Affirmed and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00967-CR

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BENNIE RAY HALE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 779,733

O P I N I O N

A jury convicted appellant, Bennie Ray Hale, of aggravated sexual assault of a child and sentenced him to forty-five years imprisonment in the Texas Department of Corrections. Appellant presents six points of error on appeal but, finding the court below did not err, we affirm its judgment.

In March of 1997, the complainant, C. W., was staying with Katina Matthews, her aunt, for the weekend. C. W. was four years old at the time. At one point in her stay, Katina noticed

that C. W. suddenly became sad and withdrawn. When Katina asked what was wrong, C. W. explained that she wished she could live with Katina permanently. Katina asked why and C. W. stated that appellant, who was her step-father, was mean to her. When asked to describe the behavior that she believed to be mean, C. W. replied that appellant would come into her room at night, knock her out of bed, pull her panties down, and "stick" his finger in her "private part" and "bottom." Alarmed, Katina called Janis Wesley, who is Katina's mother and C. W.'s grandmother, and asked her to come over right away. C. W. told the same story to her grandmother.

Later that day, appellant and C. W.'s mother, Ramona Hale, arrived at Janis' house to pick up C. W. When Janis refused to return the child and confronted them with C. W.'s accusations, appellant called the police. Houston Police Officer Michael Adams responded to the call.

Officer Adams interviewed all involved, including C. W., who related the story of appellant's behavior to him. Based on his investigation, Officer Adams referred the matter to the Harris County District Attorney's Office and Children's Protective Regulatory Service. Subsequently, appellant was indicted and charged with aggravated sexual assault of a child.

At trial, appellant asserted that C. W. was fabricating the story at the behest of Janis, who never liked him and was upset that he had married her daughter. In support of his theory of fabrication, appellant asserted that C. W. did not first tell her mother about the abuse, but rather told Janis and Katina. According to appellant, this fact showed the strong influence that Janis had over the child. He also asserted that Janis' motivation for coercing C. W. to lie was that Janis would profit from having C. W. in her home. The jury, however, did not believe this defense and convicted appellant of the aggravated sexual assault of C. W.

In his first point of error, appellant claims that the trial court erred by admitting expert testimony in violation of TEX. R. EVID. 702. We review complaints regarding the admission or exclusion of evidence for an abuse of discretion. *See Erdman v. State*, 861 S.W.2d 890,

893 (Tex. Crim. App.1993). A trial court abuses its discretion only when no reasonable view of the record could support its conclusion under the correct law when the facts are viewed in the light most favorable to its legal conclusion. *See DuBose v. State*, 915 S.W.2d 493, 497-98 (Tex. Crim. App.1996).

Appellant complains that the trial court improperly admitted the testimony of Houston Police Officer Chad Ellis because it lacked a proper scientific basis. Officer Ellis testified in the State's rebuttal that, based on his knowledge of the particular facts of this case and his training in investigating child abuse cases, he was not surprised that C. W. did not outcry to her mother. Liberally construing appellant's objection to this testimony, the objection was that no predicate had been laid, making the testimony inadmissible.

On appeal, however, appellant complains that the testimony was inadmissible because it did not qualify as scientific, technical, or other specialized knowledge that would assist the trier of fact. *See* TEX. R. EVID. 702. Appellant also complains that Officer Adams testimony constituted improper bolstering of the complainant and was an improper comment on the complainant's credibility. None of these objections, however, were raised at trial. The objection lodged at trial must comport with the points of error raised on appeal for error to be preserved. *Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990). Since appellant asserts errors on appeal different from those made at trial, he has failed to preserve these errors. Appellant's first point of error is overruled.

Appellant complains in his second point of error that he was denied due process because of the allegedly perjured testimony of one of the State's witnesses and the prosecutor. Since this point of error was raised in appellant's motion for new trial based on newly discovered evidence, it appears to be a complaint that the trial court erred by failing to grant his motion for new trial.

At trial, the State cross-examined appellant's mother, Marsha Hale, who testified on direct examination that the complainant's grandmother was receiving benefits from the

government for caring for the complainant. During cross-examination, Ms. Hale admitted that it was possible that the grandmother was receiving no benefits for C. W. At the hearing on appellant's motion for new trial, appellant presented testimony from two witnesses that C. W. was receiving Medicaid and government subsidized day care. Appellant claimed that these facts would corroborate this witness' testimony, thus countering the damaging testimony elicited by the State in its cross-examination of the witness.

The standard of review for the denial of a motion for new trial based on newly discovered evidence is abuse of discretion. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App.1995); *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App.1993). Motions for new trial based on newly discovered evidence are not favored by the courts and are viewed with great caution. *See Drew v. State*, 743 S.W.2d 207, 225-26 (Tex. Crim. App.1987). We do not substitute our judgment for that of the trial court, but rather decide whether the trial court's decision was arbitrary or unreasonable. *Id.*

In order to prevail on a motion for new trial based on newly discovered evidence, "the movant must show that the evidence was: 1) unknown before trial; 2) not discoverable before trial; 3) probably true and material; and 4) competent, and not merely cumulative, corroborative, collateral, or impeaching." *Dickerson v. State*, 745 S.W.2d 401 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd). Here, the newly discovered evidence complained of by appellant only corroborated the testimony of the defense witness. Further, it is unclear whether or not this information was undiscoverable through the exercise of due diligence prior to trial. Based on these facts, we find that the trial court did not abuse its discretion in denying appellant's motion for new trial.

On appeal, however, appellant again complains of issues not raised in the trial court in his motion for new trial. Appellant complains in his appellate brief that newly discovered evidence shows that the testimony of Katina, who testified that Janis did not receive government assistance on behalf of C. W., was perjured and knowingly used by the State.

Assuming that appellant has not waived this complaint, *See* TEX. R. APP. P. 33.1(a), appellant has failed to show that C. W.'s receipt of government sponsored day care and Medicaid makes this witness' testimony perjured, much less why or how this information should be imputed to the State. Finding no merit in this contention, appellant's second point of error is overruled.

In his third point of error, appellant complains that he was denied a fair trial where the judge denied him the right to challenge a juror for cause. After the jury was selected and the remaining venire dismissed, a juror complained to the judge about being selected. This juror stated that she had business deadlines that prevented her from serving on the jury, since she would lose money if she served. When the judge refused to disqualify her after this statement, the following exchange occurred at the bench:

Juror:	I have a daughter and I believe everything my daughter says and, you know, that's real hard for me to be fair to this side of it. It's real hard for me. And I'm sorry. That's just my personal opinion. And I'm not saying the guy is guilty. It's going to be hard for me, very hard for me.
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Defense Counsel:	Judge, I ask that you strike for cause since she made that obvious statement that she's going to believe the prosecution. I know the prosecution likes that.
Prosecutor:	She has not said that. She has not. She's already said on the record here that she would not give more credibility to a child than anyone else.
Defense Counsel:	That's before she got picked.
Prosecutor:	She says she believes her child.
Defense Counsel:	Can I ask her?
Prosecutor:	No.
The Court:	You are asking me–are you asking me to find that you would be unfair, that you won't follow the law?
Juror:	No sir. I'm not saying that.
The Court:	You said–you did say–

Juror: I will follow the law. I just–I'm not saying I wouldn't follow the law.

Bias exists as a matter of law when a prospective juror admits that he is biased for or against a defendant. *Anderson v. State*, 633 S.W.2d 851, 854 (Tex. Crim. App. 1982). Here, the juror never said that she would be biased against the defendant, especially in light of the equivocal answers given to the questions posed by the judge. We thus find that this juror was not biased against the defendant as a matter of law.

If a juror is not shown to be biased against the defendant as a matter of law, we review the trial court's decision not to strike the juror under an abuse of discretion standard. *See Perillo v. State*, 758 S.W.2d 56,7 577 (Tex. Crim. App. 1988) (holding that an appellate court must show "great deference ... to the trial court's discretion"). When faced with a vacillating or equivocal venireperson, appellate courts accord great deference to the trial judge who had the better opportunity to see and hear the person. *See Green v. State*, 840 S.W.2d 394, 402 (Tex. Crim. App 1992); *Mooney v. State*, 817 S.W.2d 693, 701 (Tex. Crim. App.1991). The propriety of the trial court's rulings will be reviewed in light of the venireperson's voir dire as a whole.

Here, while the juror admitted it would be hard for her to be fair to appellant, she also stated that she would not be unfair. Based on the juror's statements, we find that the trial court did not abuse its discretion in refusing to strike her.

In appellant's fourth point of error, he claims that he received ineffective assistance of counsel because his attorney opened the door to testimony about extraneous offenses. During his direct examination of Ms. Hale, defense counsel asked the witness questions eliciting testimony that Janis had filed three other prior complaints against appellant for his treatment of C. W. Appellant claims this act constituted ineffective assistance of counsel and resulted in his conviction in the court below.

We review claims of ineffective assistance of counsel based on the two-part test delineated by the U. S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To prevail on this claim, the appellant must show: 1) that his counsel's performance was so deficient that it was outside the range of reasonable professional judgment; and 2) that he was so prejudiced by his counsel's erroneous performance that there is a reasonable probability that the result of trial would have been different without trial counsel's error. *See id*. Appellant must overcome the presumption that the challenged action constituted sound trial strategy. *See Strickland*, 466 U.S. at 689.

Where, as here, the appellant fails to file a motion for new trial alleging ineffective assistance of counsel, appellate courts refuse to speculate as to counsel's trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 77071 (Tex. Crim. App. 1994). Since appellant has failed to overcome the presumption that his trial counsel's actions were sound trial strategy, appellant has failed to meet his burden of proof under the first prong of the *Strickland* test. Further, testimony regarding the extraneous offenses was elicited by the State in its cross-examination of the complainant's mother. This occurred prior to the instance complained of by appellant and is problematic to appellant's claim that his counsel's performance was deficient, since appellant's counsel did not "open the door" to the admission of this testimony. Appellant's fourth point of error is overruled.

Appellant complains in his fifth point of error that the trial judge erred by admitting one of the State's exhibits into evidence. During her testimony, Ms. Hale testified to the contents of a medical report outlining the complainant's physical signs of abuse. This report was prepared after Janis suspected that the complainant had been abused and took her to a hospital for testing. After this testimony about the contents of the report, the State admitted the document into evidence over appellant's objection. Appellant claims that the trial court's admission of this record was erroneous because the predicate was not laid to admit the document as a business record. While we agree with appellant that the documents were

hearsay and it was erroneous for the judge to admit them, any error was harmless. The contents of the documents had already been testified to by the witness and were already in evidence, making their admission harmless. *See Shaw v. State*, 826 S.W.2d 763, 765 (Tex. App.–Fort Worth 1992, pet. ref'd). Appellant's fifth point of error is overruled.

In appellant's sixth point of error, he claims that the evidence was legally and factually insufficient to support his conviction. In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all of the elements of the offense beyond a reasonable doubt. *See Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2789, 61 L.Ed.2d 560 (1979)). Here, the only element in question was the whether or not the defendant committed the crime. The complainant testified that the defendant penetrated her vagina and anus with his finger. Viewing this evidence in the light most favorable to the prosecution, we find the evidence legally sufficient to sustain appellant's conviction.

In reviewing factual sufficiency questions, the court of appeals must view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court accomplishes this objective by viewing all of the evidence adduced at trial, using enough deference to keep the appellate court from substituting its own judgment for that of the fact finder. *See Santellan*, 939 S.W.2d at 164. The appellate court will overrule the fact finder only when its finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *See id.* at 165 (citing *Clewis*, 922 S.W.2d at 135). In addition, appellant must direct the court to the specific portion of the record supporting the complained of error. *See Lape v. State*, 893 S.W.2d 949, 953 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd).

Here, appellant offers no argument, authority, or references to the record in support his contention of factual insufficiency. Rather, appellant relies on the bald assertion that the jury's verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. As such, we find that appellant has waived this issue on appeal by failing to adequately brief his point of error. *See Huerta v. State*, 933 S.W.2d 648, 650 (Tex. App–San Antonio 1996, no pet.); *Maldonado v. State*, 902 S.W.2d 708, 711 (Tex. App.–El Paso 1995, no pet.). Accordingly, we overrule his sixth point of error

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).