NO. 12-15-00068-CR
NO. 12-15-00069-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ANDREW PJ WHITAKER, APPELLANT	***§***	***APPEAL FROM THE 420TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION

Andrew PJ Whitaker appeals his convictions for unauthorized use of a motor vehicle and evading arrest. Appellant raises four issues on appeal. We affirm.

BACKGROUND

Jesus Barrios-Quezada's sister went to his house and discovered that someone had taken his truck. She contacted Barrios-Quezada, who reported the truck stolen.[1]

A few days later, Nacogdoches County Sheriff's Deputy Austin Taylor McDonald was on patrol when he observed Appellant commit a traffic violation. McDonald attempted to initiate a traffic stop, but Appellant refused to stop and sped away, eluding capture by multiple officers for several minutes. During the pursuit, McDonald discovered that the truck Appellant was driving had been reported stolen. Eventually, Appellant lost control of the vehicle, which became immobilized. Appellant exited the vehicle and ran into a nearby wooded area. Several deputies pursued Appellant and, eventually, apprehended him.

[1] The record reflects that Barrios-Quezada had left the truck unlocked with the keys in it, but had not given anyone permission to use it. The record further reflects that Barrios-Quezada and Appellant were not acquainted.

Appellant was charged by indictment with unauthorized use of a motor vehicle and evading arrest. Appellant pleaded "not guilty" to each offense, and the matter proceeded to a jury trial. The jury found Appellant "guilty" as charged, and the court conducted a trial on punishment. Appellant then pleaded "true" to an enhancement allegation that he previously had been convicted of a felony. Ultimately, the jury sentenced Appellant to imprisonment for two years for unauthorized use of a motor vehicle and thirteen years for evading arrest. The trial court sentenced Appellant accordingly and ordered that Appellant's sentences run concurrently. This appeal followed.

VENUE

In his fourth issue, Appellant contends that the State failed to establish that venue was proper in Nacogdoches County, Texas. Specifically, Appellant argues that while there was evidence that connected the offenses to Nacogdoches County, no evidence was presented that connected either offense to Texas.

Applicable Law

Venue in a criminal case need only be proven by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art. 13.17 (West 2005); ***Murphy v. State***, 112 S.W.3d 592, 604 (Tex. Crim. App. 2003). Proof of venue may be established by direct or circumstantial evidence, and the jury may draw reasonable inferences from the evidence. *See* ***Edwards v. State***, 97 S.W.3d 279, 285 (Tex. App.–Houston [14th Dist.] 2003, pet. ref'd). The evidence is sufficient if the jury may reasonably conclude that the offense was committed in the county alleged. ***Rippee v. State***, 384 S.W.2d 717, 718 (Tex. Crim. App. 1964).

Application

In the instant case, the State alleged that the offenses occurred in Nacogdoches County, Texas. At trial, after the close of evidence, Appellant moved for a directed verdict because the witnesses testified that the offenses occurred in Nacogdoches County, but did not specifically indicate that the offenses occurred in Texas. The trial court denied Appellant's motion. On appeal, Appellant contends that the State failed to establish venue in Texas because it failed to demonstrate that either offense was committed in Texas. We disagree.

The case was tried in Nacogdoches County, Texas. Barrios-Quezada's sister testified that Barrios-Quezada lives "[h]ere in Nacogdoches" and gave the address. Barrios-Quezada testified

that he has lived in Nacogdoches County for fifteen years. He provided the same address that his sister recited. When asked about his work schedule, Barrios-Quezada testified that he sometimes had to work out of state. When asked where he was on the date that his truck was stolen, Barrios-Quezada testified that he "was working here in the state of Texas." A photograph of Barrios-Quezada's truck's license plate was admitted into evidence, and the truck had a Texas license plate. Finally, Appellant testified that he was born in Nacogdoches, Texas. His attorney then asked, "You lived here your whole life?" Appellant responded, "My whole life."

Based on the foregoing, we conclude that the State sufficiently established that venue was proper in Nacogdoches County, Texas. Thus, we hold that the trial court did not err in denying Appellant's motion for directed verdict. Appellant's fourth issue is overruled.

CHARGE ERROR

In his first issue, Appellant contends that the trial court erred when it failed to include an instruction in its charge on the defense of mistake of fact.

Standard of Review

The review of an alleged jury charge error in a criminal trial is a two step process. ***Abdnor v. State***, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). First, an appellate court must determine whether there was error in the jury charge. ***Id.*** Then, if there is charge error, the court must determine whether there is sufficient harm to require reversal. ***Id.*** at 731–32. The standard for determining whether there is sufficient harm to require reversal depends on whether the appellant objected. ***Id.*** at 732.

If the appellant objected to the error at trial, the appellate court must reverse the trial court's judgment if the error "is calculated to injure the rights of the defendant." TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006). This standard requires proof of no more than some harm to the accused from the error. ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). An appellant who did not raise the error at trial can prevail only if the error is so egregious and created such harm that he has not had a fair and impartial trial. ***Id.*** "In both situations the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." ***Id.*** In assessing whether the trial court erred by denying a requested defensive instruction, an appellate

court must examine the evidence offered in support of the defensive issue in the light most favorable to the defense. ***Id.***

Governing Law

It is a defense to prosecution that the actor, through mistake, formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense. TEX. PENAL CODE ANN. § 8.02(a) (West 2011). A "reasonable belief" is a belief that would be "held by an ordinary and prudent man in the same circumstances as the actor." ***Id***. § 1.07(42) (West Supp. 2015).

An accused has the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense. ***Hamel v. State***, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). This rule is designed to ensure that the jury, not the judge, will decide the relative credibility of the evidence. ***Sands v. State***, 64 S.W.3d 488, 494 (Tex. App.–Tyler 2001, no pet.).

However, a defendant must request such an instruction or object to its omission. ***Posey v. State***, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). A trial court does not commit error by failing to *sua sponte* instruct the jury on mistake of fact. ***Id***; *see also* ***Vega v. State***, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); ***Traylor v. State***, 43 S.W.3d 725, 730 (Tex. App.–Beaumont 2001, no pet.).

Analysis

In the case at hand, Appellant did not object to the court's charge or seek to submit an instruction on mistake of fact. Thus, because Appellant failed to request this defensive instruction, we hold that the trial court did not err by failing to include it in the charge. Appellant's first issue is overruled.

LEGAL SUFFICIENCY

In his second issue, Appellant contends that the evidence is legally insufficient to establish that he committed the offense of unauthorized use of a motor vehicle. Specifically, Appellant alleges there is no evidence that he knew the vehicle was stolen.

Standard of Review and Applicable Law

Legal sufficiency of the evidence is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson v. Virginia***, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–88, 61 L. Ed. 2d 560 (1979); ***Escobedo v. State***, 6 S.W.3d 1, 6 (Tex. App.–San Antonio 1999, pet. ref'd); *see also* ***Brooks v. State***, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Johnson v. State***, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). The evidence is examined in the light most favorable to the verdict. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Johnson***, 871 S.W.2d at 186. A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida***, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 2d 652 (1982). This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789.

Under this standard, we may not sit as a thirteenth juror and substitute our judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *See* ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also* ***Brooks***, 323 S.W.3d at 899. Instead, we defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See* ***Brooks***, 323 S.W.3d at 899–900; ***Clayton v. State***, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime charged. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

Moreover, the sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." ***Id***.

To support Appellant's conviction for unauthorized use of a motor vehicle, the State was required to prove that Appellant intentionally or knowingly operated another's motor-propelled vehicle without the effective consent of the owner. *See* TEX. PENAL CODE ANN. § 31.07 (West 2011). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *See* ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Application

Here, the State presented evidence that Barrios-Quezada reported his truck missing on June 3, and that Appellant was seen driving that truck on June 6. When he was spotted by law enforcement, Appellant attempted to evade contact with the officers. This is strong circumstantial evidence that Appellant knew he was engaged in unauthorized use of Barrios-Quezada's truck.

On the other hand, we note that the State had no direct evidence of Appellant's taking Barrios-Quezada's truck from his property. Appellant testified that he rented Barrios-Quezada's truck for ten dollars from a man whom he knows as "Runny." Appellant asserted that Runny was willing to rent the truck to him for ten dollars so that Runny could do more drugs. According to Appellant, he did not know anything else about Runny, but believed that he was the owner of the truck.

Appellant further testified that he began looking for a truck to rent on May 17, a couple of weeks before the events at issue. Appellant stated that he had to search the east side of Nacogdoches for some time before he found someone willing to rent him a truck. Appellant stated that Runny agreed Appellant could drive the truck for an hour, and Appellant conceded that he did not return the truck to Runny as he had promised. On cross examination, Appellant agreed that when Deputy McDonald pulled behind him and began to initiate a traffic stop, he was not supposed to have been in possession of the truck.

Appellant also attempted to explain why he tried to evade the police, stating that he drove away because he was afraid that the police were trying to harm him. He stated that he planned to stop as soon as others were present who could observe what the police were going to do to him. In spite of Appellant's testimony, however, the jury heard testimony that Appellant eluded police in the truck until it became immobilized, after which Appellant fled into a wooded area.

Having examined the evidence in the light most favorable to the verdict, we conclude that the evidence is sufficient to prove Appellant engaged in the unauthorized use of Barrios-Quezada's truck. *See* ***Brooks***, 323 S.W.3d at 899. Further, a rational factfinder could have rejected Appellant's version of events. ***Id***. at 899–900. Thus, we hold that the evidence is legally sufficient to support the trial court's judgment. Appellant's second issue is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his third issue, Appellant argues that he received ineffective assistance of counsel at trial. Specifically, Appellant contends that his trial counsel should have requested an instruction on mistake of fact.

Governing Law

Claims of ineffective assistance of counsel are evaluated under the two step analysis articulated in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). The first step requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 688, 104 S. Ct. at 2065. To satisfy this step, the appellant must identify the acts or omissions of counsel alleged to be ineffective assistance and affirmatively prove that they fell below the professional norm of reasonableness. *See* ***McFarland v. State***, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See* ***Strickland***, 466 U.S. at 695, 104 S. Ct. at 2069.

In any case considering the issue of ineffective assistance of counsel, we begin with the strong presumption that counsel was effective. *See* ***Jackson v. State***, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See* ***id***.; *see also* ***Okonwo v. State***, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). Appellant has the burden of rebutting this presumption by presenting evidence illustrating why his trial counsel did what he did. *See* ***id***. Appellant cannot meet this burden if the record does not affirmatively support the claim. *See* ***Menefield v. State***, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012). A record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See* ***Kemp v. State***, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd).

Before being condemned as unprofessional and incompetent, defense counsel should be given an opportunity to explain his or her actions. *See* ***Bone v. State***, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). Thus, absent a properly developed record, an ineffective assistance claim must usually be denied as speculative, and, further, such a claim cannot be built upon retrospective speculation. ***Id.*** at 835.

Moreover, after proving error, the appellant must affirmatively prove prejudice from the deficient performance of his attorney. *See* ***Hernandez v. State***, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999); ***Burruss v. State***, 20 S.W.3d 179, 186 (Tex. App.–Texarkana 2000, pet. ref'd). The appellant must prove that his attorney's errors, judged by the totality of the representation and not by isolated instances of error, denied him a fair trial. ***Burruss***, 20 S.W.3d at 186. It is not enough for the appellant to show that the errors had some conceivable effect on the outcome of the proceedings. ***Id***. He must show that there is a reasonable probability that, but for his attorney's errors, the jury would have had a reasonable doubt about his guilt or that the extent of his punishment would have been less. *See* ***id***.; *see also* ***Bone v. State***, 77 S.W.3d at 837.

Application

Here, Appellant sets forth in his brief that his attorney's performance at trial fell below the professional norm because he failed to request a jury instruction on the defense of mistake of fact. Yet, the record before us is silent about trial counsel's underlying strategy or why he chose the course he did. Normally, a silent record cannot defeat the strong presumption of effective assistance of counsel. *See* ***Garza***, 213 S.W.3d at 348; ***Thompson v. State***, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999); *but see* ***Menefield***, 363 S.W.3d at 593 (holding if trial counsel is not given opportunity to explain allegedly deficient actions, appellate court should not find deficient performance absent challenged conduct "so outrageous that no competent attorney would have engaged in it"); ***Andrews v. State***, 159 S.W.3d 98, 102–03 (Tex. Crim. App. 2005) (reversing a conviction "in a rare case" on the basis of ineffective assistance of counsel when trial counsel did not object to a misstatement of law by the prosecutor during argument).

In ***Andrews***, the same prosecutor who filed a motion to cumulate the sentences in four counts of sexual abuse later argued to the jury, "You give him 20 years in each case, it's still just 20 years. It's still not 80. You can give different amounts if you want. You can give 20, 10, 10, five, it's still just 20." ***Andrews***, 159 S.W.3d at 100. The appellant's trial counsel did not object to the prosecutor's misstatement of the law. ***Id.*** The trial court ultimately granted the State's

motion to cumulate the sentences and imposed a combined prison sentence of seventy-eight years. ***Id.*** The court concluded that the argument left the jury with the incorrect impression that the appellant's sentences could not be stacked and that the appellant would serve no more than twenty years in prison for all four counts. ***Id.*** at 103. Therefore, the court held that, under the "extremely unusual circumstances of [the] case," the record contained all of the information it needed to conclude that there could be "no reasonable trial strategy for failing to object" to the prosecutor's misstatement of the law. ***Id.***

More recently, in ***Villa v. State***, 417 S.W.3d 455 (Tex. Crim. App. 2013), the court of criminal appeals considered the issue with facts similar to those before us. There, Villa was charged with aggravated sexual assault of a child. ***Id.*** at 459. At trial, the evidence indicated that the then three-year-old child frequently suffered diaper rashes and irritations, to which family members routinely applied diaper rash cream. ***Id.*** at 458. In response to his counsel's question at trial, Villa testified that he touched the child's genitals for the purpose of applying medication. ***Id.*** at 459. On appeal, Villa argued that he received ineffective assistance of counsel because his attorney did not request a medical care defensive instruction. ***Id.*** at 460. The court ultimately held that there was no imaginable strategic motivation for Villa's trial counsel's failure to request medical care defensive instruction where the record demonstrated that (1) his counsel elicited testimony from Villa that could reasonably be regarded as confession to all elements of the charged offense, (2) his counsel argued the medical care defense to the jury, and (3) the trial court's refusal of a medical care defense instruction, had it been requested, would have been erroneous. *See* ***id.*** at 463–64.

Potential Trial Strategy

In the instant case, the record reveals a potential strategic rationale for Appellant's counsel's action. During jury argument, Appellant's counsel argued that Appellant was not guilty of unauthorized use of a vehicle because (1) he believed that Runny was the owner of the vehicle and (2) the State failed to prove that Appellant knew he was driving Barrios-Quezada's vehicle without the owner's consent. This argument tracked the instructions later given to the jury that a person commits the offense of unauthorized use of a motor vehicle "if the person intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner." The jury also was instructed that consent is not effective if "given by a person the defendant knows is not legally authorized to act for the owner." Thus,

based on the charge as given, Appellant still was able to argue that he did not know that he lacked the consent of the owner of the truck. *See* ***McQueen v. State***, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) (holding that, in unauthorized use of motor vehicle case, a culpable mental state applies to whether defendant knew his use of motor vehicle was without effective consent of owner).

On the other hand, had Appellant's counsel requested an instruction on mistake of fact, Appellant would have had to prove that his purportedly incorrect belief was reasonable. *See* TEX. PENAL CODE ANN § 8.02(a). Thus, by not requesting this defensive instruction, Appellant's counsel allowed the jury to consider the same defensive theory, but did not increase his client's burden of proof with regard to the reasonableness of his mistaken belief. *See* ***id.***

Having reviewed the record in the instant case, we conclude that the facts before us are distinguishable from the facts in ***Andrews*** and ***Villa***, and that Appellant's trial counsel's alleged deficient conduct is not "so outrageous that no competent attorney would have engaged in it." *See* ***Menefield***, 363 S.W.3d at 593. Thus, we decline to hold that the record before us contains all of the information needed for us to conclude that there could be no reasonable trial strategy for Appellant's trial counsel's alleged unprofessional acts. Therefore, we hold that Appellant has not met the first prong of ***Strickland*** because the record does not contain evidence concerning Appellant's trial counsel's reasons for choosing the course he did. As a result, Appellant cannot overcome the strong presumption that his counsel performed effectively. Appellant's third issue is overruled.

DISPOSITION

Having overruled Appellant's four issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered April 6, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 6, 2016

NO. 12-15-00068-CR

ANDREW PJ WHITAKER,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 420th District Court
of Nacogdoches County, Texas (Tr.Ct.No. F1421007)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

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