Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00894-CR

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NORADINO GARCIA ANDRADE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 775,392

O P I N I O N

Noradino Garcia Andrade was convicted by a jury of sexual assault of a child and assessed sixteen years confinement. Specifically, he was alleged to have committed the assault by inserting his finger into his stepdaughter's vagina. He raises three issues on appeal: (1) the court erred in not *sua sponte* directing a verdict of acquittal because the State failed to prove the crime occurred in Texas; (2) the evidence was legally insufficient to prove an element of the charged offense; and (3) he did not receive effective assistance of counsel. We affirm.

I. Jurisdiction

Appellant first points out that under TEX. PEN. CODE § 2.01, the State is required to prove every element of the crime beyond a reasonable doubt. He argues that because there was no proof at trial that the offense occurred in the state of Texas, the prosecution failed to prove a jurisdictional element. Because of this, he claims the court abused its discretion in not directing a verdict of acquittal at the close of the State's evidence.

Jurisdiction, like any other requisite of an offense, can be proven circumstantially. *Vaughn v. State*, 607 S.W.2d 914, 920 (Tex. Crim. App. 1980). References to places known to be in Texas represent ample evidence on which the jury could base its verdict. *See Woodard v. State*, 931 S.W.2d 747, 752 (Tex. App.--Waco 1996, no pet.); *Hewitt v. State*, 734 S.W.2d 745, 747 (Tex.App.--Fort Worth 1987, pet. ref'd) (holding that references to county where crime occurred, a state agency, and various communities within the county was sufficient to show that crime occurred within the state of Texas).

The evidence shows complainant testified that she lived at 522 Mayford Street and was sexually assaulted by appellant there. She also stated that address was in Houston and Harris County. In addition to complainant's testimony, appellant himself testified that he resided in "Houston, Texas, 522 Mayford." Likewise, Dr. McNeese, who examined complainant, testified she worked at "Texas Medical School at Houston." Other trial witnesses referred numerous times to Houston, as well as Conroe and Galveston.

Obviously, the residence where the offense occurred, the cities mentioned, the County of Harris, and University of Texas, are all in Texas. There is no doubt that the offense occurred in Texas. Therefore, viewing the evidence in the light most favorable to the verdict, we hold that the jury could have found that the offense occurred in Texas. Appellant's first point of error is overruled.

II. Legal Sufficiency

Next, appellant argues that the evidence was legally insufficient to prove, as alleged in the indictment, that appellant inserted his finger in complainant's vagina. He states that complainant, who was an above-average student at her high school, only testified that appellant put his "hand" in her. This, he argues, is insufficient as a matter of law to enable a rational trier of fact to find beyond a reasonable doubt that appellant inserted his finger in complainant.

In response, the State notes that the court of criminal appeals has held that child victims in sexual assault cases cannot be expected to testify with the same clarity and ability as is expected of mature and capable adults.[1] *See Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990). The State further cites *Jones v. State*, 817 S.W.2d 854 (Tex. App.--Houston [1st Dist. 1991, no pet.). In that sexual assault case, the indictment also alleged penetration by the defendant's finger. The complainant, who was under fourteen years of age, testified that the defendant touched her private with his whole hand. *Id*. at 856. She later testified that after that incident, he "touched her with his fingers on her butt." *Id.* The court held this circumstantial evidence was sufficient to support the conviction. *Id*. at 857.

In our case, in addition to the testimony by complainant establishing appellant penetrated her with his hand, Dr. McNeese testified that complainant stated appellant had "fingered" her vagina. She also testified the injuries to complainant's vagina were consistent with her being penetrated by a finger.

Viewing the foregoing testimony in the light most favorable to the verdict, we hold a rational trier of fact could have found appellant penetrated complainant with his finger. Therefore, appellant's second point of error is overruled.

III. Ineffective Assistance of Counsel

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[1] While we do take into account complainant was fifteen years old at time of trial and the evidence shows her to have been above average in intelligence, she was nonetheless a minor and cannot be expected to articulate her testimony with the same degree of specificity as we would expect from an adult.

Finally, appellant argues he was denied effective assistance of counsel in violation of the Sixth Amendment.

A. Allegations of Ineffectiveness

Appellant alleges trial counsel was deficient in the following ways:

1. Failing to object to inadmissible hearsay in medical records introduced into evidence by the State. By doing so, the jury was allowed to consider complainant's hearsay statements about her being suicidal and information about contacts with law enforcement and CPS.

2. Failing to object to testimony by the State's expert, Dr. McNeese, concerning the complainant's credibility. Specifically, she testified:

> You'll sometimes get shades of something on one side or the other in individuals that are not being completely frank with you. Her story was right down the line, never wavered. It was the same thing over and over and over again. I'm not a soothsayer, but you get a good sense when someone – who is being frank with you. And I had the distinct feeling that this young lady was telling the truth coupled with her physical examination which I can't explain otherwise.

3. Failing to point out during closing argument that (a) complainant had told more than one story and embellished it with every telling, (b) appellant had never admitted to committing the offense and at all times denied the allegations, and (c) though complainant was infected with a sexually transmitted disease, appellant and his wife had tested "clean."

4. Failing to move for a directed verdict on the lack of jurisdiction because the State did not show the offense was committed in Texas.

B. Applicable Law

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance

prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See id.*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992). In determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670.

Judicial scrutiny of counsel's performance must be highly deferential. In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App.1994)(en banc). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id*. Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* 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). In *Jackson*, the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *Jackson*, 877 S.W.2d at 772; *see also Jackson v. State*, 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

Appellant did not file a motion for a new trial, and therefore failed to develop evidence of trial counsel's strategy. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial). As the court of criminal appeals recently pointed out:

> A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. 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. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.

Thompson v. State, No. 1532-88-CR 1999 WL 812394 (Tex.Crim.App. October 13, 1999).

C. Discussion

Here, the record is silent as to the reasons appellant's trial counsel chose the course he did. As such, it would be speculative to try to ascertain his trial strategy. We have, however, nonetheless considered appellant's contentions of ineffectiveness and find them not to be firmly founded in the record.

First, we disagree with appellant that the statements and information contained in the medical records were inadmissible hearsay. The record was a six-page "Medical Evaluation." Buried in it was complainant's statement that, at worst, alluded to suicidal thoughts and indicated she had no plan to commit suicide. Even if appellant had objected, we believe the court would not have abused its discretion in admitting the statement under TEX. R. EVID. 803(4) as a "statement made for purposes of medical diagnosis or treatment" or under TEX. R. EVID. 803(3) as a statement of her "then existing mental or emotional condition." The other information appellant complained of was not hearsay and was admissible as a record of regularly conducted activity.

We agree with appellant that the statement by Dr. McNeese as to her opinion that complainant was telling the truth was inadmissible under *Schutz v. State*, 952 S.W.2d 52 (Tex. Crim. App. 1997). The State concedes as much. Again, however, the record is silent as to why counsel did not object to the testimony, therefore it would be a futile exercise in speculation to try to ascertain counsel's trial strategy.

But even if counsel's failure to object was not motivated by sound trial strategy, an isolated failure to object to certain procedural mistakes or improper evidence generally does not constitute ineffective assistance of counsel. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex.Crim.App.1984). An appellate court should be especially hesitant to declare counsel ineffective based on a single alleged miscalculation during what amounts to otherwise satisfactory representations, especially when the record provides no discernible explanation of the motivation behind counsel's actions. *Thompson*, 1999 WL 812394. The constitutional right to counsel does not mean errorless counsel. *Mercado v. State*, 615 S.W.2d 225, 228 (Tex.Crim.App. 1981). Indulging the strong presumption that trial counsel was following a sound trial strategy, we find that although this evidence was objectionable, it was plausible for trial counsel to refrain from objecting and that, by doing so, counsel's representation did not fall below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 694. We further hold that even if the failure to object constituted ineffective assistance, appellant has not shown that, but for counsel's error, the result of the proceeding would have been different.

Next, appellant claims counsel was ineffective for not making certain points during closing argument. Closing argument is uniquely an area where counsel exercises trial strategy. *See Thompson v. State*, 915 S.W.2d 897, 904 (Tex.App.--Houston [1st Dist.] 1996, pet. ref'd). Counsel is required to sum up an entire case in a very limited time. Consequently, there are any number of sound tactical reasons counsel may have chosen or emphasized some arguments over others. The choice of discretionary emphasis by trial counsel prevents us from injecting our perceived preferences and leaves us little basis to hold counsel was ineffective for not making specific points during closing argument. For example, counsel may not have chosen to discuss the Andrades' test results because Dr. McNeese testified that the STD complainant had contracted was not transmittable by digital contact. Therefore, counsel may have for sound reasons believed this information was not important enough to the outcome of the case to mention during closing argument.

Finally, appellant claims trial counsel was ineffective for not moving for a directed verdict because the State failed to prove the offense occurred in Texas. Because, as discussed, the State more than adequately proved this element, counsel was not ineffective for failing to move for directed verdict on this issue.

Appellant's third point of error is overruled. The judgment of the trial court is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed March 2, 2000.
Panel consists of Justices Draughn, Edelman, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe L. Draughn and Norman R. Lee sitting by assignment.