NUMBER 13-22-00193-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

LARRY GENE STRICKLAND II, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 355th District Court of Hood County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Chief Justice Contreras

A jury convicted appellant Larry Gene Strickland II on four counts of possession of child pornography, a third-degree felony. *See* TEX. PENAL CODE ANN. §§ 12.34, 43.26. Appellant elected for the trial court to impose punishment, and it sentenced him to ten years' incarceration for each count and ordered the sentences to run consecutively. *See*

id. § 3.03(b)(3). By his sole issue, appellant contends that his trial counsel was ineffective because he failed to call any witnesses during the punishment phase of trial. We affirm.[1]

I. BACKGROUND[2]

Trial began on March 8, 2022. Detective Hank Stufflemire of the Office of the Attorney General (OAG) testified that he received a tip from the National Center for Missing and Exploited Children (NCMEC) stating that it received notice from Google that child pornography was viewed on a Google account. The NCMEC report included the IP address and a phone number belonging to the offending party. Detective Stufflemire discovered that the IP address was associated with a house in Brownwood, Texas. Based on records subpoenaed from Google, Detective Stufflemire learned that the email address of the offending Google account was LarryStrickland1154@gmail.com. And Detective Stufflemire testified that the images viewed by the account depicted children ranging from approximately six months to seven years old being sexually assaulted or photographed nude. Detective Stufflemire went to the address in Brownwood to further investigate the NCMEC tip, but neighbors told him that the tenants had recently moved. After that, the case "went cold."

At some point, Detective Stufflemire received six additional tips from NCMEC and Google, this time leading to a physical address in Granbury, Texas, and an email address listed as Larry1154Strickland@gmail.com. Detective Stufflemire executed a search warrant at the Granbury address and found that appellant and his partner, Vanessa

[1] This case was transferred from the Second Court of Appeals in Fort Worth to this Court pursuant to a docket equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[2] The State did not file a brief to assist the Court with this appeal.

Beckemeyer, lived in a shed in the home's backyard. In the shed, Detective Stufflemire located a smartphone belonging to appellant which contained multiple pictures and GIFs[3] of child pornography. Detective Stufflemire testified that the pornographic images were mixed in with non-pornographic images in the phone's photo library. Detective Dara Bowlin, also of the OAG, testified that between fifty and seventy images of child pornography were found on appellant's phone. She informed the jury that the phone number listed on the NCMEC report belonged to appellant.

Appellant testified in his own defense, denied that he downloaded the child pornography, and called four other witnesses in an attempt to paint Beckemeyer, who had access to his phone, as the one who downloaded the illegal images. Marilyn McClain, appellant's cousin, testified that Beckemeyer was a rude and mean person. Robert Oswald, appellant's stepson, testified that he was somewhat familiar with Beckemeyer and often saw her using appellant's phone. Oswald stated that he never saw his stepfather do anything untoward to any little girls, that appellant was good to his mother, and that he never saw appellant "sneak around with dirty magazines." Tena Ervin, appellant's aunt, testified that appellant and Beckemeyer had an on and off relationship spanning eighteen years. Ervin noted that appellant and Beckemeyer lived in a shed in her backyard. She told the jury that she would help appellant and Beckemeyer locate used appliances to clean, refurbish, and sell. Ervin testified that the operation was conducted from appellant's phone and that it was Beckemeyer who "was always the one with the phone." Rachel Burleson testified that she is appellant and Beckemeyer's friend

[3] As defined by Detective Stufflemire, a GIF (graphics interchange format) file comprises "a series of photos that is set to constantly repeat itself" and presents "almost in a . . . video form."

and former coworker. Burleson stated that she was once doing laundry at appellant and Beckemeyer's house when Beckemeyer, using appellant's phone while he was elsewhere, showed her "child porn[] of a kid tied up."

The jury found appellant guilty on each count. On March 9, 2022, a bench trial on punishment commenced. The entire reporter's record of the punishment phase of trial spans six pages. The State submitted a copy of a deferred adjudication order in a separate criminal cause involving appellant and then rested. Appellant's counsel informed the court that appellant would rely on the presentence investigation report (PSI)[4] and then rested. The trial court took a few minutes to review the PSI and then asked for closing arguments. Appellant's counsel simply stated that the PSI "contains what [he] had hoped for, for the best, so [the defense] would ask [the court] to do that." The State argued that while appellant was eligible for probation, the nature of the images depicted were abhorrent, and to protect the community, it requested the maximum sentence of ten years' imprisonment on each count. The State also reminded the trial court that it filed a motion to cumulate appellant's sentences.

The trial court sentenced appellant to ten years' imprisonment on each count and then requested a responsive argument from appellant on the State's motion to cumulate. Appellant's counsel stated that "on the scale of the worst one in the world and . . . the lesser" the images here were "not toward the worst end." In response, the State argued that minor children being sexually assaulted was quite serious and that appellant has shown "no remorse." The trial court granted the State's motion to cumulate and concluded

[4] The PSI does not appear in the record.

trial.

On March 23, 2022, appellant moved for a new trial arguing, in part, that his trial counsel was ineffective for failing to present any mitigation evidence during the punishment phase of trial. On May 20, 2022, the trial court heard arguments on appellant's motion at which appellant presented four witnesses who testified that they were willing to testify on appellant's behalf but were never asked to do so.

Paula Barnhart testified that she is appellant's mother, was present at trial, and was never asked to testify on her son's behalf. She stated that if she were given the opportunity to testify, she would have told the court that appellant is a great person, a hard worker, and a good Christian. Ervin, who testified during the guilt-innocence phase of trial, testified that she would have informed the trial court that appellant was a hard worker and an amazing person who would do anything for anybody, and she allowed her children to work for him while he managed a Pizza Hut restaurant. McClain, who testified during the guilt-innocence phase of trial, testified that she had known appellant for nearly fifty years. She stated that appellant was "[f]un-loving, very family-oriented, a great person, [and] kind." She informed the trial court that she stayed at trial for the punishment phase, that she was willing to testify for mitigation purposes, but trial counsel never spoke with her. Marilyn Biggs testified that she and her husband were appellant's family friends. She testified that appellant worked hard, took care of his aunt, and has a huge heart. Biggs believed that appellant had made some poor choices about who he associates with, but that he was a "good man and [has] a good heart," and he is "an asset to society."

Appellant testified that he was neither aware nor told that he could testify during the punishment phase of trial but would have informed the trial court about his work history, his faith, and his completion of the Celebrate Recovery program. Appellant testified that he also would have noted that while in jail awaiting trial, he "wrote a sermon and preached to about ten other men" every day. He testified that he would have consented and "pa[id] any price" to undergo a psychosexual evaluation but was never asked to. He stated that his trial counsel never spoke to him about mitigation evidence or investigated whether any existed.

Appellant's trial counsel testified at the new trial hearing that he neither investigated nor presented mitigation evidence at the punishment phase of trial. He stated that he spoke to appellant's friends and family only after trial began. Counsel mistakenly asserted that appellant testified during the punishment phase, and he thought appellant "did a really good job." When asked whether, in a possession of child pornography case, it is counsel's strategy to "just do nothing at the punishment phase," counsel responded:

> Well, by then it's too late. I mean, there's nothing to do. This is a skillet shot for the prosecution. I mean, . . . there's nothing you can really say at this point. Not only is he a child pornographer, he's a lying child pornographer. And if you call . . . character witnesses to say, well, he's a really fine fellow, you're going to backfire. But, I mean, he got the max anyway, so what difference does it make?

After closing arguments by both sides, the trial court denied appellant's motion for new trial. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review & Applicable Law

When "a defendant presents an ineffective-assistance claim to the trial court in a

motion for new trial, a reviewing appellate court analyzes the ineffectiveness claim as a challenge to the denial of the defendant's motion for new trial." *Young v. State*, 591 S.W.3d 579, 603 (Tex. App.—Austin 2019, pet. ref'd). We review these challenges under an abuse of discretion standard. *Id.*; *cf. State v. Johnson*, 663 S.W.3d 776, 784 (Tex. App.—Dallas 2021, pet. ref'd) ("[I]n reviewing [an] order granting motion for new trial based on ineffective assistance, we review trial court's application of *Strickland* factors through abuse of discretion prism and do not consider them de novo."). A trial court abuses its discretion when it "acts 'arbitrarily or unreasonably' or 'without reference to any guiding rules and principles.'" *State v. Lerma*, 639 S.W.3d 63, 68 (Tex. Crim. App. 2021) (quoting *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016)). We will conclude that the trial court abused its discretion "only when no reasonable view of the record could support its ruling." *Id.*

We evaluate claims of ineffective assistance of counsel using a two-pronged test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting *Strickland*). An appellant is required to show that: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced" appellant. *Strickland*, 466 U.S. at 687. "Failure to satisfy either prong of the *Strickland* test is fatal." *Morrison v. State*, 575 S.W.3d 1, 24 (Tex. App.—Texarkana 2019, no pet.). Accordingly, a court may bypass the first prong and decide the issue solely on the prejudice prong. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

"[T]o satisfy the first prong, appellant must prove, by a preponderance of the evidence, that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms." *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Such a showing "must be firmly founded in the record." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We indulge "a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Id.*

Yet, even if the performance was deficient, such an error does not warrant setting aside the judgment if there has been no prejudicial effect on the outcome. *United States v. Morrison*, 449 U.S. 361, 364–65 (1981). The test for prejudice requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In conducting our analysis, we consider the totality of the evidence before the factfinder. *Id.* at 695.

B. Analysis

We assume without deciding that trial counsel's performance was deficient and, because it is dispositive, assess only the issue of prejudice. *See Strickland*, 466 U.S. at 697. In deciding whether counsel's failure to present mitigation evidence prejudiced appellant, we consider the totality "of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [new trial hearing]—and reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41 (2009)

(cleaned up); *see Strickland*, 466 U.S. at 695; *Ex parte Gonzales*, 204 S.W.3d 391, 398 (Tex. Crim. App. 2006). "[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker." *Sears v. Upton*, 561 U.S. 945, 954 (2010) (quoting *Strickland*, 466 U.S. at 700). Evidence showing "that numerous people who knew [a defendant] thought he was generally a good person" will not usually move the needle. *Strickland*, 466 U.S. at 700. By contrast, substantial new mitigation evidence just might. *See, e.g.*, *Porter*, 558 U.S. at 41 (concluding that the defendant was prejudiced where the jury would have heard mitigation evidence of the defendant's "heroic military service," "struggles to regain normality upon his return from war," "childhood history of physical abuse," and "brain abnormality"); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (concluding the same where the jury was not informed that, *inter alia*, the defendant and his siblings were "severely and repeatedly beaten by [their] father" and that defendant was "borderline mentally retarded"); *Ex parte Gonzales*, 204 S.W.3d at 399 (concluding the same where there was available mitigation evidence that the defendant's father sexually and physically abused him as a child and, as a result, defendant suffered from post-traumatic stress disorder).

Here, the evidence adduced at trial showed that the photo library on appellant's smartphone was riddled with photographs and GIFs of infants and children being sexually assaulted. Those images were interspersed with appellant's other photos of appropriate, quotidian affairs, making it improbable that he was unaware of the child pornography's presence. Two email addresses using appellant's name and appellant's phone number were associated with the Google accounts that downloaded the pornographic images.

And two homes at which appellant resided housed the IP addresses used to access the internet to download the offending content.

On the other side of the ledger is the evidence appellant presented at his new trial hearing—the four witnesses who would testify to his general good character. *See Strickland*, 466 U.S. at 700. Considering the aggravating and mitigating evidence together, we cannot say that the new mitigation evidence is of the type that would have "altered the sentencing profile" presented to the court at the punishment phase and led to a different sentencing result. *See id.* Appellant, believing otherwise, cites three cases for the proposition that mitigation evidence "would have provided some counterweight to evidence presented during the guilt-innocence phase" of trial and that trial counsel's failure to present any mitigation evidence during the punishment phase of trial prejudiced him. We find each case distinguishable.

In *Vela v. Estelle*, a habeas corpus appeal stemming from a murder case in which a jury sentenced defendant to ninety-nine years' imprisonment, the Fifth Circuit held that the defendant was prejudiced primarily because trial "counsel allowed the State to encourage the jury to set punishment based on the goodness of the murder victim" and provided no mitigating evidence. 708 F.2d 954, 965–66 (5th Cir. 1983) ("Faced with the task of assessing Vela's punishment, the jury was informed that the man he had killed was kind, inoffensive, a star athlete, an usher in his church, a member of its choir, a social worker with underprivileged children of all races, a college student holding down two jobs while he attended classes and played on the championship football team, and the father of a three-year-old child."). The court concluded that counsel's errors were not harmless:

> The State dropped a skunk into the jury box. Defense counsel made no serious effort to either identify it as a skunk, have it removed, or have the jury instructed to disregard its presence. We cannot in reason conclude that the jury did not consider this inadmissible, improper, highly prejudicial testimony in determining Vela's sentence. The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. Each item of testimony has an incremental effect; large segments of highly prejudicial, inadmissible testimony have a considerable effect, skewing the calculus and invalidating the result reached.

Id. at 966. The court reversed and remanded for a new trial. *Id.* No similar segments of "inadmissible, improper, highly prejudicial testimony" were dropped during either phase of trial here, so we do not find *Vela* persuasive.

In *Blake v. Kemp*, 758 F.2d 523, 535 (11th Cir. 1985), a habeas corpus appeal stemming from a murder case in which a jury sentenced defendant to death, the Eleventh Circuit explicitly noted that its holding rested "*solely on the facts of this case*, in which the sanity of the defendant was fairly raised." *See id.* at 531 n.8. No issue of appellant's sanity was raised here.

In *Ex parte Felton*, 815 S.W.2d 733, 736 n.4 (Tex. Crim. App. 1991), trial counsel's failure to object to the introduction of a void judgment in the punishment phase of trial "raised the minimum possible punishment from five to fifteen years" and so the jury, "in all probability, started their assessment at a higher level than would have been the case if the void prior conviction had not been available for enhancement." The court of criminal appeals concluded that counsel was thus ineffective, and appellant was prejudiced. *Id.* at 736. Again, no similar error appears in this case. And appellant cites no other cases to support his prejudice argument.

What is most notable about each of the preceding cases, however, is that punishment was to the jury. Here, by contrast, appellant elected for the trial court to impose punishment. We thus find it difficult to agree with appellant that "[a] reasonable probability exists that [his] sentence would have been less severe had the judge balanced the aggravating and mitigating circumstances." *See Strickland*, 466 U.S. at 694. The same judge that imposed appellant's original sentence heard arguments on appellant's motion for new trial, considered the testimony the witnesses would have given had they been called at trial, and still concluded that appellant was not entitled to relief. *See id.*; *see also Burdine v. State*, No. 12-07-00374-CR, 2009 WL 1067595, at *2 (Tex. App.—Tyler Apr. 22, 2009, no pet.) (mem. op., not designated for publication) ("The evidence that [a]ppellant offered and argues his trial counsel should have presented at his sentencing hearing does not convince us that the result would have been different nor does it undermine our confidence in the result [because] . . . the original sentencer, the trial court, passed on the evidence offered by [a]ppellant at the motion for new trial hearing and determined that he was not entitled to relief.").

The trial court's denial of appellant's motion for new trial based on ineffective assistance of counsel is supported by the record. We conclude that the trial court did not abuse its discretion by impliedly concluding that there was not a reasonable probability that, but for counsel's failure to present the relevant mitigation evidence at the punishment phase of trial, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694; *Young*, 591 S.W.3d at 603. Accordingly, we overrule appellant's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS
Chief Justice

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

Delivered and filed on the
3rd day of August, 2023.