# NUMBER 13-19-00293-CR

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**LOUIS RAY GAYTON,** **Appellant,**

**v.**

**THE STATE OF TEXAS,** **Appellee.**

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**On appeal from the 19th District Court of McLennan County, Texas.**

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# MEMORANDUM OPINION

## Before Chief Justice Contreras and Justices Longoria and Perkes Memorandum Opinion by Justice Perkes

Appellant Louis Ray Gayton appeals his conviction of burglary of a habitation, a second-degree felony.[1] *See* TEX. PENAL CODE ANN. § 30.02. Gayton was sentenced to

[1] This case is before this Court on transfer from the Tenth Court of Appeals in Waco pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001. Because this is a transfer case from the Waco Court of Appeals, we are bound to apply the precedent of the Waco Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

thirty years' incarceration following an affirmative finding of a prior felony conviction. *See id.* § 12.42(b). By two issues, Gayton contends: (1) the trial court erred in refusing to submit an instruction on the lesser included offense of theft, and (2) trial counsel rendered ineffective assistance by failing to request an instruction on the lesser included offense of criminal trespass. *See id.* §§ 30.05, 31.03(a). We affirm.

## I. BACKGROUND

On March 15, 2017, Gayton was indicted on one count of burglary of a habitation with intent to "commit[] theft of property, to-wit, shoes and/or a stereo," occurring on or about October 3, 2016. Gayton pleaded not guilty, and the case proceeded to trial.

At trial, eighteen-year-old Samuel Salazar testified that before his home was broken into, he had heard rumors that a former friend, Michael Gutierrez, was going to "hit[] a lick" against him. Samuel explained that meant "to steal something." Samuel conceded he had previously borrowed a pair of expensive shoes from Gutierrez and then refused to return them. Salazar testified he arrived home from school on October 3 to find the backdoor of his home had been "rammed into" or "kicked." Samuel testified that the only items stolen were his brother's shoes and a stereo.[2] The shoes that were stolen were not the same shoes Samuel had taken from Gutierrez. On cross-examination, Samuel admitted that he initially declined to disclose to law enforcement the possible motive behind the burglary because he was on juvenile probation, and Samuel did not want to get in trouble for stealing Gutierrez's shoes.

[2] Luis Fernando Salazar, Samuel's older brother, testified that a pair of new shoes that he kept in his closet and a car stereo he kept under his bed were stolen. Salazar testified that his room was also left in disarray, and someone had rummaged through his dresser drawers.

Samuel's mother, Margarita Salazar, testified that although only two items were stolen, she had been the first to arrive home to find "everything destroyed and strewn" about in her normally tidy home. According to Margarita, the backdoor of the home had been "broken, open,"[3] and her son's bed that previously leaned against the door had been "pushed back."

Claudia Gonzalez, a neighbor who lived across the street from Salazar's home, testified that on October 3, she witnessed a man park in front of Salazar's residence, exit the vehicle, and go "around back" without first "knock[ing] on the front door." Gonzalez said she used her cell phone to record the vehicle's license plate, and she witnessed the man return to his vehicle "[a]bout ten minutes later" with something bundled in his arms.

Jason Bihl, a Waco Police Department detective in the burglary and automobile theft unit, testified he ultimately identified Gayton as a suspect after pulling up the vehicle registration information off the license plate visible in Gonzalez's cell phone recording. The vehicle was registered to Gayton's sister, who told Bihl that she had loaned Gayton her vehicle on the day in question. Bihl said he left his contact information at Gayton's residence, and Gayton voluntarily provided a statement to police at the department on November 7, 2016.

Gayton's recorded statement was admitted into evidence, wherein Gayton confirmed he was at the Salazar's residence but denied "break[ing] into that house." Gayton told Bihl he had purchased some shoes for "Michael,"[4] "the son of a girl [he] used

[3] Marissa Popham, a crime scene technician with the Waco Police Department, testified she observed damage around the door handle where the wood was "split and cracked." Popham opined that though she "didn't see any distinct tool marks," it was "possible" that the suspect had used a tool or "shouldered" the door. Popham testified she was unable to retrieve any usable prints from the door or handle.

[4] Gayton was unable to provide a last name.

to talk to." Gayton said Michael told him he had let "the dude at this house borrow" the shoes, and Michael and "this dude" had come to some "kind of agreement" regarding an exchange of items. According to Gayton, Michael asked him to go over to Salazar's residence and take "some Jordans and a radio" that were going to be left out on the porch by the backdoor. Gayton maintained that the items were there waiting for him when he arrived and that he "did not go inside that house." Gayton asserted that, upon his arrival, he noticed the backdoor appeared already damaged.

During the charge conference, Gayton requested an instruction on the lesser included offense of theft, which the trial court denied. The jury returned a guilty verdict and sentenced Gayton. This appeal followed.

## II. LESSER INCLUDED OFFENSE

By his first issue, Gayton argues that the trial court erred by refusing to issue an instruction in the jury charge on the lesser included offense of theft. Specifically, Gayton asserts that there was more than a scintilla of evidence supporting a finding that he did not enter the complainant's residence; therefore, the jury should have been instructed on theft.

### A. Standard of Review and Applicable Law

We review a trial court's refusal to include a lesser included offense instruction for an abuse of discretion. *See Goad v. State*, 354 S.W.3d 443, 451 (Tex. Crim. App. 2011) (Alcala, J., concurring) (citing *Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004)); *see also McGruder v. State*, No. 10-19-00064-CR, 2020 WL 373224, at *4–5 (Tex. App.—Waco Jan. 22, 2020, pet. ref'd) (mem. op., not designated for publication).

An offense is a lesser included offense if, among other things, it is established by proof of the same or less than all the facts required to establish the commission of the

offense charged. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(1); *Hall v. State*, 225 S.W.3d 524, 527 (Tex. Crim. App. 2007). In *Hall*, the Texas Court of Criminal Appeals set forth a two-step analysis to determine whether a defendant is entitled to a lesser included offense instruction. *Hall*, 225 S.W.3d at 535–36; *see Safian v. State*, 543 S.W.3d 216, 220 (Tex. Crim. App. 2018). The first step concerns whether a lesser included offense exists based on a comparison to the greater offense, as contained in the charging document. *Safian*, 543 S.W.3d at 219–20; *Hall*, 225 S.W.3d at 526. "This is a question of law, and it does not depend on the evidence . . . produced at trial." *Safian*, 543 S.W.3d at 220 (citing *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011)). An offense is a lesser included offense of another offense if the indictment for the greater-inclusive offense either: (1) alleges all of the elements of the lesser included offense or (2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser included offense may be deduced. *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013); *DeLeon v. State*, 583 S.W.3d 693, 696 (Tex. App.—Austin 2018, pet. ref'd).

Only if the first step of the *Hall* analysis is answered affirmatively do we then conduct an inquiry into whether there was more than a scintilla of evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty of only the lesser included offense. *Meru*, 414 S.W.3d at 162–63. A defendant is entitled to a lesser included offense instruction if some evidence from any source "affirmatively in the record" raises a fact issue on whether he is guilty of only the lesser offense and negates or rebuts an element of the greater offense, regardless of whether such evidence is weak, impeached, or controverted. *Ritcherson v. State*, 568 S.W.3d 667, 671 (Tex. Crim. App. 2018) (citing *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017)). This second

step is a question of fact and is based on the evidence presented at trial. *Cavazos v. State*, 382 S.W.3d 377, 383 (Tex. Crim. App. 2012).

**B. Discussion**

Based on the indictment,[5] the offense of theft can be a lesser included offense of burglary of a habitation. *See Phillips v. State*, 178 S.W.3d 78, 82 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) ("The offenses of theft and criminal trespass can be lesser-included offenses of burglary."); *see also McGruder*, 2020 WL 373224, at *4–5 (observing the same). We therefore proceed to the second step in the *Hall* analysis. *See Hall*, 225 S.W.3d at 535–36.

Contrary to Gayton's assertions, his statements to law enforcement do not demonstrate that if he is guilty, he is guilty only of the lesser included offense of theft. *See id.* Gayton categorically denied committing theft. Gayton maintained: (1) he never entered the residence, and (2) he retrieved the items off the back porch with permission. *See* TEX. PENAL CODE ANN. § 31.03(a) (providing that a person commits the offense of theft if "he unlawfully appropriates property with intent to deprive the owner of property); § 31.03(b) (defining unlawful appropriation as property taken "without the owner's effective consent" or "the property is stolen and the actor appropriates the property knowing it was stolen by another"). By asserting as much, Gayton negated all of the elements of burglary of a habitation and theft. *See id.* §§ 30.02(a)(1), 31.03(a); *see also Lofton v. State*, 45 S.W.3d

[5] The elements of burglary of a habitation, as alleged in the indictment, are:

> . . . LOUIS RAY GAYTON, hereinafter called Defendant, on or about the 3rd day of October, 2016 in said county and state did then and there intentionally and knowingly enter a habitation, without the effective consent of FERNANDO SALAZAR, the owner thereof, and attempted to commit or committed theft of property, to-wit: shoes and/or a stereo, owned by FERNANDO SALAZAR . . .

*Compare* TEX. PENAL CODE ANN. § 30.02(a)(1) (establishing the elements of burglary of a habitation) *with id.* § 31.03(a) (establishing the elements of theft).

649, 652 (Tex. Crim. App. 2001) ("A defendant's own testimony that he committed no offense, or testimony that otherwise shows that no offense occurred at all, is not adequate to raise the issue of a lesser-included offense."); *McGruder*, 2020 WL 373224, at *4–5 (finding the defendant failed to establish he was guilty of only theft, for purposes of a lesser included offense instruction analysis, where the defendant denied committing the theft and burglary by stating he found the items). Gayton points to no other evidence, and a review of the record yields none, which would support a finding that if Gayton is guilty, he is guilty only of the lesser included offense of theft. *See Hall*, 225 S.W.3d at 535–36.

Thus, we conclude the trial court did not abuse its discretion by refusing to issue an instruction in the charge of the lesser included offense of theft. *See Cavazos*, 382 S.W.3d at 383; *Hall*, 225 S.W.3d at 536. We overrule Gayton's first issue.

## III. INEFFECTIVE ASSISTANCE

In his second issue, Gayton complains that he received ineffective assistance of counsel because his trial counsel failed to request an instruction on a lesser included offense of criminal trespass. *See* TEX. PENAL CODE ANN. § 30.05.

### A. Standard of Review and Applicable Law

To reverse a conviction based on ineffective assistance of counsel, the appellate court must find: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)); *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Any claim for ineffectiveness of counsel must be firmly founded in

the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). Where trial counsel was not given an opportunity to explain his actions, "counsel should be found ineffective only if his conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id.* (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). Although failure to request a jury instruction on a lesser included offense can render assistance of counsel ineffective if the trial judge would have erred in refusing the instruction had counsel requested it, the defendant bears the burden of overcoming the initial presumption that counsel's decision not to request the instruction could be considered sound trial strategy. *Jones v. State*, 170 S.W.3d 772, 775 (Tex. App.—Waco 2005, pet. ref'd). A defendant's inability to make a showing under either *Strickland* prong defeats a claim for ineffective assistance. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011); *see also Holloway v. State*, No. 10-17-00023-CR, 2017 WL 5503868, at *2 (Tex. App.—Waco Nov. 15, 2017, pet. ref'd) (mem. op., not designated for publication).

**B. Discussion**

Gayton argues that though there was evidence that he entered onto the property without the effective consent of the owners, "[i]f the jury believed [him], they could find that he entered the property without the intent to commit theft," which would establish criminal trespass as a lesser included offense of burglary of a habitation. *See* TEX. PENAL CODE ANN. § 30.05(a) ("A person commits an offense [of criminal trespass] if the person enters or remains on or in property of another, including residential land . . . without effective consent and the person . . . had notice that the entry was forbidden."). Gayton then summarily asserts that his trial counsel's failure to request the instruction constituted ineffective assistance.

We first note that Gayton did not move for a new trial or request a post-verdict hearing on trial counsel's purported ineffective strategy. Thus, we do not know Gayton's trial counsel's reasons for the conduct at issue. "Ineffective assistance of counsel claims are not built on retrospective speculation; they must be firmly founded in the record." *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002); *McNeil v. State*, 174 S.W.3d 758, 760 (Tex. App.—Waco 2005, no pet.) ("Without a record that reveals the reasons for the challenged conduct of McNeil's trial counsel, we cannot speculate whether McNeil's trial counsel was ineffective."). In the absence of such a record, and in the lack of anything that would indicate such completely ineffective assistance as could be shown without such a record, we cannot find that trial counsel was ineffective. *See McNeil*, 174 S.W.3d at 760.

In any event, counsel may have had a legitimate strategic reason for his conduct. For example, trial counsel may have chosen not to request the lesser included offense instruction because he believed that the jury would acquit Gayton of the charged offense of burglary of a habitation. *See Ex parte White*, 160 S.W.3d 46, 55 (Tex. Crim. App. 2004) (rejecting claim of ineffective assistance for counsel's failure to request lesser included offense because counsel's all-or-nothing approach was a strategy decision); *Jones*, 170 S.W.3d at 775. Because the decision not to request the lesser included offense instruction may have been strategic, and the record is silent regarding counsel's reasons, Gayton has not shown deficient performance. *See Washington v. State*, 417 S.W.3d 713, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (determining that, because record contained no explanation for trial counsel's failure to request lesser included offense instruction, "[t]he decision to not request a lesser included could have been strategic; thus, appellant has failed to show deficient performance"); *see also Brydon v. State*, No.

12-19-00037-CR, 2019 WL 5656484, at *2 (Tex. App.—Tyler Oct. 31, 2019, no pet.) (mem. op., not designated for publication) (holding appellant failed to show deficient performance by counsel where the record is silent regarding counsel's reasons, noting that "the decision not to request the lesser included offense instruction may have been strategic"); *Green v. State*, No. 01-18-00162-CR, 2019 WL 2621738, at *8 (Tex. App.—Houston [1st Dist.] June 27, 2019, pet. ref'd) (mem. op., not designated for publication) (same); *Brown v. State*, No. 10-06-00015-CR, 2007 WL 765244, at *1 (Tex. App.—Waco Mar. 14, 2007, no pet.) (mem. op., not designated for publication) (same).

Accordingly, under the circumstances of this case, we conclude that Gayton failed to rebut the presumption that trial counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *See Strickland*, 466 U.S. at 687; *Miller*, 548 S.W.3d at 499; *McNeil*, 174 S.W.3d at 760. Gayton's second issue is overruled.

## IV. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

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

Delivered and filed the
24th day of November, 2020.