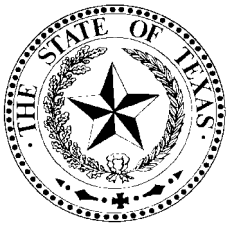
Affirmed and Opinion filed April 13, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00497-CR

GREGORY JOSEPH SCHMIDT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th Judicial District
Galveston County, Texas
Trial Court Cause No. 97CR1031

O P I N I O N

Over his plea of not guilty, a jury found appellant, Gregory Joseph Schmidt, guilty of the felony offense of aggravated sexual assault of a child. *See* TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i)(Vernon Supp. 2000). The jury fixed punishment at twelve years' confinement in the Texas Department of Criminal Justice, Institutional Division and a $3,000.00 fine. Appellant appeals his conviction on five points of error. We affirm the trial court's judgment for three reasons: (1) legally and factually sufficient evidence supports appellant's conviction; (2) the trial court did not err in consolidating appellant's prosecution

cases; and (3) appellant failed to demonstrate that he received ineffective assistance of counsel at trial.

FACTUAL BACKGROUND

Labrada spent the night at appellant's trailer, where appellant, Suma , and Suma's son, Mark, lived together. That evening, Suma went to sleep very late, and Mark and Labrada were still awake, playing in the living room. Suma shouted several times for the children to go to sleep. When she awoke early in the morning, she found appellant in the living room, sleeping next to Mark and Labrada under the same blanket. She became very nervous when she saw appellant next to them, and she lifted the blanket and slapped appellant to wake him. After she lifted the blanket, she thought she saw appellant's hands on Labrada, but she was not sure if his hands were inside her underpants. When Suma told appellant that he was a "sick man," appellant blurted out several expletives and said that he did not know what he was doing.

Both children made statements explaining what happened that night. Labrada received a medical exam, and told the physician that appellant hurt her when he put his hand inside her underpants. At trial, Labrada testified that the area near her front leg hurt the next morning when she awoke. She explained that her shorts were buttoned when she went to sleep that night, but were unbuttoned the next morning. She did not unbutton her shorts herself. She also said that appellant apologized to her the next morning. However at trial, Labrada testified that all she knew about the incident was what Suma had told her, that appellant touched her.

Suma talked to her son, Mark, about what happened. When Suma asked Mark if appellant touched him, he said appellant touched him on his "ding-ding." After asking Mark questions designed to determine if he was competent to testify, the court deemed him incompetent to testify because he lacked the intellect to understand questions at trial.

The State called other witnesses in addition to Labrada. Trudy Davis, director of the Children's Advocacy Center, testified about her experiences with children who have been sexually abused. Joy Blackman, a physician's assistant examined Labrada and testified about her findings and the statements Labrada made during the examination; her findings were consistent with digital penetration. The pediatrician who examined Labrada also testified that there was evidence of a penetrating injury.

DISCUSSION AND HOLDINGS

Legal and Factual Sufficiency of the Evidence

In his first three points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction for aggravated sexual assault. Specifically, he argues that the State did not present sufficient evidence that he intentionally penetrated or contacted Labrada's female sexual organ. We disagree.

When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. Instead, we consider all the evidence equally, including the testimony of defense witnesses and the existence of alternative hypotheses. *See Orona v. State*, 836 S.W.2d 319, 321 (Tex.App.—Austin 1992, no pet.). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence

as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App.1996).

Sexual assault is proven when the State shows that the defendant "intentionally or knowingly causes the penetration of the anus or female sexual organ of a child by any means." TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i)(Vernon Supp. 2000). Penetration of the female sexual organ may be proven circumstantially. *See Nilsson v. State*, 477 S.W.2d 592, 595 (Tex. Crim. App. 1972). Circumstantial evidence is no less trustworthy or less probative than direct evidence. *See Jiminez v. State*, 953 S.W.2d 293 (Tex. App.—Austin 1997, no pet.). The victim need not testify as to penetration. *See Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990). However, a sexual assault victim's testimony alone is sufficient evidence of penetration. *See Cagle v. State*, 976 S.W.2d 879, 880 (Tex. App.—Tyler 1998, no pet.) (citing *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. [Panel Op.] 1978)).

The jury is the sole judge of the facts, the witnesses' credibility, and the weight to be given the evidence. *See Clewis*, 922 S.W.2d at 129; *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Therefore, the jury may choose to believe or disbelieve any portion of the witnesses' testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Contradictions or conflicts between the witnesses' testimony do not destroy the sufficiency of the evidence; rather, they relate to the weight of the evidence, and the credibility the jury assigns to the witnesses. *See Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). The jury exclusively resolves conflicting testimony in the record. *See Heiselbetz v. State*, 906 S.W.2d 500, 504 (Tex. Crim. App. 1995). A reviewing court may not substitute its conclusions for that of the jury, nor may it interfere with the jury's resolution of conflicts in the evidence. *See Heiselbetz*, 906 S.W.2d at 504.

Here, we have circumstantial evidence from both the victim and other witnesses which proves that appellant intentionally penetrated Labrada's female sexual organ.

Labrada testified at trial that appellant hurt her, and the area by her front leg hurt the next morning when she awoke next to the appellant. She also told the court her shorts were buttoned when she went to sleep, that she awoke with her shorts unbuttoned, and that she did not unbutton them. She also stated that appellant apologized to her the next morning. Joy Blackman, the physician's assistant who examined Labrada, testified that Labrada's genital area on the hymen had an abrasion and some bleeding beneath the skin. During her examination, Labrada told Blackman that appellant put his hand inside her underpants and inside her private parts, and that she had a pain where appellant put his hand inside her private area. Blackman concluded that Labrada's injuries are consistent with a digital penetration injury of the genitals.

Appellant argues that the evidence is insufficient to prove penetration because Labrada's testimony at trial is inconsistent with the statements she made to Joy Blackman. Appellant also argues the State presented no evidence that he knowingly or intentionally committed the act because he was asleep at the time of the incident. At trial, Labrada testified that all she knew about the incident was what Suma had told her, that appellant touched her. Suma testified that when she discovered appellant under the blanket with the Labrada and Mark, appellant was asleep. However, conflicting testimony does not destroy the sufficiency of the evidence, and, as noted earlier, the element of penetration can be circumstantially proved by the evidence. *See Weisinger*, 775 S.W.2d at 429.

Viewing this evidence in the light most favorable to the jury's verdict, we believe that a rational trier of fact could infer beyond a reasonable doubt that appellant intended to penetrate Labrada's female sexual organ. We also believe the jury's decision was not so contrary to the weight of the evidence as to be clearly wrong and unjust. Thus, we find the evidence both legally and factually sufficient to sustain appellant's conviction for aggravated sexual assault of a child and overrule appellant's first three points of error.

Consolidation of Prosecutions

In his fourth point of error, appellant contends that the trial court erred in joining Labrada's and Mark's cases for trial because the State failed to give appellant thirty days' notice as required by TEX. PEN. CODE ANN. § 3.02(b) (Vernon 1994). This section of the Penal Code provides a defendant with thirty days' notice that the State is going to proceed in a single trial on more than one indictment, so that the defendant may have time to decide whether he wants separate trials. *See* TEX. PEN. CODE ANN. § 3.02(b); *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). However, the notice requirement is merely procedural, and a defendant can waive it either affirmatively or by inaction. *See LaPorte*, 840 S.W.2d at 414. Although the record does not reflect that the State gave appellant thirty days' notice, appellant waived any complaint by failing to object before trial. *See York v. State*, 848 S.W.2d 341, 343 (Tex. App.—Texarkana 1993, pet. ref'd) (holding appellant waived error under article 1.14 of the Texas Code of Criminal Procedure by failing to object to State's failure to give appellant proper notice of the consolidation of the two indictments into a single trial). We, therefore, overrule his fourth point of error.

Ineffective Assistance of Counsel

In his fifth point of error, appellant contends that he was denied effective assistance of counsel at trial. He argues that counsel was ineffective for three reasons: (1) trial counsel failed to object to the qualifications of the witness, Trudy Davis, as an expert; (2) trial counsel failed to object when Mark and Labrada's cases were consolidated for trial; and (3) trial counsel failed to effectively cross examine witnesses and object to Joy Blackman's opinion testimony. Again, we disagree.

For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Hernandez*, 726 S.W.2d at 55.

Appellant carries the burden to prove his trial counsel was ineffective by a preponderance of the evidence. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 688-89; *Thompson*, 9 S.W.3d at 813. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in the record. *See Thompson*, 9 S.W.3d at 813-14. The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet ref'd). As we explain below, appellant has not met his burden.

First, appellant contends that Trudy Davis was allowed to testify without objection to her experience with child sexual abuse victims. Davis testified about her many years' experience and training working with children who have been sexually abused: she has been the director of a Children's Advocacy Center since it opened several years ago, she was a sexual abuse supervisor at Children's Protective Services for eighteen years, and she was a criminal investigator in Galveston County for two years. Davis is also a licensed peace officer with a bachelor's degree in sociology and criminal justice. During each of these experiences, Davis received training in the dynamics of child abuse and development and has interviewed many sexually abused children. She explained how child sexual abuse victims feel embarrassed and guilty, change their stories, and tell different details about the abusive events. She also explained that children will often retract their stories after a traumatic event happens, such as visiting a doctor after they have been sexually abused.

A trial court has discretion whether to allow a witness to testify as an expert. *See Steve v. State*, 614 S.W.2d 137, 139 (Tex. Crim. App. 1981). If a witness has scientific, technical, or other specialized knowledge that will assist the trier of fact and is qualified as

an expert by knowledge, skill, experience, training, or education, that witness may testify about his or her opinions. *See* TEX. R. EVID. 702. Moreover, when a witness is an expert in a social science or a field that is based primarily on experience and training, we apply a less rigorous reliability test to the witness' theory than we apply to a witness' theory in a hard science. *See Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998). When addressing fields of study aside from the hard sciences, we ask the following questions: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *See id.*

Applying these factors to Davis' testimony, the Texas Court of Criminal Appeals has acknowledged research concerning the behavior of sexually abused children as a legitimate field of expertise. *See Cohn v. State*, 849 S.W.2d 817(Tex. Crim. App.1993) (recognizing types of expert knowledge concerning the behavioral characteristics typically exhibited by sexual abuse victims). Davis testified that her analysis was based on her many years' education, training, and experience in personally working with sexually abused children. The reliability of Davis' testimony was sufficiently established under Rule 702, and therefore, the trial court would have appropriately overruled such an objection. In short, appellant has not shown that an objection to Davis' qualifications would have been sustained, and appellant has not shown that counsel's failure to object to her qualifications constitutes ineffective assistance.

Second, appellant contends that his trial counsel was ineffective because he failed to object when the State did not give 30 days' notice before consolidating the cases involving Labrada and Mark for trial. However, appellant's claim is not firmly founded and affirmatively demonstrated in record; the record is silent as to why appellant's trial counsel failed to object to the consolidation of the cases. Appellant's counsel may reasonably have concluded that consolidating the cases into one trial was a sound strategy because appellant might have a more difficult time avoiding a conviction in two separate trials; appellant also

might have wanted to avoid the time and agony of an additional trial. Moreover, appellant may have initially planned to testify at the guilt-innocence phase of trial. If so, appellant's trial counsel might have decided not to object because any testimony regarding Mark's assault may have been admissible to rebut appellant's testimony. *See Creekmore v. State*, 860 S.W.2d 880, 892 (Tex. App.—San Antonio 1993, pet. ref'd) (holding that trial courts may properly admit extraneous offense evidence when the door is opened by direct defense testimony or when the evidence is admissible to rebut a defensive theory).

In short, we cannot speculate why appellant's trial counsel chose not to object when the State failed to give 30 days' notice before consolidating Labrada's and Mark's cases for trial. No motion for new trial was filed, so the record does not reveal why counsel acted as he did. As the Court of Criminal Appeals has noted, it is almost impossible to obtain a reversal for actions taken by trial counsel, or for counsel's failure to act, without some reflection in the record of the reasons for the actions. *See Jackson*, 973 S.W.2d at 957; *see also Kemp*, 892 S.W.2d at 115 (holding that a record is best developed in the context of a hearing on application for writ of habeas corpus or motion for new trial). Thus, appellant has failed to rebut the strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *See Thompson*, 9 S.W.3d at 813.

Third, appellant argues that his defense counsel failed to effectively cross-examine the state's witnesses and object to Joy Blackman's testimony. However, appellant does not direct the court to any specific portion of the record that supports his argument that counsel did not effectively cross-examine witnesses. Additionally, he fails to cite to any authority for either argument. Because these issues were not properly briefed, we need not address them. *See* Tex. R. APP. P. 38.1(h).

A reviewing court must examine the adequacy of counsel's assistance based upon a totality of the representation. *See Johnson v. State*, 614 S.W.2d 148, 149 (Tex.Crim.App. [Panel Op.] 1981). After reviewing the record and appellant's arguments, we hold that appellant has not met his burden to show that he received ineffective assistance of counsel.

Accordingly, his fifth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 13, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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