Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00825-CR & 14-98-00826-CR

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FRANK GLENN THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 773,570 & 773,571

O P I N I O N

Appellant, Frank Glenn Thomas, pleaded not guilty to two counts of aggravated sexual assault of a child under the age of fourteen. See TEX. PEN. CODE ANN. § 22.021 (Vernon 1993). He was convicted and the jury assessed punishment at forty-five years' confinement for each count. We have consolidated the cases for disposition. Appellant asserts five points of error. In his first two points, he contends that his trial counsel did not render effective assistance. In his remaining points of error, appellant asserts that the trial court erred by overruling his objection to inadmissible character evidence, by permitting the jury to remain

in the courtroom during plea negotiations, and by failing to grant a mistrial after the court properly sustained his objection. We affirm.

Appellant had vaginal intercourse with his eleven year old daughter on several occasions. The sexual abuse began in the summer of 1994, and occurred periodically until the fall of 1997. Appellant told his daughter not to tell anyone because he could go to jail. In December 1997, she told her younger brother that their daddy was a rapist. When her mother heard about this comment, she questioned her daughter. The child then admitted that her father had sexually abused her. She was taken to the hospital for a physical exam. The examination was consistent with sexual abuse. Appellant was arrested and charge with aggravated sexual assault.

In his first point of error, appellant contends that he was denied effective assistance of counsel at the guilt/innocence phase of trial. Appellant cites eleven instances during the trial in which counsel rendered ineffective assistance. We will discuss each instance in turn.

For counsel to be ineffective at the guilt/innocence phase of trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires a defendant to show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) the probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App.1999).

In looking at these requirements, a court is to keep in mind that the right to counsel does not guarantee an error-free counsel or counsel whose competency is judged by hindsight. *See Hernandez v. State*, 726 S.W.2d 53, 58 (Tex. Crim. App.1986). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id*.

In the first instance, appellant claims that his trial counsel failed to investigate the facts, failed to seek out and interview potential witnesses, and failed to interview and prepare testifying defense witnesses.

Counsel has a duty to independently investigate the facts of the case. *McFarland v. State*, 928 S.W.2d at 501. We assess counsel's decision not to investigate for reasonableness under all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id*. We will not reverse a conviction unless the consequence of the failure to investigate "is that the only viable defense available to the accused is not advanced [,]" *Ex parte Duffy*, 607 S.W.2d 507, 517 (Tex. Crim. App. 1980) (plurality opinion), and "there is a reasonable probability that, but for counsel's [failure to advance the defense], the result of the proceeding would have been different." *Strickland*, supra, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; *McFarland*, 928 S.W.2d at 501.

In his motion for new trial, appellant elicited testimony to establish a promiscuity defense, to discredit the State's medical evidence, and to show that the witnesses were not properly prepared to testify. Appellant called three witnesses during the motion for new trial. Each stated that they were not properly prepared to testify. One of the witnesses, Jackie Kirkpatrick, claimed that the complainant became sexually active prior to the alleged sexual abuse from appellant. There was also evidence that the complainant had a venereal disease, which appellant claims would rebut the State's medical evidence.

None of this evidence, however, would have been admissible at appellant's trial. Kirkpatrick's testimony about the complainant's sexual promiscuity is inadmissible under TEX. R. EVID. 412(a). Any testimony regarding the venereal disease would not have been admissible under TEX. R. EVID. 412(b)(1) because the record does not show how the disease was acquired, or that the acts occurred before the sexual assault. *Rankin v. State*, 821 S.W.2d 230, 233 (Tex. App.–Houston [14th Dist.] 1991, no pet.). Finally, the record does not show that prior preparation with these witnesses would have made any difference in appellant's defense.

In the second, third, fourth, fifth, sixth, and seventh instances, appellant argues that his trial counsel failed to object to inadmissible evidence, including appellant's (1) extramarital affair, (2) failure to pay child support, (3) demand for paternity testing on his children, (4) charging his wife to babysit his own children, (5) poor work habits and use of cocaine, and (6) other hearsay evidence. The record is silent as to why appellant's trial counsel did not object to this evidence.

Because the record contains no evidence to explain trial counsel's alleged acts of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). Therefore, appellant has failed to rebut the presumption this was a reasonable decision. *See Thompson v. State*, 1999 WL 812394, *5 (Tex. Crim. App.).

In the eighth instance, appellant claims that his counsel was ineffective when trial counsel introduced evidence of appellant's reputation as a law abiding citizen, opening the door for the State to introduce evidence of appellant's extraneous offenses.

Appellant's sister testified to appellant's reputation. The State than introduced several specific instances to rebut her testimony. Appellant's trial counsel testified in the motion for new trial. He said that he informed appellant that evidence of prior crimes could become admissible if his sister testified about his reputation. Appellant still wanted her to testify, even though his counsel insisted that she should not take the stand. Appellant was informed of the risk of allowing his sister to testify, but chose to disregard his counsel's advice. After considering this evidence, we find that appellant has not defeated the 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, 877 S.W.2d at 771.

In the ninth instance, appellant argues that a conflict of interest existed between him and his trial counsel because his trial counsel was not compensated for his work. During the

motion for new trial, appellant's trial counsel said that he had not been paid for his work, but that had not effected his representation of appellant.

When a conflict of interest is alleged, *Strickland* requires the appellant to show "that defense counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Banda v. State*, 890 S.W.2d 42, 60 (Tex. Crim. App. 1994). An "actual conflict of interest" exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest. *James v. State*, 763 S.W.2d 776, 779 (Tex. Crim. App.1989). We find nothing in the record to show that appellant's counsel was engaged in an actual conflict of interest or represented conflicting interest of the appellant. The fact that trial counsel was not paid, in and by itself, is not sufficient to show a conflict of interest.

In the final instance, appellant complains that his counsel engaged in plea negotiations in front of the jury. During the trial, trial counsel asked the judge to remove the jury. The judge overruled his request. Counsel then asked to approach the bench. The record shows that Appellant's trial counsel and the prosecutor approached the bench. The following conversation ensued:

Appellant's counsel:	We'll take the 12.
Prosecutor:	I'm ready to go. I want to keep going.
Court:	I'm really not inclined to take a plea agreement after –
Prosecutor:	You didn't get to hear all the testimony
Appellant's counsel:	Okay.

Appellant and his sister, Tanya Richard, said that they overheard this conversation. The trial judge said that no plea bargain was discussed in the presence of the jury. There is no evidence in the record to indicate that any of the jurors overheard plea negotiations. Without any evidence to confirm that the jury had overheard plea negotiations, we are unable to conclude

that appellant's trial counsel's performance was deficient. *Jackson*, 877 S.W.2d at 771; *Osorio*, 994 S.W.2d at 253.

Having addressed all of appellant's concerns, we overrule appellant's first point of error.

In his second point of error, appellant argues that he received ineffective assistance from counsel in the punishment phase. The proper format for deciding claims of ineffective assistance of counsel in the punishment phase of a non-capital trial is also the *Strickland* two-prong test.[1] *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). Specifically, appellant complains that his trial counsel failed to object to the State's closing argument. He claims that the following statements were improper:

> . . . cause he hasn't been concerned about that in the past especially his first four children. He let that mother work two jobs to support her children. He let her go on government assistance to support her children. And then when the State comes back and says they're your children too you have to pay for them what does he have the audacity to do? Prove it. Just like he's done here. Prove it. He invokes the system. Puts his children through that.

However, the record is silent as to why appellant's trial counsel did not object to the prosecutor's closing argument. Again, the record is undeveloped and does not adequately reflect the failings of trial counsel. *Jackson*, 973 S.W.2d at 957. We hold that appellant failed to defeat the presumption of reasonable professional assistance. Moreover, the statement was a proper summation of the evidence. *Hughes v. State*, 878 S.W.2d 142, 157-158 (Tex. Crim. App. 1992). We overrule appellant's second point of error.

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[1] In *Hernandez*, the Court of Criminal Appeals reconsidered whether the standard set forth in *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980), and *Ex parte Cruz*, 739 S.W.2d 53 (Tex. Crim. App. 1987), should continue to determine ineffectiveness of counsel claims in noncapital sentencing proceedings. The court stated that the *Duffy* standard essentially is the first prong of the *Strickland* standard. Therefore, under *Duffy*,defendants are not required to prove prejudice. *See Hernandez*, 988 S.W.2d at 770-771. The court went on to hold that the two-prong standard from *Strickland* should be used instead in both the guilt/innocence and punishment phases of trial. *See id.* at 771-72.

In his third point of error, appellant complains that the trial court erred in overruling appellant's objection to the complaining witness's testimony concerning appellant's extramarital affair. Appellant has failed to preserve this complaint for review.

Appellant's daughter testified that she knew appellant had a girlfriend. Appellant told her not to tell her mother about this affair. Prior to the testimony, appellant's trial counsel objected on the grounds "that it goes to his insistence and fear of her about [the girlfriend]." On appeal, appellant argues that the testimony is not relevant, and unfairly prejudicial.

To preserve error for appeal, a defendant's objection on appeal must comport with his objection in the trial court. TEX. R. APP. P. 33.1; *Knox v. State*, 934 S.W.2d 678, 687 (Tex. Crim. App.1996). Appellant's trial objection in no way specifically alerted the trial judge to the alleged error of which he now complains. Moreover, prior to this testimony, the record shows that appellant had children with his girlfriend while he was still married. This evidence was not objected to. Any error is cured where the same evidence comes in elsewhere without objection. *Hernandez v. State*, 914 S.W.2d 226 (Tex. App.–Waco 1996, no pet.). Appellant's third point of error is overruled.

In his fourth point of error, appellant contends that the trial court erred in permitting the jury to remain in the courtroom during plea bargaining discussions pursuant to TEX. R. EVID. 410. Appellant did not object to these statements, and in fact, initiated the discussion. Appellant has failed to preserve error on appeal. TEX. R. APP. P. 33.1. We overrule appellant's fourth point of error.

In his fifth point of error, appellant contends that the trial court erred in failing to grant his motion for a mistrial. The State called Officer Clark to testify as an expert in human fabrication and in the psychology of human behavior. During Clark's examination, the following exchange took place:

> Prosecutor: In this case were there any things concerning the statements that were provided the results of medical examination, anything that concerned you, concerning the validity of the allegations in this case?

Clark: No ma'am

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Mr. Mock: I re-urge my former objection and he still has not been qualified as an expert to testify.

The trial judge sustained the appellant's objection, instructed the jury to disregard the statement, and denied appellant's motion for mistrial.

A mistrial is warranted only in extreme conditions and ought be exceedingly uncommon when an objection is sustained and curative instructions given. *See Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App.1996). An instruction to disregard the argument generally cures any error. *Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App.), *cert. denied*, --- U.S. ----, 116 S.Ct. 106, 133 L.Ed.2d 59 (1995). We hold that the trial court's instruction cured the State's error. Appellant's fifth point of error is overruled.

The judgment is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed December 23, 1999.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.[**]

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

[**] Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.