NUMBER 13-16-00299-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JULIAN SILVAS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 117th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Longoria, and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellant Julian Silvas appeals his conviction for evading arrest or detention with a prior conviction, a state jail felony offense with enhanced punishment due to appellant's habitual felony offender status. *See* TEX. PENAL CODE ANN. §§ 12.425, 38.04(b)(1) (West, Westlaw through 2017 1st C.S.). The jury found appellant guilty, and the trial court assessed punishment at six years' confinement in the Texas Department of Criminal

Justice-Institutional Division. By one issue, appellant argues his trial counsel was ineffective. We affirm.

I. BACKGROUND[1]

A grand jury returned an indictment alleging that appellant "intentionally [fled] from Joshua Newman, a person [appellant] knew was a peace officer who was attempting to arrest or detain [appellant.]" The indictment also alleged that appellant was previously convicted of evading arrest or detention. At trial, four police officers with the Corpus Christi Police Department testified concerning their attempt to execute an outstanding arrest warrant for appellant and appellant's subsequent attempt to evade the officers on foot.

Officer Jared Heck reported to a residence in Corpus Christi, Texas in response to a domestic disturbance call. There, he made contact with appellant's mother, Sandra Silvas. Appellant, who was not present, also resided in the home. As part of his investigation, Officer Heck reviewed appellant's criminal history and discovered an outstanding warrant for his arrest. Officer Heck advised Sandra[2] that he would return later to execute the warrant. During his testimony, Officer Heck offered no other details concerning the nature of the disturbance call.

The next night, Officer Heck returned to the residence with Officers Lisa Periman, Austin Jochec, and Joshua Newman to arrest appellant. Officer Heck knocked on the

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

[2] As this witness shares the same surname as appellant, we will use her first name to avoid confusion.

front door, but no one answered. Meanwhile, Officers Jochec and Newman approached the rear of the house. There, they made contact with Sandra, who was taking out the trash. Sandra informed them that appellant was asleep but she would let the officers in through the back door. Before they were able to enter, appellant appeared in the back doorway and immediately closed the door when he saw the officers. Officer Newman radioed for backup then entered the house in pursuit followed by Officer Jochec.

Appellant ran through the house, throwing chairs behind him to impede the pursuing officers. The officers identified themselves as "police" and yelled several times for appellant to stop. Officer Newman pursued appellant through the house and into the front yard. He was able to apprehend appellant two houses away, tackling him to the ground.

Jacqueline Luckey, a fingerprint identification expert for the Nueces County Sheriff's Office, testified regarding her comparison of appellant's fingerprints with the fingerprints contained in appellant's prior conviction record. Luckey opined that the fingerprints were a match.

Appellant called Sandra to testify. Sandra stated she was startled that night when she saw the officers in her backyard. She denied knowing that there was an outstanding arrest warrant for her son. Sandra also stated that appellant wears glasses but was not wearing them when the officers arrived because he was sleeping.

The jury returned a guilty verdict. This appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

To prevail on an ineffective assistance claim, appellant must show (1) counsel's

representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). "Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective." *Lopez*, 343 S.W.3d at 142. To satisfy the first prong, appellant must prove by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Id.* To prove prejudice, appellant must show there is a reasonable probability the result of the proceeding would have been different, that is, a probability sufficient to undermine confidence in the outcome. *Id.*

Our review of counsel's representation is highly deferential, and we will find ineffective assistance only if appellant rebuts the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *Lopez*, 343 S.W.3d at 142. "In order for an appellate court to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation." *Lopez*, 343 S.W.3d at 142; *see Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) ("Any allegation of ineffectiveness must be firmly rooted in the record[.]"). "It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). When direct evidence is unavailable, we will assume counsel had a strategy "if any reasonably sound strategic motivation can be imagined."

Lopez, 343 S.W.3d at 143. We must review the totality of the representation and the circumstances of each case without the benefit of hindsight. *Id.*

Although an appellant may claim ineffective assistance of counsel for the first time on direct appeal, the record in such a case often will be insufficient to overcome the presumption that counsel's conduct was reasonable and professional. *Cannon v. State*, 252 S.W.3d 342, 349 (Tex. Crim. App. 2008); *Washington v. State*, 417 S.W.3d 713, 724 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Where, as here, there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show trial counsel's performance was deficient. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Under this procedural posture, we will not find deficient performance unless counsel's conduct is so outrageous that no competent attorney would have engaged in it. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Washington*, 417 S.W.3d at 724.

III. REASONABLENESS OF COUNSEL'S REPRESENTATION

Appellant argues that his counsel was ineffective for multiple reasons. We will address each alleged instance of ineffectiveness in turn.

A. Prior Bad Acts

Appellant asserts that his trial counsel failed to object to evidence concerning prior convictions or bad acts. Texas Rule of Evidence 404(b) prohibits extraneous-offense evidence of other crimes, wrongs, or acts unless the evidence holds relevance apart from proving that the defendant acted in conformity with bad character. TEX. R. EVID. 404(b); *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003). To establish ineffective

assistance of counsel based on a failure to object, appellant must demonstrate that the trial court would have committed harmful error in overruling the objection if trial counsel had objected. *See Brennan v. State*, 334 S.W.3d 64, 74 (Tex. App.—Dallas 2009, no pet.) (citing *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996)). Trial counsel is not ineffective in failing to assert frivolous arguments and objections. *Id.*

First, appellant maintains his trial counsel should have objected to testimony and evidence concerning appellant's prior conviction for evading arrest. Texas Penal Code section 38.04 provides that evading arrest or detention is a Class A misdemeanor, except that the offense is a state jail felony "if the actor has been previously convicted under this section." TEX. PENAL CODE ANN. § 38.04(1)(A). Texas courts have construed this provision as requiring the State to prove the prior conviction during the guilt-innocence phase of trial as an element of the offense. *See State v. Atwood*, 16 S.W.3d 192, 196 (Tex. App.—Beaumont 2000, pet. ref'd); *see also Calton v. State*, 176 S.W.3d 231, 234–35 (Tex. Crim. App. 2005) (construing offense of third-degree felony evading arrest and concluding that the prior conviction was an element of the offense). Accordingly, evidence concerning appellant's prior conviction was admissible because it was offered by the State to establish an element of the charged offense and not to prove that appellant acted in conformity with bad character. Therefore, even if appellant's counsel objected to the evidence, the trial court would not have erred in overruling the objection.

Second, appellant complains that his trial counsel failed to object to evidence of his outstanding arrest warrant. Evidence of another crime, wrong, or act may be admissible as same-transaction contextual evidence where "several crimes are

intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony . . . of any one of them cannot be given without showing the others." *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000) (quoting *Rogers v. State*, 853 S.W.2d 29, 33 (Tex. Crim. App. 1993)). "[E]vents do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of that act so that it may realistically evaluate the evidence." *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Same-transaction contextual evidence is admissible when the offense would make little or no sense without also bringing in that evidence, and it is admissible "only to the extent that it is necessary to the jury's understanding of the offense." *Wyatt*, 23 S.W.3d at 25 (quoting *Pondexter v. State*, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996)).

As set out above, the officers arrived at Sandra's residence to execute an arrest warrant. When appellant became aware of the officers' presence, he ran through the house and out the front door, before he was detained down the street. Evidence of appellant's outstanding warrant was necessary to the jury's understanding of why the officers were there and appellant's subsequent flight. *See id.*; *Swarb v. State*, 125 S.W.3d 672, 682 (Tex. App.—Houston [1st Dist.] 2003, pet dism'd) (concluding that evidence of an arrest warrant constituted same transaction contextual evidence because it explained why officers were searching for the defendant when they discovered narcotics in his vehicle). Therefore, even if appellant's counsel objected to the evidence, the trial court would not have erred in overruling the objections.

There being no objectionable testimony, appellant has failed to demonstrate that

his counsel was ineffective. *See Brennan*, 334 S.W.3d at 74.

B. Failure to Request a Mistrial

Appellant also argues his trial counsel should have requested a mistrial because a witness referenced a "previous probation." Appellant highlights the following exchange during the State's examination of Luckey, the State's fingerprint expert:

Prosecutor:	Did you also compare those prints to what I have marked as State's Exhibit 2?
Luckey:	Yes.
Prosecutor:	And was there a match between the prints you took here in court from the defendant, State's Exhibit 2, and the booking prints? Did they all match up?
Luckey:	Yes.
Prosecutor:	Okay. And so now the booking prints, are they with regard to a specific offense of any kind?
Luckey:	Yes. Well, on one of them is motion to revoke probation.
Prosecutor:	Just a second. Is there an evading arrest?
Luckey:	Oh, yes. Okay.
Prosecutor:	And is there—
Appellant's Counsel:	I would object, Your Honor. I would ask that that last bit of testimony be stricken from the record.
Trial Court:	I will sustain the objection, and you're to disregard the prior testimony, save and except for that which related to an evading.

The failure to request a mistrial constitutes ineffective assistance of counsel only

if a mistrial should have been granted. *Thomas v. State*, 445 S.W.3d 201, 210 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). Testimony referring to or implying extraneous offenses can be rendered harmless by an instruction to disregard unless it is so clearly calculated to inflame the minds of the jury and is of such a nature as to suggest the impossibility of withdrawing the harmful impression from the jury's mind. *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992); *see Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000) ("Ordinarily, a prompt instruction to disregard will cure error associated with an improper question and answer, even one regarding extraneous offenses.").

Luckey's unsolicited and fleeting reference to a previous motion to revoke community supervision was not so clearly calculated to inflame the minds of the jury so as to suggest it would be impossible to remove the harmful impression from the jury's mind. *See Kemp*, 846 S.W.2d at 308. Therefore, we must presume that the trial court cured any harm associated with the reference by instructing the jury to disregard the statement. *See Hackett v. State*, 160 S.W.3d 588, 592 (Tex. App.—Waco 2005, pet. ref'd) ("Texas courts have consistently held that the prejudicial effect of such indirect suggestions can be cured by an instruction to disregard."); *Wilson v. State*, 90 S.W.3d 391, 395 (Tex. App.—Dallas 2002, no pet.) ("Generally, a prompt instruction to disregard will cure a witness's inadvertent reference to an extraneous offense."). Accordingly, we cannot conclude that the trial court would have granted a mistrial had appellant's counsel requested one. Appellant has not demonstrated that his counsel was ineffective in this regard. *See Thomas*, 445 S.W.3d at 210.

C. Plea of True to Enhancement Paragraphs

Next, appellant asserts his trial counsel "coerced [him] to plead true to enhancement paragraphs [during the punishment trial] when it is clear [appellant] did not know what he was pleading to or what the enhancement paragraphs were." The relevant portion of the record reflects the following exchange:

Trial Court:	Mr. Silvas, how do you plea to your prior conviction on October 16, 2012, of the offense of evading arrest with a prior conviction, true or not true?
Appellant:	I was found guilty, so guilty.
Trial Court:	No, this is October 16th, 2012. You had a prior conviction of state jail felony and evading—
Appellant:	I think you put me on probation. I don't remember, it's been a long time.
Appellant's Counsel:	But do you want to plea true—
Trial Court:	Do you want to plea true, or not true?
Appellant's Counsel:	Do you want to plea true, that it happened, and that you were found guilty, or not?
Appellant:	I think true.
Trial Court:	And is—are you pleading true, that on July—January 9th, 2013, that you were convicted of a state jail felony of felony forgery.
Appellant:	True.

Appellant suggests based on this exchange that his trial counsel did not adequately inform him as to the nature of his plea of true. Appellant's allegation of ineffectiveness "must be firmly rooted in the record[.]" *Thompson*, 9 S.W.3d at 813.

There is nothing in the record establishing the nature of counsel's advice to appellant on this issue. Without the benefit of a hearing on a motion for new trial, the evidentiary record is inadequate to demonstrate that trial counsel was deficient in advising appellant. *See Cannon*, 252 S.W.3d at 349; *Bone*, 77 S.W.3d at 833.

D. Inadequate Trial Strategy

Finally, appellant generally maintains that his trial counsel did not offer a vigorous defense. Specifically, appellant argues that his trial counsel failed to "offer expert testimony regarding identification of police, police procedure, fingerprinting, or any other aspect of this offense" and did not offer "any exhibits or evidence beyond testimony from [appellant's] mother[.]"

The decision whether to present certain evidence is largely a matter of trial strategy. *Carter v. State*, 506 S.W.3d 529, 541 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Appellant does not identify other available witnesses, what their testimony would be, or how that testimony would have aided appellant's defense. When direct evidence is unavailable, we will assume counsel had a strategy "if any reasonably sound strategic motivation can be imagined." *Lopez*, 343 S.W.3d at 143. In reviewing the record, we note that appellant's trial counsel cross-examined each of the State's witnesses, developing a defensive theory that appellant was startled from sleep, was not wearing his eyeglasses, and did not know that the responding officers were law enforcement officials. On this record, we conclude that appellant has failed to rebut the strong presumption that his trial counsel's decisions regarding the presentation of evidence constituted reasonable trial strategy. *See Lopez*, 343 S.W.3d at 142.

E. Summary

Because appellant has not demonstrated that his trial counsel's performance fell below an objective standard of reasonableness, we need not address whether such performance prejudiced appellant's defense. *See* TEX. R. APP. P. 47.1; *Lopez*, 343 S.W.3d at 142. We overrule appellant's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

LETICIA HINOJOSA
Justice

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

Delivered and filed the
15th day of February, 2018.