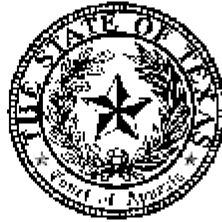
Affirmed and Opinion filed May 3, 2001.



In The

Fourteenth Court of Appeals

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NOS. 14-98-01437-CR &14-98-01438-CR

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PHILISTER STARLING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause Nos. 775,945 & 783,375

O P I N I O N

Philister Starling appeals his jury conviction for two aggravated sexual assaults on his son, P.S. The jury assessed his punishment in each case at life imprisonment and a $10,000.00 fine. In one point of error, appellant contends his trial counsel was ineffective for failing to properly object to the admission of extraneous bad acts. We affirm.

FACTS

When appellant's son, P.S., was four or five years old, appellant forced him to have anal and oral sex with him while his mother, Priscilla, was working. On each of these numerous occasions, appellant would dress in Priscilla's clothes, then put P.S. on the bed, pull his pants

down, and then sexually assault him. Appellant told P.S. not to tell anybody and this would be their "secret." After about one year of these repeated assaults, Priscilla stopped working at night, and thereafter, appellant did not sexually assault P.S.

Appellant and Priscilla separated in July 1994, and divorced in 1995. Malcom Himes met Priscilla in June 1994, and later started living with her. Himes noticed that P.S. seemed withdrawn, and was doing poorly in school. When P.S. was in the ninth grade, Himes noticed that P.S. would suck his thumb, masturbate, and dress in women's clothing. Himes talked to P.S. about this behavior, and P.S. initially said nothing. Later, P.S. told Himes that "it was a secret." Finally, in November 1997, P. S. told Himes that appellant had sexually abused him. Malcolm then took P. S. to Priscilla, in the next room, and P.S. told her about appellant's repeated sexual assaults when he was four or five-years-old. Priscilla asked P.S. why he had not told her about this before. P. S. told her that appellant told P.S., not to tell anybody, and appellant called it "the secret."

Dr. Robin Williams, a physician at the University of Texas-Houston Medical School, examined P.S. to determine if he had been sexually abused. P.S.'s physical examination was normal. P.S. told Dr. Williams that appellant had sexually assaulted him. Based on his overall examination of P.S., Dr. Williams stated that P.S. had "probably been a victim of sexual abuse."

Dr. Robert McClaughlin, a clinical psychologist, interviewed P.S. at Priscilla's request. P.S. told Dr. McClaughlin the history of his father's repeated sexual assaults when P.S. was four or five-years-old. During the interview, Dr. McClaughlin stated he observed several characteristics in P.S. that are consistent with a child victim of sexual abuse. He stated that P.S: (1) appeared to be "hypervigiliant," and was always "scanning the environment" for possible risks; (2) had difficulty concentrating; and (3) had difficulty in school. Dr. McClaughlin stated that Priscilla's reports of P.S. playing with his penis, wearing female clothes, and his delay in the outcry, were consistent with a child victim of sexual abuse.

Appellant did not testify, and he presented a number of witnesses to testify in his defense. Mr. Lavell Whitiker knew appellant for twenty years. He stated that P.S. was a little

"slow," and never told him anything about his father's sexual assaults. Dr. Lynn Chapeski testified that she treated P.S. in 1991, and she did not discover any evidence of sexual abuse. She stated that P.S. had an attention deficit disorder and low intelligence. John Roberts, a school psychologist, testified that although Priscilla told him that she suspected appellant had sexually abused P.S., she had no proof. P.S. did not say anything to Roberts in this 1995 interview about appellant's sexual abuse. Roberts stated that P.S.'s symptoms were consistent with a child that was a sexual abuse victim. Roberts did not report it to the authorities. Priscilla's grandmother, Irene Malone, stated that Priscilla brought some pornographic material she had found in appellant's dresser to her for safekeeping.

THE EXTRANEOUS BAD ACTS

In his sole point of error, appellant contends his trial counsel was ineffective because he did not properly object to the introduction into evidence of pornographic magazines and cards that Priscilla found in his dresser drawer. Appellant asserts that the evidence was highly prejudicial, and trial counsel should have objected that the evidence was not relevant and in violation of rule 404(b) because the State was trying to prove appellant's character by showing other bad acts and that he was acting in conformity therewith. Appellant contends that trial counsel should have objected and followed the procedure required in *Montgomery v. State,* 810 S.W.2d 372 (Tex.Crim.App. 1990) when improper extraneous bad acts are offered to prove a person's bad character and conformity therewith.

On direct examination by the State, Priscilla identified two decks of cards that showed men having sex with other men and two magazines showing men dressed in women's clothes having sex with other men. When the State first showed the material to Priscilla, she tentatively identified them as "some cards and some magazines I found in my ex-husband's drawer." Appellant's trial counsel objected and asked to "take the witness on voir dire." He then stated: "[W]hat she's testifying to now is not relevant to anything my client may have done. It's something that she has brought and given to the D.A. and claimed he has done." The trial judge then asked if appellant's counsel had any objections, and that she "will be glad to rule on

them." At this point, appellant's trial counsel said: "[M]y objection is – go ahead, Judge. I will wait for cross." Thereafter, the State asked Priscilla to identify the material, and appellant's trial counsel objected to the failure to connect appellant to the material because Priscilla did not know who put the material in the dresser. The trial judge asked Priscilla if she put them there and if anybody else had access to it. She answered "no" to both questions. The State then offered the material into evidence, and appellant's counsel further objected that "there is nothing to corroborate that these magazines belonged to anybody other than her testimony." The trial court overruled appellant's objection and admitted the pornographic material into evidence.

Appellant's only objection to the evidence was that the State failed to establish that the pornographic material was his. Appellant's trial counsel argued to the jury that anyone could have put the cards and magazines in the drawer because it was unlocked. There is nothing in the record to indicate why trial counsel did not make a relevancy objection under rule 401, Texas Rules of Evidence, to the cards and magazines.

When handed the task of determining the validity of a defendant's claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Thompson v. State*, 9 S.W.3d 808, 813-814 (Tex. Crim. App. 1999). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994).

In this case, the record fails to rebut this strong presumption of reasonable counsel. A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. *Thompson,* 9 S.W.3d at 813-814. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. *Id.* In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately

reflect the failings of trial counsel. *Id.* To defeat the presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id.* "Indeed in a case such as this, where the alleged derelictions primarily are errors of omission de hors the record rather than commission revealed in the trial record, collateral attack may be the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record." *Id.*

Appellant did not file a motion for new trial and request a hearing to question his trial counsel. The record is silent as to why appellant's trial counsel objected to the evidence on failure to prove appellant's ownership of the pornographic material rather than on relevancy grounds. Therefore, appellant has failed to rebut the presumption this was a reasonable decision. "Failure to make the required showing of . . . deficient performance . . . defeats the ineffectiveness claim." *Strickland v. Washington*, 104 S.Ct. at 2071. Appellant's counsel may have considered it good trial strategy not to object on relevancy grounds, and instead objected that there was no proof that the material was his. Without anything in the record to affirmatively show trial counsel's reasons for his actions, appellant has not demonstrated that his trial counsel was ineffective. We overrule appellant's sole point of error asserting his trial counsel was ineffective for improperly objecting to evidence.

We affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed May 3, 2001.

Panel consists of Justices Sears, Draughn, and Hutston-Dunn.[*]

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

[*] Senior Justices Ross A. Sears, Joe L. Draughn, and D. Camille Hutston-Dunn sitting by assignment.