Affirmed and Opinion filed November 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00981-CR

CHARLES LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 839,211

O P I N I O N

Appellant, Charles Lopez, appeals his conviction for the offense of sexual assault. *See* TEX. PEN. CODE ANN. § 22.011(a)(1)(A) (Vernon Supp. 2001). In two points of error, appellant complains the evidence is legally insufficient to support his conviction and alleges he received ineffective assistance of counsel at trial. We affirm.

Background and Procedural History

On April 17, 1999, the complainant was stranded outside a convenience store when

appellant and Freddie Guajardo pulled up. The complainant knew Guajardo from the neighborhood but did not know appellant. The two men gave her fifty cents to make a phone call and told her they would come back later to check on her and give her a ride if she was still there. About 45 minutes later the two men returned and offered the complainant a ride. They then asked if she would like to go "party," and she agreed to go with them to appellant's house to smoke crack cocaine and drink beer. After they finished smoking crack cocaine, Guajardo left the house.

According to the complainant's testimony, she again called for a ride from appellant's house and became upset when no one would pick her up. She testified that appellant approached her, took the phone out of her hands, and said, "you can try and call him later." Appellant then hugged her, but she told him she did not need a hug. She testified that appellant stated, "I can't help it. I'm attracted you. You have something I want." At this point, the complainant was scared and tried to leave. When she repeatedly attempted to get up from the couch, appellant pushed her back, and ultimately placed one hand on her throat and removed her clothes with the other hand. The complainant testified that she cried and begged appellant to stop but that he tightened his grip on her throat and told her to shut up. The sexual assault lasted about ten minutes, ending when appellant ejaculated inside her.

The complainant testified that after the sexual assault, appellant's parents returned. She said that as appellant's parents approached, appellant placed his hands on the back of the complainant's neck and told her to shut up as she and appellant left the house. She testified she was sitting outside in the grass crying when Guajardo returned. She told Guajardo that appellant had raped her, and Guajardo walked with the complainant back to the convenience store to call the police.

Two officers testified about the complainant's condition when police and emergency medical services responded to the call. Officer Michael J. Parrie of the Houston Police Department said that the complainant was "crumpled in a ball, in a fetal position, crying

hysterically." He said that the complainant was visibly upset and had some red marks on her throat. Captain James Tryon of the Houston Fire Department testified that the EMS report also noted the presence of "obvious redness to [the complainant's] neck."

Appellant was arrested and later charged with and convicted by a jury of sexual assault. The jury assessed punishment at sixty years' confinement, enhanced by two prior felony convictions. This appeal followed.

Legal Sufficiency

In his first point of error, appellant claims the evidence is legally insufficient to support his conviction for sexual assault. When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89 (1979); *Cardenas v. State*, 30 S.W.3d 384, 389 (Tex. Crim. App. 2000). If a reviewing court determines the evidence is insufficient under the *Jackson* standard, it must render a judgment of acquittal because if the evidence is insufficient under *Jackson*, the case should never have been submitted to the jury. *See Jackson*, 443 U.S. at 318-19, 99 S.Ct. at 2788-89. In a legal sufficiency challenge, we do not re-weigh the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

A person commits the offense of sexual assault if they intentionally or knowingly cause the penetration of another's sexual organ without consent. *See* TEX. PEN. CODE ANN. § 22.011(a)(1)(A) (Vernon Supp. 2001). Appellant admitted to having sexual intercourse with the complainant and admitted that his semen was taken from her. Therefore, the only issue for the jury to determine was consent. The assault was without consent if appellant compelled the complainant to submit to the sexual intercourse by the use of physical force or violence. *See id*. § 22.011(b)(1).

In this case, the jury heard the complainant testify that the sexual intercourse was not consensual. She testified that appellant squeezed her throat during the assault, and she described the force appellant used against her and the injuries he inflicted. Several witnesses at the scene described the complainant as visibly shaken with red marks on her neck and face. In addition, the jury heard the testimony of medical personnel and saw hospital records that corroborated the complainant's account of the events.

While acknowledging that an appellate court does not re-evaluate the credibility of the witnesses, appellant argues that the complainant's testimony was so unbelievable that this court should disregard that rule. We disagree. In a jury's determination of guilt and innocence, the weight of credibility to be given to each witness is "within the exclusive province of the jury." *See Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000). The jury was able to see and hear all of the witnesses as they related the events that occurred. Further, the jury heard the corroborating police testimony and medical evidence that supported the complainant's version of a physical assault that left red marks on her face and neck. Where there is sufficient evidence to support the jury's verdict, we will not second guess their determination of the witnesses' credibility.

After viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the offense of sexual assault beyond a reasonable doubt. Accordingly, appellant's first point of error is overruled.

Ineffective Assistance of Counsel

In his second point of error, appellant claims that his trial counsel was ineffective because she failed to move for an instructed verdict at the close of the State's case.

The standard for determining claims of ineffective assistance under the Sixth Amendment is the standard adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The Court of Criminal Appeals adopted

the *Strickland* standard in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To prevail on a claim of ineffective assistance an appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for his trial counsel's errors, a different outcome would have resulted. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). The review of counsel's representation is highly deferential and we must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable representation. *McFarland*, 928 S.W.2d at 500. Appellant bears the burden of overcoming that presumption. *Id*. Appellant must identify the acts or omissions allegedly constituting ineffective assistance and must prove that these acts fall below the professional norm for reasonableness. *Id*.

Appellant must also affirmatively prove prejudice. *Id.* Appellant must prove that the errors, judged by the totality of the representation, rather than by isolated instances of error, denied him a fair trial. *Id*. It is not sufficient for appellant to show that the errors had some conceivable effect on the outcome of the proceedings. *Id*.

The failure of appellant to make the required showing of deficient representation or sufficient prejudice defeats an ineffective assistance claim. *Id*. Appellant must also present a record supporting the claim of ineffective assistance of counsel and "in the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy *Strickland*." *Thompson v. State*, 9 S.W.3d 808, 814 n.6. (Tex. Crim. App. 1999).

Here, appellant claims that his trial counsel was ineffective because she failed to move for an instructed verdict. Appellant filed a motion for new trial, but we find no evidence in the record of any hearing where appellant inquired into trial counsel's strategy or the lack thereof. Without such proof, we presume trial counsel's conduct and decisions were reasonable. *Id*. at 814. The fact that appellant's counsel on appeal would have moved for an instructed verdict does not show ineffective assistance of trial counsel. *See Flanagan*

v. State, 675 S.W.2d 734, 747 (Tex. Crim. App. 1984); *Cheak v. State*, 757 S.W.2d 172, 173 (Tex. App.—Amarillo 1988, no pet.). Furthermore appellant neglects to set forth a valid basis for an instructed verdict, and the record does not reflect an instructed verdict would have been appropriate. *Gonzales v. State*, 732 S.W.2d 67, 68 (Tex. App.—Houston [1st Dist.] 1987, no pet.). As stated above, the evidence here is sufficient to support the jury's finding that appellant committed sexual assault, and counsel's decision not to request an instructed verdict after the admission of sufficient evidence does not render counsel ineffective. *See McGarity v. State*, 5 S.W.3d 223, 229 (Tex. App.—San Antonio 1999, no pet.); *Jenkins v. State*, 870 S.W.2d 626, 630 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Accordingly, appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 1, 2001.
Panel consists of Justices Yates, Edelman, and Wittig.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.