Affirmed and Opinion filed June 28, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01227-CR

LUCIANO NARANJO, III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 800,576

O P I N I O N

Appellant, Luciano Naranjo, III, appeals from a conviction for burglary of a habitation with the intent to commit sexual assault. Appellant complains that (1) the trial court erred in allowing a police officer to give hearsay testimony; and that (2) he received ineffective assistance of counsel. We affirm.

I. BACKGROUND

Appellant arrived at the residence of complainant, Alice Schriefer, with one or more friends. Ms. Schriefer was busy putting up outside Christmas decorations, and going in and out of her house. Appellant followed Ms. Schriefer into her house and offered her $150 if she would let him "eat" her for fifteen minutes. She refused. Appellant then grabbed Ms. Schriefer, and she told him and the others to leave. They left, but appellant returned a short time later and asked to use her phone. Ms. Schriefer stated that she would bring a phone outside for him to use. Instead of waiting outside as instructed, appellant followed her inside. After hanging up, he again asked if he could "eat" her. She again refused, and ushered appellant outside. Appellant pushed his way back in, prompting Ms. Schriefer to call for her children. Appellant then grabbed Ms. Schriefer, tried to push her to the ground and "touched her bottom." Ms. Schriefer told her daughter to call "911." The girl attempted to comply with her mother's request, but appellant took the phone from her, preventing her from requesting emergency assistance. The "911" operator called back, and when there was no response, she dispatched police officers to the residence.

Houston Police Officer Kenneth Cech arrived to find Ms. Schriefer in the driveway of her home "crying and shaking." Officer Cech tried to calm her down. Ms. Schriefer told the officers what had happened. Although appellant had fled the scene by that time, officers later arrested him. Ms. Schriefer identified appellant from a photo lineup.

Appellant was charged by indictment with the felony offense of burglary of a habitation with the intent to commit sexual assault, enhanced with a prior felony conviction. Appellant pled true to the enhancement allegation and waived trial by jury. The trial court found appellant guilty as charged and found the enhancement allegation true. The court then assessed punishment at thirty-five years' confinement in the Texas Department of Criminal Justice–Institutional Division.

II. ISSUES PRESENTED FOR REVIEW

In his first point of error, appellant asserts the trial court erred in allowing, over his trial counsel's objection, the hearsay testimony of Officer Cech. In his second and third points of error, appellant asserts he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 10 of the Texas Constitution.

A. HEARSAY

In arguing his first point of error, appellant asserts the testimony of Officer Cech contained inadmissible hearsay that improperly bolstered the complainant's credibility. Specifically, appellant complains of the following exchange during the State's direct examination of Officer Cech:

STATE:	Did Miss Schriefer tell you what happened?
OFFICER CECH:	Yes, ma'am.
STATE:	What did she say?
DEFENSE:	Objection, hearsay, Judge.
COURT:	It's overruled.
STATE:	What did she tell you?
OFFICER CECH:	She told me that she invited some friends over to help with Christmas decorations. And after a short period of time, she told everybody to leave because she wanted to cook dinner or something. And later on someone came to her door and stated that the person wanted to use the phone, so she allowed them to use the phone. When she came back with the phone, the person was inside the residence who wanted to use the phone. She said that she let the person use the phone. After a short call was made, the person she allowed to use the phone made sexual advances towards her.
STATE:	Did she tell you he had said to her, Let me eat you?
OFFICER CECH:	Yes, ma'am, she did.

STATE: Did she tell you that she had told him to leave the residence?

OFFICER CECH: Yes, ma'am.

The State contends this testimony from Officer Cech was admissible under the "excited utterance" exception to the hearsay rule. Appellant responds that the State failed to lay the proper predicate for admission of this hearsay testimony.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d). Texas Rule of Evidence 802 provides: "Hearsay is not admissible except as provided by statute or these rules . . . ." TEX. R. EVID. 802.

The rules of evidence provide an exception to the hearsay rule for excited utterances, described as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TEX. R. EVID. 803(2). To qualify as an excited utterance, (1) the statement must be the product of a startling occurrence, (2) the declarant must have been dominated by the emotion, excitement, fear, or pain of the occurrence, and (3) the statement must be related to the circumstances of the startling occurrence. *Couchman v. State*, 3 S.W.3d 155, 158 (Tex. App.—Fort Worth 1999, pet. ref'd). The critical factor in determining whether a statement is an excited utterance under Rule 803(2) "'is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event.'" *Lawton v. State*, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995) (quoting *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)) *overruled on other grounds, Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994)). The amount of time that elapsed between the occurrence of the event and the utterance is only one factor considered in determining the admissibility of the hearsay statement. *Id.* If the statement is made while the witness is in the grip of emotion, excitement, fear, or pain, and it relates to the exciting event, it is admissible even after an appreciable time has elapsed between the exciting event

and the making of the statement. *Penry v. State*, 691 S.W.2d 636, 647 (Tex. Crim. App. 1985).

It is unclear from Officer Cech's testimony whether Ms. Schriefer was still in the "grip of emotion, excitement, fear, or pain" because the officer's testimony indicates he was, in fact, able to calm her down before she made the statement. We cannot discern from the record how much he had calmed her down or how long this process took:

STATE:	Could you describe her demeanor when you arrived at her house?
	. . . .
OFFICER CECH:	She was crying, shaking.
STATE:	And what did you try to do after you saw the way she was acting?
OFFICER CECH:	*Tried to calm her down so I could get the information from her to try and find out what exactly happened.*
STATE:	*Was it easy for you to calm her down?*
OFFICER CECH:	*No, ma'am. Took a little bit.*
STATE:	Did Miss Schriefer tell you what had happened?
OFFICER CECH:	Yes, ma'am.
STATE:	What did she say?
DEFENSE:	Objection, hearsay, Judge.
COURT:	It's overruled.
STATE:	What did she tell you?
OFFICER CECH:	She told me that she invited some friends over to help with Christmas decorations. And after a short period of time, she told everybody to leave because she wanted to cook dinner or something. And later on someone came to her door and stated that the person wanted to use the phone, so she allowed them to use the phone. When she came back with the phone, the person was inside the residence who wanted to use the phone. She said that she let the person use the phone. After a short call was made, the person she allowed to use the phone made sexual advances towards her.

Even assuming Officer Cech's testimony was not admissible under the excited utterance hearsay exception, we find that any error the court may have made in allowing this testimony

was harmless.

Error in the admission of evidence is subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *see* TEX. R. APP. P. 44.2(b). Under Rule 44.2(b), the reviewing court is to disregard any error unless it affects the appellant's substantial rights. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial, injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

Here, we begin the harm analysis by noting that the State introduced the same information derived from Officer Cech's testimony during its direct examination of Ms. Schriefer, without objection. Specifically, Ms. Schriefer testified:

STATE:	When he followed you in the house, what did he do?
MS. SCHRIEFER:	He kept offering me money and offering me money. He kept saying he wanted to eat me. He kept wanting to eat me for $150. And I kept saying, I'm not like that. I'm a mom. I'm not a prostitute or anything. And he just kept following me. Every time I'd walk in the house, he'd follow me in the house.

Ms. Schriefer later testifed that she reluctantly allowed appellant to use her phone; however, instead of waiting on her porch as instructed, appellant followed her back into the house and pretended to use her phone. She testified, without objection, as follows:

STATE:	You told him to wait on the porch and you would bring the phone to him?
MS. SCHRIEFER:	Yeah, so –
STATE:	Did you have a cordless phone?
MS. SCHRIEFER:	No.

STATE:	Did you go in your house and get a phone?
MS. SCHRIEFER:	Yes. The phone was in the kitchen down the hall, and I had to go all the way – well, I closed the door the best I could; but the Christmas cords and stuff, the wires, were in the door. So, I closed the door, and he was on the porch. And I walked down the hall, got the phone, and started walking back down the hall. And I looked up in the middle of the hall, and he was already in the living room.
	. . . .
STATE:	After he hung up, what happened then?
MS. SCHRIEFER:	He kept asking me if he could eat me and if he could eat me. And I kept telling him no, and I wanted him out the house. I said, Get out the house. And so I thought about it, and I walked out the house; and so maybe I could run back in and lock the door behind me, but he followed me back in again.
	. . . .
STATE:	Did he touch your bottom?
MS. SCHRIEFER:	Yes.
STATE:	Did he touch between your legs?
MS. SCHRIEFER:	He did that before he even left, before he left the first time, when he kept following me in the house . . . . He was trying to get me down. That's why I had bruises on my arms, from him trying to pull me down. And I bit him on the chest.

Because the evidence presented through hearsay testimony of Officer Cech was essentially the same as the unchallenged testimony of Ms. Schriefer, we find that any error in the trial court's admission of Officer Cech's testimony did not affect appellant's substantial rights. *See Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1082 (2000); *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 956 (1999) (holding that any error in the admission of hearsay testimony was

harmless in light of other properly admitted evidence proving the same fact); *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) (holding that "overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. This rule applies whether the other evidence was introduced by the defendant or the State."). Having found that any error in the admission of Officer Cech's testimony was harmless, we overrule appellant's first point of error.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

In his second and third points of error, appellant complains that he received ineffective assistance from his trial counsel and that such ineffectiveness resulted in harm. In support of this complaint, appellant argues his trial counsel (1) repeatedly failed to object to several leading questions propounded by the State; (2) divulged privileged attorney-client communications; and (3) made an ineffective closing argument, in which he, among other things, failed to ask the court to consider conviction for a lesser included offense.

A defendant in a criminal case is entitled to reasonably effective assistance of counsel. *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). In determining whether a defendant has received effective assistance of counsel, Texas follows the two-prong standard articulated in *Strickland v. Washington*. *See* 466 U.S. 668, 687 (1984); *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997). A defendant must first demonstrate that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. *Valencia*, 946 S.W.2d at 83. Judicial scrutiny of the reasonableness of trial counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Thus, to prevail on an ineffective assistance claim, a defendant must rebut the presumption that the challenged action or inaction is considered sound trial strategy. *Id.* at 688–89.

If the first prong is met, the defendant must also show that his counsel's performance prejudiced his defense. *Id.* at 686–89. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* A defendant has the burden of making this showing by a preponderance of the evidence. *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000), *cert. denied*, 69 U.S.L.W. 3748 (2001).

When addressing the second prong under *Strickland*, we examine counsel's errors not as isolated incidents, but in the context of the overall record. *Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995). However, we need not reach the second *Strickland* prong if we determine the first cannot be met. *Strickland*, 466 U.S. at 697. This two-prong standard is equally applicable to both the guilt/innocence and punishment phases of trial. *Valencia*, 946 S.W.2d at 83.

Generally, when the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). For the most part, when confronted with a silent record, we may not speculate on trial counsel's actions. *Id.* "[I]f there is any basis for trial strategy to have been a reason for trial counsel's action, then further inquiry is improper." *Newsome v. State*, 703 S.W.2d 750, 755 (Tex. App.—Houston [14th Dist.] 1985, no pet.). However, if a silent record clearly indicates no reasonable attorney could have made such trial decisions, it is not speculation to find counsel ineffective. *Vasquez v. State*, 830 S.W.2d 948, 950–51 (Tex. Crim. App. 1992).

1. First Prong of *Strickland* Analysis

Because appellant identifies multiple instances of alleged ineffective assistance of counsel, we must examine each allegation separately before considering the totality of the representation. *Burnett v. State*, 784 S.W.2d 510, 513 (Tex. App.—Dallas 1990, pet. ref'd).

a. Attorney-Client Privilege

Appellant complains that his trial counsel breached the attorney-client privilege during his direct examination of appellant. To support his argument, appellant points to the following exchange:

DEFENSE COUNSEL:	Can you think of any reason why she would tell this story?
DEFENDANT:	Well, basically, I owe her money.
DEFENSE COUNSEL:	Now, you don't claim that you know that that's the only reason?
DEFENDANT:	No, sir.
DEFENSE COUNSEL:	That's when you say that – you're saying you're just trying – when I asked you that question at the break, you were trying to come up with a reason?

Appellant argues that trial counsel's question implied appellant was lying and trying, at the break, to fabricate a reason. We disagree. This question just as easily evinces an attempt to elicit possible reasons why appellant thought Ms. Schriefer would make such allegations against him, not to imply that appellant attempted to fabricate a reason.

b. Failure to Object to Leading Questions

Another claim of deficiency arises from defense counsel's failure to object to a number of the State's leading questions.[1] Appellant argues that his trial counsel's failure to object to

[1] "A leading question is one which suggests the desired answer or puts words into the witness's mouth to be echoed back." *Mega Child Care, Inc. v. Tex. Dep't of Prot. and Regulatory Servs.*, 29 S.W.3d 303, 307 (Tex. App.— Houston [14th Dist.] 2000, no pet.). Leading questions should not be used

over twenty-seven leading questions resulted from counsel's misunderstanding of the effect of answers to improper questions. Appellant argues that his counsel failed to object because he was laboring under the mistaken belief that the court would not consider a witness's answer to an improper question.

Between the presentation of witnesses, trial counsel asked the court for permission to ask Ms. Schriefer about whether she had been arrested for an offense involving cocaine. Counsel appeared to argue that, although the normal impeachment question is whether a witness has been convicted, he should be allowed to ask Ms. Schriefer possibly improper questions about a prior arrest because it might (1) corroborate parts of appellant's story; (2) uncover credibility problems with Ms. Schriefer; and/or (3) reveal Ms. Schriefer's motive to lie. To justify his request to elicit possibly inadmissible information, defense counsel argued: "first of all, it's a court trial; so if an inadmissible question is asked and answered, the Court will be assumed to ignore it . . . ." Counsel's statement is incorrect. Any unchallenged testimony given in response to an unchallenged question becomes part of the evidence in the case and may be considered for any purpose. *See, e.g., Young v. State*, 994 S.W.2d 387, 389 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Appellant argues that it was this misunderstanding of the law that led trial counsel to "sit on his hands rather than to stand up and object."

To successfully argue that counsel's failure to object amounted to deficient performance, appellant must show that the trial court would have committed error in overruling the objection and that there was no reasonable trial strategy for failing to object. *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

The record is fraught with leading questions the State propounded to its own witnesses

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on the direct examination of a witness except as may be necessary to develop the testimony of the witness. TEX. R. EVID. 611.

on direct examination. In virtually all instances, trial counsel failed to object, and the witness answered.

Generally, unless a witness is an adverse party, identified with an adverse party, or considered hostile, counsel should not ask leading questions on direct examination except to develop testimony. TEX. R. EVID. 611(c). Nevertheless, trial counsel may elect to refrain from objecting to an improper question to avoid calling attention to damaging evidence that is otherwise admissible or merely cumulative. *See Young v. State*, 10 S.W.3d 705, 713 (Tex. App.—Texarkana 1999, pet. ref'd), *cert. denied*, 528 U.S. 1068 (1999). In fact, it is sound trial strategy for opposing counsel to elect not to object to leading questions when the evidence likely will come in anyway. *Id.* at 712–13 (finding that failure to object to leading questions was result of trial strategy and commenting that it is sound trial strategy for opposing counsel to choose not to object to leading questions when the evidence will come in anyway); *see Velasquez v. State*, 941 S.W.2d 303, 310 (Tex. App.— Corpus Christi 1997, pet. ref'd) (stating "we are mindful that it may actually be good trial strategy to avoid objecting to inconsequential testimony so as to avoid antagonizing the jury with frequent objections."); *Ruiz v. State*, 726 S.W.2d 587, 591 (Tex. App.—Houston [14th Dist.] 1987), *overruled on other grounds*, 761 S.W.2d 4 (Tex. Crim. App. 1988) ("[m]aking many objections to leading questions would only tend to inflame the minds of the jury by appearing to be antagonizing and unnecessarily prolonging the trial."); *Henderson v. State*, 704 S.W.2d 536, 538 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd) ("[f]ailing to object to every introduction of improper evidence or questioning does not indicate that appellant's representation was ineffective. Not objecting can be a trial strategy."). For this reason, where the record is silent, a failure to object to leading questions ordinarily does not support a claim of deficient performance.

Appellant argues that, unlike most cases, where counsel's reason for not objecting is unapparent from the record, here the record contains defense counsel's stated rationale for not

voicing objections to the prosecutor's leading questions, *i.e.*, "if an inadmissible question is asked and answered, the Court will be assumed to ignore it . . . ." However, trial counsel did not make this remark in response to the prosecutor's leading questions, but rather as part of defense counsel's attempt to impeach the complainant with questions about prior arrests. Moreover, even if trial counsel had uttered his mistaken understanding of the law in conjunction with his failure to object to leading questions, trial counsel's misunderstanding in this regard would not foreclose the possibility that he failed to object to the leading questions, *for other reasons*, as part of a legitimate trial strategy. That defense counsel misunderstood the effect of a failure to object to an improper question is apparent from the record. *That this was the reason he failed to object in response to the State's long line of leading questions is not.* We must presume that trial counsel's inaction was motivated by sound trial strategy. *Strickland*, 466 U.S. at 689. Appellant has failed to rebut that presumption.

c. Closing Argument

Appellant asserts that trial counsel's closing argument was inadequate, unclear, and ineffective. Additionally, appellant argues trial counsel improperly offered this argument before hearing any of the State's argument.

Trial counsel's entire argument follows:

> Judge, you've heard the evidence. I would simply say three things. Number one, you heard the defendant's testimony exposing himself to cross-examination. I think it's quite clear as to the complainant's testimony that there are a number of inconsistencies in the various stories she told to the various officers. I won't bore the Court again with those. I think that's quite clear, although she made a valiant attempt, I think, to clear up some of the inconsistencies to say he came back repeated times. In any case, all of those things are true.
>
> As to the last business about her (inaudible) what it all amounts to. It

> certainly corroborates something that Mr. Naranjo knows. And I would suggest if you put all of those things together, it adds up to the fact that the State has failed to prove beyond a reasonable doubt that a crime was committed and that this defendant committed it.

Appellant contends that trial counsel's performance was deficient in that his closing argument failed to address necessary issues. Specifically, appellant claims his trial counsel (1) failed to argue conviction for a lesser included offense (criminal trespass of a habitation) despite evidence indicating that appellant remained in the house without consent but did not do so with intent to commit a sexual assault; (2) failed to explain why appellant's performance on cross-examination made him appear credible and, therefore, counsel should not have even mentioned it; (3) failed to explain counsel's allusion to differences between appellant's and Ms. Schriefer's stories because he did not want to "bore" the judge; (4) stated, without explaining, that "all those things are true[;]" and (5) referred to some unspecified "last business."

i. *Sequencing of Closing Argument*

We first address appellant's complaint that trial counsel made his final argument before hearing any of the State's argument. Appellant contends that when the trial court inquired whether either side wanted to argue, "defense counsel piped up 'I do' before the prosecutor said anything . . .[The] prosecutor never even said she was waiving her right to open . . . [and counsel] [p]assed up the only chance to rebut the State's argument . . . ."

In many ways, the closing argument is the culmination of tactical decisions defense counsel has made throughout the trial. It is the phase of trial where strategy is most evident. *Flemming v. State*, 949 S.W.2d 876, 881 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Consequently, decisions relating to closing arguments are often purely strategic. For example, declining to mention alleged discrepancies in the state's evidence during final argument, refraining from voicing objections during the state's closing argument, and giving a selective

synopsis of the evidence in closing argument are all inherently tactical decisions. *Taylor v. State*, 947 S.W.2d 698, 704 (Tex. App.—Fort Worth 1997, pet. ref'd). As such, they generally are not the types of decisions that render defense counsel's performance deficient. *Id.* Similarly, defense counsel's decision to give a very brief closing argument[2] or to waive final argument altogether are generally considered matters of trial strategy that usually will not support a finding of deficient performance. *See, e.g.*, *Ransonette v. State*, 550 S.W.2d 36, 41 (Tex. Crim. App. 1976) (finding waiver of final argument, in the punishment phase of trial, sound trial strategy); *Salinas v. State*, 773 S.W.2d 779, 782–83 (Tex. App.—San Antonio 1989, pet. ref'd) (stating "[i]t is the trial strategy of some attorneys to waive final argument in an attempt to cut off the State's rebuttal."). Just as trial counsel may decide, as a tactical matter, whether to deliver a closing argument, he may, for the same reasons, decide when he will deliver the closing argument, *i.e.*, before or after hearing any part of the state's argument. *See, e.g., Salinas*, 773 S.W.2d at 782–83 (finding trial counsel's waiver of final argument permissible trial strategy). We presume that counsel's decision to make his closing argument when he did was sound trial strategy. Appellant points to nothing in the record that overcomes this presumption.

ii. *Failure to Argue for Lesser Included Offense*

Next, we address appellant's contention that he was not afforded effective assistance of counsel at the guilt/innocence stage of the trial because, *inter alia*, counsel failed to request that the trial court consider the lesser included offense of criminal trespass to a habitation under law in effect at the time of appellant's trial.[3] *See* TEX. PEN. CODE ANN. art. 30.05

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[2] *See, e.g.*, *Taylor*, 947 S.W.2d at 704. (finding it plausible that brief closing argument was product of realistic trial strategy); *Ortiz v. State*, 866 S.W.2d 312, 314–15 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (finding no ineffective assistance for trial counsel's short closing argument and stating "[w]hich witnesses to call, and what type of closing argument to make, are clearly trial strategy.").

[3] The offense of burglary to a habitation occurs when one

(Vernon 1994 & Supp. 2001). We begin by noting that in a bench trial, the trial court is authorized to find the defendant guilty of any lesser offense for which the state provides the required proof. *Barfield v. State*, 999 S.W.2d 23 (Tex. App.—Houston [14th Dist.] 1999, pet. granted). This is true even if consideration of the lesser included offense is not requested by either party. *Id*. Thus, despite trial counsel's failure to argue for the lesser included offense, the trial court could have considered it if the evidence supported it. *See id*.

Assuming that a lesser included offense is raised under the evidence, it may nonetheless be reasonable trial strategy for trial counsel to decide not to request the trial court to consider a lesser included offense and elect instead to pursue an "all or nothing" strategy. *See Lynn v. State*, 860 S.W.2d 599, 603 (Tex. App.—Corpus Christi 1993, pet. ref'd) (noting in a jury trial that appellant "required the jury to opt between murder, an intentional or knowing act, and acquittal. Such a decision, although risky, is sometimes successful."). Indeed, counsel, as a tactical matter, could choose not to urge the court's consideration of the lesser offense and argue for an acquittal on the greater. If appellant's trial counsel had a different reason for not urging the trial court to consider the lesser included offense, it is not reflected in the record. Appellant argues that it would not have been "a reasonable decision to pursue a 'home run' strategy at the point of argument because appellant already had given testimony which virtually conceded that he committed Criminal Trespass of a Habitation but did not commit Burglary of a Habitation." However, when the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

> enters or remains on property . . . of another without effective consent or he enters or remains in a building of another without effective consent and he:
>
> (1) had notice that the entry was forbidden; or
> (2) received notice to depart but failed to do so.

TEX. PEN. CODE ANN. art. 30.05 (Vernon 1994 & Supp. 2001).

Appellant bears the burden of proof on an ineffective assistance claim and this court applies a strong presumption that counsel's actions fell within the wide range of reasonable professional assistance. *See id.* at 771–72. Appellant proffers nothing to overcome the strong presumption that trial counsel's decision not to request consideration of a lesser included offense, and not to include a plea for it in his closing argument to the trial court, was reasonable from counsel's perspective at the time of trial. Thus, appellant has not met the first prong of *Strickland* for this complaint.

iii. *Brevity and Substance of Closing Argument*

We now consider appellant's remaining complaints regarding the brevity and substance of defense counsel's closing argument.

Closing arguments serve an essential function at trial:

> Closing arguments provide the last opportunity for counsel to address the judge or jury. Its purpose is to summarize the evidence and explain its significance. Counsel may draw reasonable inferences from the evidence presented and argue conclusions which may be made from the evidence. So long as it is not misrepresented or expanded upon, counsel may explain how the law applies to the facts of the case. Above all, and save for matters of common knowledge, final argument must have some basis in the evidence which was presented to the factfinder.

KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 6.06 (5th ed. 2000). Defense counsel's closing argument failed to meet any of these objectives. It was unclear, rambling, completely devoid of substance, and served no real purpose.

While decisions relating to closing arguments, including whether to give one and what to include in it, are usually matters of trial strategy, there could be no plausible strategic reason for giving a closing argument that is aimless, incoherent, devoid of substance, and without any apparent purpose. Having elected to give a closing argument, counsel was required to do so in a manner that fell within an objective standard of reasonableness under prevailing

professional norms. Defense counsel's closing argument itself undermines the presumption that counsel exercised reasonable professional judgment in making it. *See Strickland*, 466 U.S. at 687. We conclude trial counsel's final argument was wholly inadequate and his performance in making it fell below objective standards of professional conduct. *See id.* Accordingly, we find appellant has established the first prong of *Strickland* as to this complaint.

2. Second Prong of Strickland Analysis: Prejudice

Having found that trial counsel rendered ineffective assistance in making the closing argument to the court, we now consider the prejudicial impact of this deficient performance. *See Milburn v. State*, 15 S.W.3d 267, 270 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The second prong of the *Strickland* test for ineffective assistance of counsel requires that we determine whether appellant has shown a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). While the harm prong of *Strickland* is not an outcome determinative test, the United States Supreme Court has nevertheless observed that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696

We find that despite the deficiencies in trial counsel's closing argument, appellant has not shown a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The trial judge, as the fact finder, determined the credibility of the witnesses after hearing their testimony and after personally observing their courtroom demeanor. While closing argument can serve as an effective tool for guiding the fact finder in judging the credibility of the witnesses, it would not likely have impacted this subjective determination in any significant way given the strength of the evidence in the record.

The complainant gave detailed testimony concerning the offense and the events surrounding it. Although appellant denied that he attempted to sexually assault the complainant or burglarize her home, he admitted that he went inside the complainant's house, asked to use her telephone, and that the complainant told him to get out of her house. Moreover, the complainant's minor daughter corroborated much of her mother's testimony. Although the daughter did not testify to any sexual propositions or sexual touching, she stated that (1) she heard her mother arguing with appellant and yelling for him to get out; (2) appellant did not leave when told, and her mother ended up with a crowbar that appellant subsequently snatched from her mother's hands; (3) her mother asked another daughter to call "911," but appellant snatched the phone from that daughter's hand; and (4) appellant ran out of the door after her mother. The police officer testified that the complainant was visibly upset when he arrived at the scene. The guilty verdict in this case has ample record support.

Given the strength of the evidence in the record, it is unlikely that the outcome would have been different even if defense counsel had presented a substantive closing argument that summarized and explained the evidence in a clear and persuasive manner. Trial counsel's performance, while deficient, does not sufficiently undermine our confidence in the verdict. Thus, the second prong of *Strickland* has not been established. Appellant's second and third points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed June 28, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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