Opinion issued November 20, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-06-00708-CR

NICHOLAS WILFORD DIEDRICK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 228th District Court
Harris County, Texas
Trial Court Cause No. 1036969

MEMORANDUM OPINION

A jury convicted appellant, Nicholas Wilford Diedrick, of aggravated sexual assault of a child younger than 14 years of age and assessed punishment at 23 years in prison. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (a)(2)(B) (Vernon 2003).

We determine whether appellant preserved his challenge that he was deprived of effective assistance of counsel by the trial court's improperly limiting his voir dire and whether appellant was deprived of effective assistance of counsel by his trial counsel's failure:

> (1) to object during voir dire when the prosecutor posed a hypothetical example with facts differing from those contained in the indictment;
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> (2) to make various objections and to request jury instructions regarding a statement made by the complainant to appellant's brother;
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> (3) to object to testimony and argument referring to the effect of the crime on the complainant; and
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> (4) to investigate and to present evidence and expert testimony regarding a 2003 psychological diagnosis of the complainant and the side effects of medication prescribed to her.

We affirm.

Background

The State alleged, in cause numbers 1036968 and 1036969, that appellant committed aggravated sexual assault of a child by penetrating his young niece's anus with his penis. The cases were tried jointly. The trial court declared a mistrial in cause number 1036968 after the jury indicated that it was deadlocked, and the jury convicted appellant in cause number 1036969. It is that conviction that is the subject of this appeal.

The underlying aggravated sexual assault allegation in this case was reported during an investigation of aggravated sexual assaults against the same child by appellant's brother, Joshua Diedrick, uncle to the complainant, after Joshua had been caught in the act of sexually assaulting the complainant by anal penetration in March 2005. The day after the complainant's forensic interview at the Child Assessment Center as part of that investigation, the complainant revealed to her mother that she had also been sexually assaulted on several occasions by her uncle Nick, appellant, prior to the assaults by Joshua. As a part of the subsequent investigation of the allegations against appellant, Officer Michael Parrie spoke with Joshua at the county jail—after Joshua had pleaded guilty to the aggravated sexual assault charges against him, but before sentencing on those charges—and Joshua told Parrie that the complainant had made a potentially incriminating statement to him regarding appellant during the course of one of Joshua's assaults against her.

Joshua, Parrie, and the complainant were all called by the State to testify at trial. The jury also heard from a forensic nurse who had examined the complainant, from the forensic interviewer from the Children's Assessment Center, and from a therapist who saw the complainant for six sessions after charges had been filed against appellant. Defense testimony came from appellant's sister (the complainant's aunt), appellant's mother (the complainant's grandmother), and appellant's stepfather.

Appellant was convicted in cause number 1036969, and the jury assessed his punishment at 23 years in prison. Appellant filed a motion for new trial alleging ineffective assistance of counsel, which the trial court denied after a hearing. Trial counsel did not testify, either in person or by affidavit, at the hearing on the motion for new trial.

Voir Dire

Appellant's first two issues raise complaints of denial of his right to effective assistance of counsel during voir dire. First, appellant complains that his counsel should have objected when the State questioned the venire with a "diluted" hypothetical concerning whether it could consider community supervision[1] as punishment. Second, appellant complains that the trial court improperly restricted counsel's questioning of the potential jurors as to whether they could "truly consider [community supervision] relative to the offense on trial as alleged in the indictment."

A. Failure to object to the State's hypothetical example

During the State's voir dire concerning community supervision as it related to

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[1] "'Community supervision' is the current statutory term for what was formerly called 'probation.'" *Ballard v. State*, 126 S.W.3d 919, 919 n.1 (Tex. Crim. App. 2004); *see* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 2(2) (Vernon Supp. 2008) (defining community supervision). As seen in the analysis of this issue, the parties and the court regularly used the former statutory term, "probation." We understand these to be references to community supervision and, in this opinion, have substituted the term "community supervision" for the term "probation" wherever appropriate.

aggravated sexual assault, the prosecutor asked, "You know, because they think gosh, if someone's been convicted of aggravated sexual assault of a child, there is no way I could ever consider it [community supervision as punishment]. Is that how some—a lot of you think?" After a veniremember answered that he did not believe in community supervision for aggravated sexual assault, the prosecutor told the panel that, before she continued asking questions, she would give an example, explaining that "we try to think of hypothetical situations where maybe [*sic*] that one-in-a-million case where you might give [community supervision]." She proceeded to give an example of a 17-year-old special-needs high school student who had intercourse with a 13-year-old girl, at the girl's insistence, then, remorsefully, told his youth minister about the encounter, turned himself in to the police, and was charged with aggravated sexual assault of a child. The prosecutor then asked the venire panel if it was "possible maybe some of you in that case could say, okay, maybe I would consider [community supervision] in that case?" The only responses were from one panel member, who stated that, even in that situation, she still "had an issue with [community supervision]"[2] and another member—the one who had initially stated that he did not believe in community supervision when the charge was aggravated sexual assault—admitting, on follow-up questioning by the prosecutor, that he "guess[ed]"

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[2] This panel member was struck for cause.

he could consider community supervision in that hypothetical.[3] The prosecutor concluded by asking the panel if "[e]veryone [was] okay [with] that range of punishment? So when the defense attorney stands up, everyone can understand why [community supervision] might be appropriate in a case." There was no response from the venire panel. It is the failure of defense counsel to object to this hypothetical example given by the State that forms the basis of appellant's complaint of ineffective assistance in issue one.

Appellant argues that the State's hypothetical example was an "improper commitment question" because it "contained facts that were beyond those alleged in the indictment" and avers that "[q]ualifying jurors using this fanciful hypothetical allowed venire persons to avoid a candid response to whether they could truly consider the full punishment range for the crime on trial," "poisoned or tainted juror understanding of what it meant to be able to consider the full punishment range, allowing evasion of the true question of whether they could consider [community supervision] for the offense on trial," and "enabled panelists to agree they would consider [community supervision] for aggravated sexual assault even though they would never consider [community supervision] for the offense alleged in the indictment." Appellant submits that his counsel was, therefore, ineffective for not

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[3] This panel member was struck for cause.

having objected to this hypothetical.

"[A] question is a commitment question if one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question." *Standefer v. State,* 59 S.W.3d 177, 180 (Tex. Crim. App. 2001). "[N]ot all commitment questions are improper." *Id.* at 181; *accord Barajas v. State*, 93 S.W.3d 36, 38–39 (Tex. Crim. App. 2002). Specifically, "[w]hen the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard." *Standefer*, 59 S.W.3d at 181. "For example, questions concerning a juror's ability to consider the full range of punishment for a particular offense meet the above definition of commitment questions but are nevertheless proper." *Id.* However, "the parties may not ask whether venire members can consider [community supervision] under the particular facts of the case beyond the offense as charged in the indictment." *Barajas*, 93 S.W.3d at 38 n.1.

A reviewing court's inquiry for determining whether a question is an improper commitment question has two steps:

> (1) Is the question a commitment question, and (2) Does the question include facts—and only those facts—that lead to a valid challenge for cause? If the answer to (1) is "yes" and the answer to (2) is "no," then the question is an improper commitment question, and the trial court should not allow the question.

Standefer, 59 S.W.3d at 182–83.

We therefore first consider whether the hypothetical example used by the State was a commitment question.

The State's hypothetical example neither attempted to commit the venire panel to resolve an issue based on a particular fact, nor asked the panel members to refrain from resolving an issue on the basis of a particular fact, nor asked the panel members to provide the hypothetical parameters for their decision-making. *See id.* at 179–80 (discussing ways in which questions may be commitment questions); *Halprin v. State,* 170 S.W.3d 111, 119–21 (Tex. Crim. App. 2005) (holding that State's hypothetical example of "mercy killing" during discussion of range of punishment for murder was not improper commitment question, even when defense objected that example was improper because it utilized facts beyond those contained in indictment and was improper attempt to qualify juror on minimum end of punishment range). It would not have been an abuse of discretion for the trial court to have overruled an objection that the State's hypothetical example was an improper commitment question, and so we cannot conclude that counsel was deficient for not having objected to this hypothetical example. Counsel is not deficient for not objecting to something that is not error. *See Flowers v. State*, 124 S.W.3d 801, 803–04 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that trial counsel was not

ineffective for failing to object because, even if counsel had objected, trial court would not have abused discretion in admitting testimony or evidence).

We overrule appellant's first issue.

B. Limitation of voir dire

In his second issue, appellant complains that the trial court improperly limited his voir dire by

> (1) preventing counsel from asking a proper voir question of the panel, namely "'If under these allegations the State were to prove that the defendant sexually assaulted a child under the age of 14 by placing his male sexual organ in her anus' could you consider imposing the minimum penalty, 5 years [community supervision]?"; and
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> (2) limiting counsel to asking jurors if they could "envision some 'appropriate' hypothetical situation (unlike the case alleged in the indictment) where jurors could consider [community supervision]."

Appellant argues that these actions by the trial court deprived him of the effective assistance of counsel because they "prevented the full and effective voir dire of the jury"[4] in violation of his right to counsel under Article 1, Section 10 of the Texas Constitution.[5]

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[4] Appellant does not complain on appeal of any actions or inactions on the part of his trial counsel regarding this allegedly improper limitation of voir dire.

[5] TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused shall have . . . . the right of being heard by himself or counsel, or both . . . .")

It is well established that the right to counsel under Article 1, Section 10 of the Texas Constitution encompasses the right to pose proper questions during voir dire examination. *See Jones v. State*, 223 S.W.3d 379, 381 (Tex. Crim. App. 2007); *Howard v. State*, 941 S.W.2d 102, 108 (Tex. Crim. App. 1996); *McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992); *Smith v. State*, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985). This right allows a defendant the opportunity to "intelligently and effectively exercise peremptory challenges and challenges for cause." *McCarter*, 837 S.W.2d at 119. However, a trial court has the discretion to impose reasonable restrictions on voir dire, *id.,* and "can and should control the scope of voir dire by exercising [its] sound discretion to limit improper questioning." *Smith*, 703 S.W.2d at 643; *see also Ex Parte McKay*, 819 S.W.3d 478, 482 (Tex. Crim. App. 1990) (discussing authority of trial court to control voir dire process "if sound discretion would compel the trial judge . . . to restrict the questioning in the interest of conducting an orderly and expeditious trial."). Accordingly, when a defendant complains of a trial court's limitation of the voir dire process in violation of his right to counsel under Article 1, Section 10 of the Texas Constitution, such complaint is analyzed under an abuse-of-discretion standard, the focus of which is whether the defendant "proffered a proper question concerning a proper area of inquiry." *Howard*, 941 S.W.2d at 108; *see also Smith*, 703 S.W.2d at 643 (holding

that trial court's decision to restrict voir dire may be reviewed only for abuse of discretion); *Ex Parte McKay*, 819 S.W.2d at 482 (same, citing *Smith*). When a defendant is denied the right to pose a proper question during voir dire, the error is one of constitutional dimension, *Jones*, 223 S.W.3d at 380, but subject to a harm analysis, *see id.* at 383; *Rich v. State*, 160 S.W.3d 575, 577 (Tex. Crim. App. 2005) (citing *Gonzales v. State*, 994 S.W.2d 170, 171 (Tex. Crim. App. 1999)). Whether the defense was compromised by such denial, i.e., whether precluding the question prevented counsel from rendering effective assistance, relates to the determination of harm, not error. *Jones*, 223 S.W.3d at 382, 383.

Review of the record in the present case indicates that during general questioning of the panel by the defense, counsel began a discussion of punishment with the venire, and the following then transpired:

> [Defense Counsel]: The minimum penalty in an aggravated sexual assault of a child is five years [community supervision]. Five years of [community supervision]. If under these allegations the State were to prove that the defendant sexually assaulted a child under the age of 14 by placing his male sexual organ in her anus—
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> [Court]: I won't permit that question. It is a commitment question specific—
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> [Defense Counsel]: I won't be specific to the indictment, Your Honor.
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> [Court]: I will not let you.

[Defense Counsel]: Thank you, Judge.

Defense counsel went on to ask the panel members questions regarding whether they could consider the minimum punishment of five years' community supervision in an aggravated sexual assault of child case.[6] At one point during this questioning, the trial court interjected the words "in an appropriate case" and informed the venire members that the purpose of the questioning was not to consider what the appropriate punishment was in the case pending before them, or whether they would "give [community supervision] in this case," because "nothing had been

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[6] Subsequent questions asked by trial counsel included:

> "On the first row, how many of you really truly could not consider that minimum punishment in an aggravated sexual assault of a child case?";
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> "How many of you simply cannot . . . Officer, you're going to be with me on this. You can't consider five years [community supervision], can you? . . . Is there—how many others are there?";
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> "So then, if question is—there are folks out here who would just say, look, for me, if that allegation were proved, I would not consider five years [community supervision]. There isn't an appropriate case. For me I know I would not recommend [community supervision] after finding someone guilty of that allegation. I don't care what the facts are."; and
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> "There's the answer I am looking for. You're just saying that in a sexual assault case no matter the facts, you're not going to consider [community supervision], correct? (venire member agreed). . . . Anybody else? (three more veniremembers agreed) . . . Anybody else? Any other hands? Okay. Tell me who you are and I'll go sit down, I promise."

proved." The court explained that it was inappropriate to ask the panel members what they "would do in this case" and "the only appropriate question was whether or not in the appropriate case the jury could consider the minimum punishment of five years [community supervision] in a sexual assault of a child." The court also told the venire members that the court was not saying that any of the given hypotheticals exemplified cases in which community supervision was appropriate; rather, the hypotheticals were simply examples of "the kind of case [that venire members] might think . . . potentially . . . appropriate for [community supervision]." The court emphasized that the jury had to be open to the entire punishment range because "the case that you hear, it could be a—you know, appropriate for the minimum. It could be appropriate for the maximum. But what we have to recognize is what the range of punishment is and be willing to assess punishment in that range—okay—in the appropriate case." Defense counsel also clarified that he did not mean to ask the venire members what they would do "in this case."

Appellant's first complaint under this issue is that the trial court improperly prevented him from asking a proper voir dire question to the venire panel. However, the record does not include the actual question that defense counsel would have posed to the panel. On appeal, appellate counsel has appended the words "could you consider imposing the minimum penalty, 5 years [community supervision]?" to the

portion of the attempted question by trial counsel that is in the record (which reads, "If under these allegations the State were to prove that the defendant sexually assaulted a child under the age of 14 by placing his male sexual organ in her anus . . ."), but there is nothing in the record that establishes that such addendum was the actual terminal clause intended by trial counsel. No bill of exception was made setting out the complete question that defense counsel would have posited, nor was any record created of the question that would have been asked at the motion for new trial. Likewise, appellant's second complaint under this issue is that he was improperly limited by the trial court to asking jurors if they could envision some appropriate hypothetical situation under which they could consider community supervision. Yet there is nothing in the trial record that establishes what questions appellant would have otherwise asked the venire panel if he had not allegedly been so restricted by the trial court.

When an appellant challenges a trial court's limitation of his voir dire, the reviewing court analyzes this challenge under an abuse-of-discretion standard, "the focus of which is whether the appellant proffered a proper question concerning a proper area of inquiry." *Caldwell v. State*, 818 S.W.2d 790, 793 (Tex. Crim. App. 1991), *overruled on other grounds*, *Castillo v. State*, 913 S.W.2d 529 (Tex. Crim. App. 1995). A trial court has broad discretion over jury selection, including the right

to impose reasonable limits on the voir dire examination. *Sells v. State*, 121 S.W.3d 748, 755 (Tex. Crim. App. 2003). The propriety of a particular question is left to a trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion. *Id.* A trial court's discretion is abused when it prohibits a proper question about a proper area of inquiry. *Id.* at 755–56.

In order to decide whether the trial court erred in prohibiting a voir dire question, the reviewing court "must first determine if the appellant proffered a proper question"—one which is both "appropriately phrased and relevant." *Caldwell*, 818 S.W.2d at 793, 794. If an appellant does not actually frame a question to the trial court, nothing is preserved for review because "there must be a question before there can be a proper question." *Caldwell*, 818 S.W.2d at 794; *see also Cockrum v. State*, 758 S.W.2d 577, 584 (Tex. Crim. App. 1988). Similarly, an appellant does not preserve error by informing the trial court of the general subject area from which he wishes to propound questions. *Sells*, 121 S.W.3d at 756; *Caldwell*, 818 S.W.2d at 794. "Potentially, a wide range of specific questions—both proper and improper—could [be] asked within [a proper subject] area." *Caldwell*,818 S.W.2d at 794. For this reason, in order to preserve error as to the improper limitation of voir dire, an appellant "must show that he was prevented from asking *particular* questions that were proper." *See Sells*, 121 S.W.3d at 756 (emphasis in original). "That the

trial court generally disapproved of an area of inquiry from which proper questions could have been formulated is not enough because the trial court might have allowed the proper question had it been submitted for the court's consideration." *Id.*; *see also Shannon v. State*, 942 S.W.2d 591, 596 (Tex. Crim. App. 1996) ("[B]ecause appellant never set out a specific question he wanted to ask, we cannot determine whether that particular question would have been proper."); *Easterling v. State*, 710 S.W.2d 569, 575–76 (Tex. 1986) ("Before we can determine if the trial court has abused its discretion by improperly restricting the voir dire examination, it is necessary for the record to reflect what questions the defendant desired to ask the jury panel"); *McManus v. State*, 591 S.W.2d 505, 519–20 (Tex. Crim. App. 1979) ("In order for this court to determine whether the parties' questions were proper questions, they must appear in the record."), *overruled on other grounds*, *Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988); *Mohammed v. State*, 127 S.W.3d 163, 170 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) ("Because appellant did not show that he was prevented from asking a particular, proper question, he failed to preserve error for review").[7]

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[7] As stated by our sister court in *Godine v. State*,

> A trial court should not be expected to separate the wheat from the chaff, cull out potentially valid subject matters from overly broad topic descriptions, and anticipate the form in which a specific question emanating from a topic will be asked. To

In this case, the record does not reflect what particular question appellant would have asked the venire panel had the trial court not prevented his doing so. It reflects only an introductory clause to a single, incomplete question. On this record, we do not know what the completed question would have been or what other particular questions appellant would have asked the panel if he had not allegedly been limited by the court. We therefore cannot determine whether such questions would have been proper, "i.e., both appropriately phrased and relevant," *Caldwell*, 818 S.W.2d at 794, and thus whether the trial court would have abused its discretion had it denied such questions. Because appellant has not shown that he was prevented by the trial court from asking proper voir dire questions, he has failed to preserve error.

We overrule appellant's second issue.

Guilt-Innocence Phase

In issues three, four, and five, appellant argues that his defense counsel rendered ineffective assistance by (1) failing to make various objections and to request instructions related to a statement made by the complainant to appellant's brother, (2) failing to object to testimony and a portion of the State's closing

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> preserve error, it behooved [appellant] to (1) present the trial court specific questions formulated in the matter they were to be asked, and (2) obtain an adverse ruling.

874 S.W.2d 197, 200–01 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

argument that related to the effect of the crime on the complainant, and (3) failing to present expert witness testimony regarding the complainant's mental health and the potential side effects of medications prescribed to her.

A. Standard of review for claims of ineffective assistance of counsel

The United States Constitution, the Texas Constitution, and a Texas statute guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.051 (Vernon Supp. 2008). As a matter of state and federal law, this right includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997).

The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *See Strickland*, 466 U.S. at 687–95, 104 S. Ct. at 2064–69; *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (applying *Strickland* test to review of claim of ineffective assistance of counsel under Texas statutes and constitutional provisions). To prove ineffective assistance of counsel, an appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) there is a reasonable probability that the result of the proceeding would have been

different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–94, 104 S. Ct. at 2064–68; *see Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Under *Strickland*, the appellant "must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). The appellant must also show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 833. An appellant must prove both prongs of the *Strickland* test, or the contention of ineffective assistance fails. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

Judicial scrutiny of counsel's performance must be highly deferential, and the defendant must overcome the presumption that, under the circumstances of the case, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. We apply a strong presumption that trial counsel was competent and presume that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

"When the record is silent on the motivations underlying counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that counsel's conduct was reasonable." *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim.

App. 2001); *see also Bone*, 77 S.W.3d at 830 (stating, "We are once again asked whether an appellate court may reverse a conviction on ineffective assistance of counsel grounds when counsel's actions or omissions may have been based on tactical decisions, but the record contains no specific explanation for counsel's decisions. Once again we answer that question, 'no.'"). "If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy," a reviewing court on direct appeal will "defer to counsel's decisions and deny relief on an ineffective assistance claim." *Ortiz v. State,* 93 S.W.3d 79, 88–89 (Tex. Crim. App. 2002). It is not enough to show, with the benefit of hindsight, that counsel's actions or omissions at trial were of questionable competence; rather the record must affirmatively demonstrate the alleged ineffectiveness, and when the record is silent as to why an attorney took or failed to take an action, an appellant fails "to rebut the presumption that trial counsel's decision was in some way—conceivable or not—reasonable." *Mata v. State,* 226 S.W.3d 425, 430–31 (Tex. Crim. App. 2007). "[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court 'commonly will assume a strategic motivation if any can possibly be imagined' and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it."

Garcia v. State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (citations omitted).

For these reason, "[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. In the majority of cases, the record on direct appeal will be insufficient for an appellant to demonstrate deficient performance under the first part of the *Strickland* standard because the reasonableness of counsel's choices often involves facts not appearing in the appellate record and the record does not adequately reflect the motives behind trial counsel's actions. *Rylander*, 101 S.W.3d at 110–11. Only in rare cases will the record on direct appeal be sufficient for an appellate court to fairly evaluate an ineffective assistance contention. *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000).

B. Failure to make objections and to request instructions regarding statement by complainant to appellant's brother

In his third issue, appellant complains of his trial counsel's response to a portion of the State's case involving a statement made by the complainant to appellant's brother, Joshua, during one of Joshua's sexual assaults on her. The State alleged that the complainant told Joshua that "[he was] doing the same thing that [appellant had done] to [her]." Joshua told Officer Parrie about the complainant's statement during Parrie's interview of Joshua. Appellant contends that counsel should have made various objections to testimony and argument, and requested

various instructions to the jury, regarding this statement.

Three witnesses testified about the statement at trial.

The first was Joshua, appellant's brother, who was originally called by the State as the "outcry"[8] witness in the case based on his hearing the statement. Joshua refused to answer questions from the State regarding the statement at issue but, when questioned by defense counsel, Joshua offered that the complainant had actually said, "Uncle Nick is just like you."

The second witness was Officer Parrie, who testified that, during his interview with Joshua, Joshua stated that the complainant told him, "You are doing the same thing that Nick did to me." This testimony was admitted, over a hearsay objection that it was a prior inconsistent statement.

The third witness was the complainant herself, who testified that she had told Joshua, during one of his sexual assaults of her, that "[he was] doing the same thing that Uncle Nick did to [her]." No objection was lodged to this testimony.

Appellant acknowledges that trial counsel made various objections regarding the alleged statement, but contends that trial counsel performed deficiently by (1) "agreeing with the prosecutor to have Joshua give outcry testimony," (2) "failing to object to Joshua's purported outcry testimony or move to strike [the] same once it

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[8] *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 2005).

became clear it did not describe an offense," (3) "allowing the State to badger Joshua with fact loaded questions purporting to describe an outcry without proper objections," (4) "failing to ask for an instruction to disregard after objection to an improper question was sustained," (5) "failing to ask for an instruction that would have limited the prior inconsistent statement of Joshua to its impeachment value for Joshua," (6) "allowing the State to ascribe probative value of guilt to that statement without objection when questioning Parrie," and (7) "failing to object to the prosecutor's misstatement of evidence during [jury] argument."[9]

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[9] During closing argument, the prosecutor stated that Joshua had

> finally on cross . . . admitted that yes, [complainant] told him—in the middle of a rape—in one of his rape sessions that she outcried to him. Stop, you're doing the same thing that Nick did to me. I can't even stress the importance of that statement. It is huge. It is absolutely huge. It just supports [the complainant] so much. . . . [H]e said that statement to Officer Parrie on August 30 of 2005. And he finally admitted it on the stand. So, I want you to highly consider Joshua's statement. . . . He has no reason to lie. And you know that statement is true. Do you think [the complainant] really made that statement up mid rape? Of course not. That is highly, highly credible evidence and that's why it came in.

The record establishes that Joshua did not so testify on cross. It was Officer Parrie who testified that Joshua made such an admission during his interview with Parrie. The complainant also testified that she made such a statement to Joshua. However, Joshua himself never admitted at trial that the complainant had made such a statement to him; he testified only that she had told him during a sexual assault that appellant was "just like" him.

There is no evidence in the record as to trial counsel's motives for these complained-of actions or inactions. Although there was a motion for new trial filed that alleged ineffective assistance of counsel (albeit not raising the complaints now raised in this issue on appeal), and a hearing on the same, there was no testimony or affidavit from trial counsel offered into evidence or considered by the trial court at the hearing on the motion for new trial.

We may not speculate on counsel's motives in the face of a silent record. *See Thompson,* 9 S.W.3d at 814 (refusing to speculate on trial counsel's failure to object in light of silent record); *Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001) (reviewing court may not speculate as to why trial counsel failed to request limiting instruction when record is silent, even if court has difficulty understanding counsel's inaction). Because we must presume that trial counsel's conduct "falls within the wide range of reasonable professional assistance" and that counsel "made all significant decisions in the exercise of reasonable professional judgment,"[10]

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[10] Trial counsel's opening statement reveals that counsel was pursuing a definite trial strategy as to the statement in question and thus supports the presumption that his actions and inactions as to this statement were strategically motivated. Counsel told the jury to

> [r]emember the promise that [the prosecutor] just made to you. She just told you that [the complainant] told her uncle . . . . Josh immediately after an assault by Josh that she said: You are doing to me exactly what Uncle Nick did. That's a statement you should rely on. That's a statement you should insist is proved

Strickland, 466 U.S. at 689–90, 104 S. Ct. at 2065–66, and because appellant has failed to bring forward evidence overcoming that presumption, we are unable to conclude that trial counsel's performance was deficient on the basis of the record before us. *See Rayme v. State*, 178 S.W.3d 21, 29 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd); *Johnson v. State,* 176 S.W.3d 74, 79 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). Moreover, given the record before us in this case, appellant has not shown that counsel's actions were so outrageous that no competent attorney would have engaged in them. *See Mata*, 226 S.W.3d at 430–31; *Garcia*, 57 S.W.3d at 440. Accordingly, we hold that the record on appeal is not sufficiently developed for us to conclude that trial counsel's performance was deficient. As we have found insufficient evidence to support a contention of deficient performance, we need not determine whether prejudice was shown. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069 (holding that reviewing court need not address both prongs if appellant makes insufficient showing on one).

We overrule appellant's third issue.

> [*sic*]. It's a statement that can't be proved [*sic*] because it is not true. And you are going to find out that it's just that sort of exaggeration, it's just that sort of remark that gets made that trigger[s] all of this to happen. It's the reason an innocent man is sitting over there at that table . . .

C. Failure to object to evidence and argument regarding effect of crime on complainant

In his fourth issue, appellant contends that his trial counsel failed to object to certain testimony elicited during the guilt-innocence phase of trial and to request a motion in limine or have a hearing outside of the presence of the jury to determine its admissibility. Appellant argues that the testimony was victim-impact evidence, which was improperly introduced at the guilt or innocence phase of trial[11] and that its probative value was greatly outweighed by its prejudicial effect. Specifically, appellant complains of the failure to object to the following testimony from the complainant:

> [Prosecutor]: How has what Uncle Nick and Uncle Josh [done] affected you [*sic*]?
>
> [Complainant]: Well, I am very scared of—if I don't like—when I'm alone at home or something like that or like I can't sleep in my room by myself. I have to ask my brothers to sleep with me or go sleep with my mother.

Appellant argues that such testimony served no purpose other than to inspire sympathy for the complainant and may have improperly helped sway the jury.

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[11] *See Garrett v. State,* 815 S.W.2d 333, 337–38 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (holding that testimony regarding after-effects of crime was inadmissible at guilt stage of trial).

Appellant also complains of evidence from the complainant's therapist during the following exchanges:

> [Prosecutor]: When you'd approach [the complainant] about that subject [abuse by two unnamed uncles], what was her demeanor like?
>
> [Witness]: She looked very sad. She didn't make any eye contact. She looked down a lot.
>
> [Prosecutor]: Was she emotional at all with you?
>
> [Witness]: Not very emotional. She always had a very flat affect.
>
> [Prosecutor]: And can you explain that to the jury, why some children, you know, aren't bawling and some are flat affect?
>
> [Witness]: Well, sexual abuse affects children differently. And some children are affected in very extreme ways. Some of them have severe systems and some of them shut down a lot and don't show a lot of emotion. Since [the complainant's] personality is very quiet to begin with, it was—it's easy for her—just not show any emotion and shut down. Based on my interaction with her, she was just a very quiet girl and she doesn't like to hurt anyone. So, she just kind of keeps her feelings to herself.
>
> [Prosecutor]: What did you talk about in therapy outside of abuse?
>
> [Witness]: Her—the effects of the abuse. She was having nightmares and flashbacks in class. She couldn't concentrate in school.

Appellant acknowledges that trial counsel tried to minimize the effects of this testimony by showing that the complainant's symptoms could have come from other causes, such as physical and verbal abuse or parental neglect, but avers that this tactic also made the complainant seem to be a victim and so would have heightened jury sympathy. Appellant argues that no reasonable attorney would have pursued such a strategy, but would instead have requested a hearing outside of the presence of the jury to exclude such testimony entirely.

Appellant also complains of his counsel's failure to object to a portion of the State's closing argument, in which he claims that the prosecutor asked the jurors to look at the complainant and to notice how she was crying as a way to demonstrate that the complainant was not lying. The portion of the argument in the record relevant to this complaint reads as follows:

> Can you imagine this little girl and what she's going through? Look at this face. Look at that face. For what? What is she gaining from this? Is she winning an award? Is she winning a prize? No. She's crying, that's what she is doing. For what? Is she getting awarded for being [sexually assaulted] by two uncles? Is that a cool thing? No, it's the truth.

Appellant argues that such statements were prosecutorial misconduct that may have warranted a mistrial but, because trial counsel failed to object, counsel waived error. Appellant concludes that these errors undermine confidence in the outcome of the proceedings because they unfairly permitted the prosecutor to court sympathy for

the complainant and this may have swayed jurors toward a conviction.

All of appellant's complaints involved alleged ineffective assistance arising from omissions by trial counsel. However, because appellant's trial counsel was not called as a witness at the motion for new trial hearing, nor was there any affidavit from trial counsel considered by the trial court, there is no evidence in the record regarding trial counsel's reasons for not taking the challenged, omitted actions. Without evidence as to trial counsel's reasons, we cannot conclude that counsel was ineffective. *Ortiz*, 93 S.W.3d at 88–89; *see also Tong v. State*, 25 S.W.3d 707, 713–14 (Tex. Crim. App. 2000) (holding that when record was silent on why counsel failed to object to improper impact testimony from victims of extraneous offenses, record was insufficient to overcome presumption that counsel's actions were part of strategic plan); *Rayme*, 178 S.W.3d at 27, 29 (holding that when no evidence in record as to why trial counsel failed to object to victim impact testimony, appellant had not overcome strong presumption that conduct fell within wide range of reasonable professional assistance and might be considered sound trial strategy). Given the sensitive nature of the case, refraining from objecting to these brief references to the child complainant's sadness and other effects of the crime could be a reasonable trial strategy. *See Henderson v. State,* 704 S.W.2d 536, 538 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd) (holding that not objecting can be trial

strategy). Moreover, appellant has not shown, by a preponderance of the evidence, a reasonable probability that, had his counsel objected to these complained-of statements, the result of the proceeding would have been different. *Bone*, 77 S.W.3d at 833.

We overrule appellant's fourth issue.

D. Failure to investigate and to present evidence and expert testimony

In his final issue, appellant complains that his trial counsel was ineffective for not investigating and presenting evidence and expert testimony regarding the complainant's 2003 psychological diagnosis and the side effects of a medication prescribed to her.

1. Standard of Review

Appellant's final complaint on appeal was raised as the sole issue in appellant's motion for new trial, which was considered and denied by the trial court after a hearing on the motion. Accordingly, we analyze this claim as a challenge to the denial of his motion for new trial. *See Biagas v. State,* 177 S.W.3d 161, 170 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (citing *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004)). In such circumstances, we review the *Strickland* test through an abuse-of-discretion standard. *Charles*, 146 S.W.3d at 208 (reviewing contention of ineffective assistance of counsel considered in motion for new trial

under abuse-of-discretion standard). "A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling." *Id.* Thus, we reverse only if, viewing the evidence in the light most favorable to the ruling, we conclude that the trial court's decision is arbitrary or unreasonable. *Id.* We defer to the trial court's determination of historical facts, presume that all reasonable factual findings that could have been made against the losing party were made against that party, and defer to all reasonable implied factual findings that the trial court might have made.[12] *Id.* at 208, 211. Then, in light of the implied reasonable factual findings, we determine whether the trial court, in denying the motion for new trial, was "arbitrary or unreasonable," *id.* at 208, acting "without reference to any guiding rules or principles" that govern claims of ineffective assistance of counsel. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990) (op. on reh'g).

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[12] The Court of Criminal Appeals, in an unpublished opinion, reaffirmed the use of an abuse-of-discretion standard in reviewing ineffective assistance of counsel claims raised by a motion for new trial. *See State v. Jones*, No. 678-02, 2004 WL 231309 at *1, *8 (Tex. Crim. App. Jan. 28, 2004) (not designated for publication). The Court of Criminal Appeals held that the "role of an appellate court is limited to viewing the evidence in the light most favorable to the trial court's ruling and insuring that the standards used to determine whether counsel was effective were properly applied." *Id.* at *9. The court also noted that reviewing courts, while required to give deference to the trial court's factual determinations, were not bound by the trial court's legal conclusions on the issue of ineffectiveness. *Id.* at *8.

2. Hearing on the motion for new trial

Appellant's motion for new trial alleged that defense counsel was ineffective by (1) failing to introduce evidence at trial regarding a 2003 psychological screening of the complainant and the side effects of the medication that she was taking and (2) failing to retain an expert to study the 2003 screening report and to give opinions regarding the complainant's cognitive dysfunction and reality distortion and the side effects of her medication, Concerta, such as psychotic behavior and hallucinations. Attached to the motion were (1) an affidavit from appellate counsel; (2) an affidavit from appellant's mother; (3) a psychological screening of the complainant by Dr. John Largen, listing evaluation dates of 1/25/03 and 2/20/03; (4) a printout of information from a web page about the drug Concerta; and (5) an affidavit from Dr. Largen.[13] Although the attached documents were not offered into evidence, the trial

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[13] Appellant also contends that the second page of a report filed by the State with the clerk's office was also part of the motion for new trial, and was attached to the motion as exhibit 3, tab 6, but somehow did not become part of the record filed by the clerk. This document provides evidence that the complainant was on Concerta at the time of the outcry in 2005. Appellant contends that this document was considered by the trial court, citing to the trial court's statement that it had reviewed the motion and its attachments. This statement by the trial court does not demonstrate what attachments the court reviewed, apart from those which are clearly attached to the motion in the record. We will not presume that a particular document was considered by the court at the hearing on the motion for new trial without any evidence that that particular document was admitted into evidence or otherwise received for review and considered as if admitted. However, even if we considered it to have been a part of the evidence, it does not alter our resolution of the issue.

court stated that it had reviewed the attachments, the State lodged no objection to their consideration, and they were treated by all parties as if they had been admitted into evidence.[14]

The sole witness testifying at the hearing was Lillian Powers, appellant's mother and the complainant's grandmother. Powers testified that she had sent an email to trial counsel seven months before trial and had asked him to introduce information into the record about the results of a 2003 psychological screening of the complainant, which included a finding that the complainant was rated within the clinically significant range on measures of cognitive dysfunction and reality distortion. She also asked the trial attorney to get into the record information as to some side effects of the medication that the complainant had been taking, which included psychotic behavior and hallucinations. She stated that defense counsel had said that it could not be used, but he had not directly told her why. She also stated that she would have been able to pay for an expert similar to Dr. Largen. She

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[14] We therefore likewise consider them as evidence. Generally, an attachment to a motion for new trial is a pleading only and must actually be offered into evidence in order to constitute evidence on the motion. *See Bahlo v. State,* 707 S.W.2d 249, 251 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). However, when a trial court reviews attachments to a motion for new trial during the hearing on the motion for new trial, without objection, and the court and the parties treat the attachments as if they had been offered into evidence, we consider these "implicitly admitted" documents as if formally admitted into evidence. *Id.* at 252; *see also Godoy v. State*, 122 S.W.3d 315, 320 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

explained that, at the time of trial, she and her daughter had again asked counsel about the matter and he had told them that he could not use the report.

Appellant's mother's affidavit avers that trial counsel told her that "a retained expert was not necessary" and, during trial, told her that "he could not get [Dr. Largen's evaluation and web pages describing side effects of complainant's prescribed medication] into evidence." No evidence was received from appellant's trial attorney, either by testimony or affidavit.

3. Analysis

The evidence presented in support of the motion for new trial is insufficient to affirmatively demonstrate ineffective assistance of counsel. The only evidence offered as to trial counsel's motives and strategy was appellant's mother's statements that counsel had told her that he could not use the documents, or offer them into evidence, and that no expert was necessary. But the record is void of any evidence as to the extent of any investigation that counsel actually conducted on these matters and counsel's reasons for choosing not to present such evidence or to call an expert witness. Counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective. *Rylander*, 101 S.W.3d at 111 (holding that reviewing court could not conclude that counsel was ineffective for not obtaining or offering qualified medical expert testimony on "automatism" when record did not

contain any explanation from trial counsel regarding why he took or failed to take actions). To conclude that counsel was ineffective on the record in this case, without any evidence from counsel as to what investigation he conducted on this matter, or his motivations for not employing such a defensive strategy, not offering such evidence, and not calling an expert witness, would require speculation, which may not be engaged in while reviewing the effectiveness of counsel. *See Rayme*, 178 S.W.3d at 29; *Johnson*, 176 S.W.3d at 79; *see also Randon v. State*, 178 S.W.3d 95, 101–03 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (declining to find ineffective assistance of counsel for counsel's failure to investigate and to present insanity defense when record was "nearly bare" as to counsel's trial strategy and depth of investigation, holding that to do so would call for speculation). Moreover, there is no evidence in the record that a particular expert existed, was available, and would have provided testimony helpful to appellant. Without such evidence, we cannot conclude that counsel was ineffective for failing to call an expert witness. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983).

Nor can it be concluded, on this record, that no reasonable attorney would have chosen not to present such evidence or testimony. The decision not to present medical evidence or experts can be a reasonable trial strategy. *See Marinos v. State*, 186 S.W.3d 167, 180–81 (Tex. App.—Austin 2006, pet. ref'd) (holding that failure

to offer expert testimony or other evidence that complainant's medications could cause misperceptions of reality or even hallucinations was strategic decision within the scope of reasonable professional assistance).

Appellant has failed to demonstrate that no reasonable view of the record supports the trial court's ruling denying a new trial on the basis of ineffective assistance of counsel.[15] *See Charles,* 146 S.W.3d at 208 ("[A] trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling."). From the record before us, we cannot conclude that the trial court's decision to deny a new trial based upon ineffective assistance of counsel was arbitrary or unreasonable. We hold that the trial court did not abuse its discretion in denying a new trial and overrule appellant's fifth issue.

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[15] The record could reasonably be viewed in a number of ways that would support the trial court's denial of a new trial on the ground of ineffective assistance of counsel, e.g., the evidence presented was insufficient to establish trial counsel's actions, inactions, and motivations regarding the investigation and presentation of evidence and expert witness testimony; the evidence did not adequately establish that an expert was available for trial who would have presented testimony favorable to appellant; the trial court may have concluded that appellant's mother's testimony about her conversations with trial counsel was not credible; appellant failed to overcome the presumption that counsel's actions might be considered sound trial strategy; and/or there was not a reasonable probability that, if such evidence and expert testimony had been presented, the outcome of the case would have been different.

Conclusion

We affirm the judgment of the trial court.

Tim Taft
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

Do not publish. *See* TEX R. APP. P. 47.2(b).