel has not had an opportunity to respond to these concerns. *See id.* The record is undeveloped as to the facts related to trial counsel's decision not to present evidence.

Nonetheless, Sumler argues that his trial counsel's failure to present evidence was so "egregious" that this omission demonstrates "per se ineffective assistance of counsel as a matter of law," quoting *Thompson v. State*. 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). However, Sumler cites no authority for the very different proposition that he would have us apply here: that some unsworn allegations of ineffective assistance are so serious that they need not find support in the record. *Cf. Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (relying on a well-developed record to conclude that counsel's failure to introduce exculpatory evidence at trial "stemmed from inattention" rather than strategic thinking); *Ex parte Briggs*, 187 S.W.3d 458, 466–67 (Tex. Crim. App. 2005) (relying on trial counsel's thorough affidavit that explained his reasons for not developing evidence—the desire to save money—and concluding that "this was not a 'strategic' decision, it was an economic one"); *Ex parte Felton*, 815 S.W.2d 733, 736 (Tex. Crim. App. 1991) (en banc) (addressing claim based on a thorough record concerning the nature of the attorney's error and its effect on applicant, including applicant's sworn testimony that he "would have taken the witness stand in his defense, but for" counsel's error).

Here, unlike *Wiggins*, *Briggs*, and *Felton*, the limited record does not allow us to determine whether the decision not to present witnesses was the product of strategic thinking or, say, a "failure to investigate thoroughly." *See Wiggins*, 539 U.S. at 526. Sumler has not carried his appellate burden to demonstrate ineffective assistance by a

preponderance of the evidence. *See Mata*, 226 S.W.3d at 430. We overrule Sumler's third issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

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

Delivered and filed the
15th day of June, 2017.