NO. 12-16-00175-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JOSHUA DALE INGRAM, APPELLANT	***§***	***APPEAL FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Joshua Dale Ingram appeals his conviction for murder. In two issues, Appellant contends that his attorney was ineffective at both the guilt-innocence and punishment phases of trial. We affirm.

BACKGROUND

Prior to the commission of the offense, Appellant, the victim, and their infant son lived together with Appellant's mother. On February 5, 2015, Appellant, the victim, and their son were alone at the residence. Appellant and the victim had an argument, and thereafter Appellant shot the victim nineteen times, killing her. Shortly thereafter, Appellant called his mother and told her that he killed the victim and planned to kill himself. He asked her to call 9-1-1. Appellant also contacted his uncle and told him that he and the victim argued and she called him a bad parent. Appellant told his uncle that he killed the victim and had three weapons and enough ammunition to "finish this."

When the special response unit of the City of Lufkin Police Department arrived at the scene, they found the victim on the bedroom floor, lying face down in a pool of her own blood. Officers saw numerous bullet holes in her back. The victim's infant was on the bed crying. Paramedics confirmed that the victim was deceased.

Officers subsequently found Appellant at a convenience store. Appellant resisted arrest, but was subdued by a conducted electrical weapon. During his arrest, Appellant reached for a firearm he had in his pocket. Investigators later identified this firearm as the murder weapon.

Appellant was indicted for murder, to which he pleaded "not guilty." A jury found Appellant guilty and sentenced him to imprisonment for life. This appeal followed.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first and second issues, Appellant contends his trial counsel rendered ineffective assistance at both the guilt-innocence and punishment phases of trial.

Standard of Review

To establish ineffective assistance of counsel, an appellant must show that trial counsel's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); ***Bone v. State***, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Under the first prong, the appellant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. Under the second prong, an appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Mitchell v. State***, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

Deficient performance requires a showing that trial counsel's performance fell below an objective standard of reasonableness. ***Thompson v. State***, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). A reviewing court must presume that trial counsel acted within the proper range of reasonable and professional assistance and that his decisions at trial were based on sound trial strategy. ***Salinas v. State***, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). Allegations of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. ***Thompson***, 9 S.W3d at 814. It is not our role to speculate as to the basis for trial counsel's actions; thus a record that is silent on the reasoning behind counsel's actions is sufficient to deny relief. S***ee Rylander v. State***, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003); s***ee also Stults v. State***, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd.). We will not conclude that challenged conduct is deficient

unless it was so outrageous that no competent attorney would have engaged in it. ***Garcia v. State***, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

It is Appellant's burden to establish ineffective assistance by a preponderance of the evidence. ***Ex Parte Chandler***, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005); ***Bone***, 77 S.W.3d at 833. Failure to satisfy one prong of the ***Strickland*** test negates a court's need to consider the other prong. ***Strickland***, 466 U.S. at 696, 697, 104 S. Ct. at 2069. The record on direct appeal is rarely sufficiently developed to fairly evaluate a claim of ineffectiveness. ***Bone***, 77 S.W.3d at 833. The appellant's failure to prove either deficient performance or prejudice is fatal to any complaint of ineffective assistance. ***Strickland***, 466 U.S. at 700, 104 S. Ct. at 2071.

Guilt-Innocence Phase

In issue one, Appellant argues that his trial counsel provided ineffective assistance at the guilt-innocence phase of trial because he failed to 1) present opening statement and closing argument, 2) contest the State's case-in-chief, 3) object to extraneous bad acts, 4) object to "inflammatory" rhetoric from the prosecutor, 5) object to the prosecutor's references in closing argument regarding Appellant's refusal to testify, and 6) present any defensive evidence. Appellant argues that prejudice in this case should be presumed because counsel entirely failed to subject the prosecution's case to meaningful adversarial testing.

"[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." ***United States v. Cronic***, 466 U.S. 648, 658-660, 104 S. Ct. 2039, 2046-47, 80 L. Ed. 2d 657 (1984); *see* ***Strickland***, 466 U.S. at 692-95, 104 S. Ct. at 2067-068 (constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice). Defense counsel's failure to test the prosecution's case must be "complete" before prejudice is presumed, meaning that counsel failed to oppose the prosecution throughout the proceeding as a whole. ***Bell v. Cone***, 535 U.S. 685, 696–97, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914 (2002).

In this case, Appellant contends that trial counsel acted ineffectively at specific points during trial. However, the law requires a showing that counsel *entirely* failed to subject the prosecution's case to meaningful adversarial testing. *See* ***Cronic***, 466 U.S. at 658-660, 104 S. Ct. at 2046-47. This Court has rejected a challenge to counsel's performance at specific points during the trial as sufficient to constitute a constructive denial of counsel. ***Manuel v. State***, 357

S.W.3d 66, 72-74 (Tex. App.—Tyler 2011, pet. ref'd). Rather, the aspects of trial counsel's performance that Appellant challenges "are plainly of the same ilk as other specific attorney errors [the Supreme Court] has held subject to ***Strickland***'s performance and prejudice components." ***Id***.; ***Bell***, 535 U.S. at 697–98, 122 S. Ct. at 1851–52. Therefore, Appellant has failed to establish that trial counsel's failure to test the prosecution's case is "complete," as required to establish a constructive denial of counsel. *See* ***Bell***, 535 U.S. at 697–98, 122 S. Ct. at 1851–52*; see also* ***Manuel***, 357 S.W.3d at 72-74. Accordingly, prejudice is not presumed and we proceed with our analysis under ***Strickland***.

Assuming, without deciding, that trial counsel's performance was deficient, Appellant's argument fails under the second prong of ***Strickland***, because he has not shown a reasonable probability that, but for counsel's alleged errors, the result of trial would have been different. *See* ***Mitchell***, 68 S.W.3d at 642; *see also* ***Strickland***, 466 U.S. at 700, 104 S. Ct. 2071. The evidence of Appellant's guilt at trial was overwhelming. The jury heard evidence that authorities were alerted to the murder because Appellant called his mother and reported that he had killed the victim and planned on killing himself. Appellant further confessed to his uncle. The victim was found shot to death in the home she shared with Appellant. After the murder, Appellant was found in possession of a firearm, which ballistics testing revealed to be the murder weapon. Additionally, the victim's blood was found on Appellant's cellular telephone battery. Under these circumstances, even if trial counsel's errors can be considered so serious that he was not functioning effectively, we conclude that Appellant has not satisfied the second prong of ***Strickland***—that there is a reasonable probability that, but for his counsel's errors, the jury would not have returned a guilty verdict. *See* ***Strickland***, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2071; *see also* ***Mitchell***, 68 S.W.3d at 642. Accordingly, we overrule Appellant's first issue.

Punishment Phase

In issue two, Appellant argues that his trial counsel was ineffective during the punishment phase because he 1) failed to object to certain bad acts that were not disclosed by the state prior to trial, 2) failed to present mitigating evidence at punishment, and 3) was deficient during the guilt-innocence phase of trial.

As with Appellant's first issue, his second issue fails the second prong of the ***Strickland*** test because he has not demonstrated that but for counsel's alleged errors, the outcome of the

proceeding would be different. *See* ***Mitchell***, 68 S.W.3d at 642; ***Strickland***, 466 U.S. at 700, 104 S. Ct. 20771. During the punishment phase, Appellant pleaded "true" to two prior felony convictions, which enhanced his punishment range to twenty-five years to ninety-nine years or life in prison. Further, the jury heard testimony from Appellant's ex-girlfriend that he had once held a gun to her head and in her mouth. The jury also heard from Appellant's probation officer who testified to Appellant's numerous past probation violations, including removal from a drug rehabilitation facility for fighting with another inmate. Appellant also testified at the punishment phase, during which he admitting killing the victim.

Moreover, when assessing punishment, the jury was entitled to consider all of the evidence adduced at trial either on guilt or innocence. *See* ***Duffy v. State***, 567 S.W.2d 197, 208 (Tex. Crim. App. 1978). Accordingly, the jury could consider the brutal nature of the murder, including the fact that Appellant shot the victim nineteen times in the presence of his infant child. Furthermore, the jury could consider that Appellant confessed to killing the victim, that he was found in possession of the murder weapon, and that the victim's blood was found on Appellant's telephone battery. The jury could also consider evidence that Appellant resisted arrest and appeared to reach for his weapon when taken into custody for the murder. Thus, the jury could have found a life sentence was justified under the circumstances of the case. For this reason, Appellant has not shown a reasonable probability that, but for counsel's alleged errors, his punishment would have been different. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; *see also* ***Mitchell***, 68 S.W.3d at 642. We overrule Appellant's second issue.

DISPOSITION

Having overruled Appellant's issues one and two, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered April 28, 2017.
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 28, 2017

NO. 12-16-00175-CR

JOSHUA DALE INGRAM,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 159th District Court
of Angelina County, Texas (Tr.Ct.No. 2015-0199)

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.

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