Affirmed and Memorandum Opinion filed July 27, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00125-CR
NO. 14-09-00126-CR

GIOVANNI GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause Nos. 1192364, 1192365

M E M O R A N D U M O P I N I O N

Giovanni Garcia appeals his convictions of sexual assault and violation of a protective order. In two issues, appellant contends the evidence is legally and factually insufficient to support the convictions and he received ineffective assistance of counsel. Because all dispositive issues are settled in law, we issue this memorandum opinion and affirm. *See* Tex. R. App. P. 47.4.

I. BACKGROUND

Appellant and X.M. began dating when she was a teenager. In August 2007, X.M., who was then nineteen-years-old, obtained a protective order, effective for two years, prohibiting appellant from committing violence against, threatening, harassing, or approaching within 200 feet of her. Appellant was accused of sexually assaulting X.M. less than four months later by compelling her to submit to anal intercourse. Appellant does not dispute that they engaged in anal intercourse but claims the act was consensual. To prove the offense, the State presented the testimony of police officers and a nurse, to whom X.M. described the incident shortly thereafter, as well as other witnesses, because X.M. later recanted her original claim that the intercourse was non-consensual and testified on appellant's behalf.

According to Pasadena Police Officer Ryan Childers, on the afternoon of November 21, 2007, he was dispatched to a Wal-Mart where he met X.M. and her brother. X.M. was scared, had a red face and "puffy" eyes, and appeared to be in pain because she grimaced when she walked, was "hunched over," and gripped her abdomen. X.M. said she had been "raped" by her boyfriend. As they spoke, X.M. continually looked around and said she was fearful he was walking around and might see her.

X.M. then described the incident as follows: she and appellant had been drinking the previous night; he began pressuring her to have sex; she told him "no" several times; he repeatedly said that she would participate if she loved him; she finally consented to vaginal sex but stopped due to pain; she rose from the floor and dressed; he told her to undress because "[her] family never helped [her]" in the past; she undressed and again began vaginal sex but repeatedly told him "no" and made "ugly faces"; he then stopped the vaginal sex and penetrated her anus with his finger; she "jumped" from the floor and attempted to cover herself and get away; appellant said that he would "beat [her] fucking ass" if she tried to leave the room; he pushed her down and began anal sex with her; she was scared and crying but appellant repeatedly said he would "fuck [her] like this until [she] liked it"; she said she liked it so that he would stop; when it ended, she vomited in

the bathroom; he instructed her to shower and "wash that thing" because she was bleeding from the anus, which was staining the bedding and carpet; he lay in bed with her until she fell asleep, asked how she liked it, and said he loved her; she awoke several hours later and told her brother's girlfriend "something bad happened" and to keep a distance from appellant; when this brother, his girlfriend, and appellant left the home, X.M. retrieved another brother, who was disabled, and walked to Wal-Mart where she called the police.

After X.M. relayed these events, Officer Childers informed her that he needed to collect her bedding as evidence. X.M. became fearful that, if the bedding were missing, Garcia would know she called the police. Despite X.M.'s hesitation, Officer Childers drove X.M. and her brother to their apartment. Officer Childers observed two large "brownish-red" stains, which appeared damp, on the bedroom carpet. After retrieving the bedding and clothes she wore during the incident, he transported X.M. and her brother to the hospital.

Later that afternoon, a sexual-assault nurse examiner, Sandra Martin, examined X.M. at the hospital. Martin testified that she initially asked X.M. to describe what happened. X.M. stated the following: her boyfriend was aggravated and told her to remove her clothes; he started touching her, and she moved his hand away; they began vaginal intercourse, and she told him to stop because it hurt; he put his finger in her anal area, and she rose; he said, "if you leave, I'm going to beat your ass"; he told her to lie back down and "raped" her in her anal area with his penis.

During the physical exam, Martin observed a 0.8 centimeter by 0.3 centimeter abrasion in X.M.'s vaginal area and five separate tears in X.M.'s anus, ranging in size from 0.2 centimeters to a 1.2 centimeter bleeding tear. Martin explained that, out of approximately 1,000 examinations she has performed, she has seen such a large tear less than ten times. Martin reported her findings to a doctor because she was concerned further medical intervention might be necessary.

Sandra Garza, a caseworker for a victim's assistance program, testified she was

contacted by the hospital to provide crisis intervention to X.M. When Garza met X.M. in the emergency room, X.M. was upset and disheveled. Garza explained to X.M. her legal rights and the services offered by the program, but they had no further contact.

A week after the incident, X.M. voluntarily gave a statement at the police station to Officer Matthew Bruegger, who was formally assigned the investigation. At trial, Officer Bruegger did not relay the contents of X.M.'s statement, but he testified it was consistent with previous police reports, and she became upset and cried during the interview. After X.M. left, Officer Bruegger contacted appellant but also did not testify regarding the substance of this conversation. The next day, X.M. called Officer Bruegger and said she was no longer interested in "pursuing" the case.

The contents of X.M.'s statement to Officer Bruegger were actually elicited by the State during its cross-examination of X.M. when she was subsequently presented as a witness by appellant. Although X.M. attempted at trial to retract or qualify some of her statements to Officer Bruegger, she agreed that she told him the following: appellant said that, if she tried to leave the room, he would "grab [her] by the hair and beat [her] ass" and he "did not understand why [she] did not like having sex with [him]"; at one point, he stopped and asked if she "wanted to get loud" and said "no one had saved you in the past"; she feared he would hurt her if she fought back, or relatives might enter the room if she screamed and he would hurt them; she was worried he would kill her after he finished and she would "die from the pain"; he photographed his penis covered in her blood and showed her the picture.

The State also presented X.M.'s mother, who testified she disapproved of X.M.'s relationship with appellant because X.M. had changed and was unhappy. She also explained that X.M. was afraid of appellant and upset about her mother testifying.

Pasadena Police Officer Jason Buckaloo testified he was dispatched to the same Wal-Mart on the night of December 7, 2007 and met with another officer and X.M., who appeared upset and extremely nervous. She showed Officer Buckaloo a text message from appellant which read, "answer the fucking phone." Officer Buckaloo eventually

transported her home in his patrol car. En route, Officer Buckaloo entered appellant's name in the police computer system and noted he had a warrant for violation of a protective order. Upon arrival at X.M.'s apartment, Officer Buckaloo requested that she contact appellant. X.M. was able to contact appellant who texted her, "I know you called the cops. Why are you doing this? I just seen the cops at the apartment." and "Call me, [X.M.]" After reading these messages Officer Buckaloo called for assistance from other officers. They searched the area but were unable to locate appellant at that time.

At trial, X.M. described the incident as follows: she and appellant drank alcohol with relatives before retiring to their room in the early-morning hours; they began consensual vaginal sex but then stopped; appellant persuaded her to resume this activity although she initially resisted; he placed his finger in her anus, which startled her, so she rose to run out of the room; he said that, if she ran out of the room, "I'm going to beat your ass"; he then persuaded her to begin vaginal sex again, but she became mad and told him to "get off" when he accused her of faking pleasure; he asked if anyone in her family ever helped her; he then persuaded her to have anal sex and told her to take a deep breath; although she did not want to do so, she never told him to stop; at one point, he photographed his bloody penis and showed her the pictures before resuming the anal intercourse; he said to tell him when she "nutted" and "I'm not going to stop until . . . you tell me that you're satisfied"; he did stop when she said she was satisfied; at his suggestion, they showered together because she was bleeding; she subsequently vomited from drinking too much alcohol; later that day, she planned to take a walk with her brother but decided to call the police during the walk.

X.M. expressly testified that the anal intercourse was "consensual." She attempted to explain the accounts she gave shortly after the incident as follows: appellant said he would "beat" her "ass" merely to prevent her from leaving the room naked, and she was "kind of scared" but did not feel threatened; his statement about no one in her family helping her was a general question about whether her family ever helped her when she had a problem, as opposed to a threat; she denied telling Officer Childers that appellant

said he "would keep fucking [her] that way until [she] liked it" and instead claimed he was concerned with her satisfaction; photographing sex acts was not unusual in the relationship; she was confused, scared, and "hung over" shortly after the incident and thought she had been sexually assaulted but has since remembered more details and realized she had been drinking; she went to the hospital at Officer Childers's insistence and did not believe she needed to do so; she thought the description she gave Sandra Martin was true at that time but has since realized it was untrue; relative to the encounter with Officer Buckaloo in December 2007, X.M.'s brother called the police because the family was fighting, and X.M. did not show the officer threatening text messages from appellant.

A jury found appellant guilty of sexual assault and violation of a protective order. Appellant pleaded "true" to one enhancement paragraph. The jury assessed punishment at sixty-five years' confinement for the sexual-assault conviction and twenty years' confinement for violating the protective order. The trial court ordered the sentences to run concurrently.

II. SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant contends the evidence is legally and factually insufficient to support the conviction. In his stated issue, he mentions only the sexual-assault finding although he seems to appeal both convictions. Because appellant was accused of violating the protective order by committing the sexual assault, we will broadly construe his issue as challenging both convictions.

A. Standard of Review

When evaluating a legal-sufficiency challenge, we review all evidence in the light most favorable to the verdict to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). The jury is sole judge of the credibility of witnesses and may choose to believe or disbelieve all or any part of a witness's testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). We ensure

only that the jury reached a rational decision and do not reevaluate the weight and credibility of the evidence. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

In examining a factual-sufficiency challenge, we review all evidence in a neutral light and set aside a verdict only if (1) the evidence is so weak that the verdict seems either clearly wrong or manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006). Although we may substitute our judgment for the jury's when considering credibility and weight determinations, we may do so only to a very limited degree and must still afford due deference to the jury's determinations. *See Marshall*, 210 S.W.3d at 625.

B. Analysis

A person commits sexual assault if he intentionally or knowingly causes the penetration of the anus of another person by any means, without that person's consent. Tex. Penal Code Ann. § 22.011(a)(1)(A) (Vernon Supp. 2009). A sexual assault under this subsection is without the consent of the other person if "the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat." *Id.* § 22.011(b)(2).

Appellant essentially contends the State did not prove lack of consent because there was no evidence appellant threatened physical force to make X.M. submit. As we have outlined, some aspects of X.M.'s statements to the police officers and nurse differed from her trial testimony, but to the extent they were similar, she attempted to qualify her earlier statements. The jury was free to believe X.M.'s statements to the officers and nurse with respect to both their actual content and meaning.

Under all of X.M.'s versions of the incident, when appellant placed his finger in her anus, she attempted to flee the room, but appellant said he would "beat" her "ass" if she left. As X.M. told Officer Childers, appellant then pushed her down and began the anal intercourse. Consequently, the jury could have reasonably construed appellant's

statement as a threat of force or violence made to compel the anal intercourse that followed. Moreover, the jury could have reasonably concluded that X.M. believed appellant had the present ability to execute the threat based on his statement that no one in her family had ever helped her, his threat to "fuck [her] like this until [she] liked it," her fear appellant would harm her or her family if she resisted or screamed, and her fear appellant would kill her when the act was finished.

Appellant contends he merely persuaded X.M. to agree to the various sex acts after some initial resistance, she even "liked it," and he terminated each act when requested. Even if X.M.'s actions demonstrated consent to vaginal sex, only the subsequent anal intercourse was the basis of the sexual-assault charge. Under X.M.'s original accounts, she did not agree to the anal intercourse and only said she "liked it" so that appellant would stop.

Appellant also suggests that X.M. consented to the anal intercourse because she did not resist, "definitively" communicate lack of consent, seek help from others in the home, or make "outcry" to these other persons after the incident. However, resistance to the sexual assault by the victim is not required; instead, the focus is on the compulsion of the actor. *See Hernandez v. State*, 804 S.W.2d 168, 170 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). Furthermore, X.M. explained to Officer Bruegger the reasons she did not resist or call for help. Moreover, the jury could have rationally inferred that X.M. did not make "outcry" to anyone in the home after the incident because she feared appellant while he was still present; however, she retrieved her disabled brother and fled to Wal-Mart as soon as it felt safe to do so.

Additionally, appellant focuses on X.M.'s trial testimony recanting her earlier accounts that the anal intercourse was non-consensual and claiming appellant threatened to "beat" her "ass" simply to prevent her from leaving the room naked. According to appellant, X.M. was merely scared, confused, and under the influence of alcohol when she gave her original accounts and misperceived consensual "unorthodoxed" or "rough" sex as sexual assault.

However, the jury could have rationally inferred X.M.'s perception of the incident was more accurate when described shortly thereafter and she later recanted based on fear of appellant. Based on the following statements, demeanor, actions, and condition of X.M. shortly after the incident, the jury could have concluded she correctly perceived the anal intercourse as a non-consensual sexual assault: she told another person in the home "something bad happened" and to keep a distance from appellant; she called the police as soon as possible; she was upset, afraid, and crying the afternoon after the incident and even a week later during her statement to Officer Bruegger; she used the term "raped" to Officer Childers and the nurse; she willingly submitted to a sexual-assault examination; and she had one of the most severe anal tears the nurse had ever seen.

In sum, we conclude a rational jury could have found beyond a reasonable doubt that appellant committed sexual assault and violation of a protective order, and the evidence is not so weak that the verdict seems either clearly wrong or manifestly unjust or against the great weight and preponderance of the evidence. We overrule appellant's first issue.

III. ASSISTANCE OF COUNSEL

In his second issue, appellant contends that he received ineffective assistance of counsel in several respects. To prevail on an ineffective-assistance claim, an appellant must prove (1) counsel's representation fell below the objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). In considering an ineffective-assistance claim, we indulge a strong presumption that counsel's actions fell within the wide range of reasonable professional behavior and were motivated by sound trial strategy. *Strickland*, 466 U.S. at 689; *Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Thompson*, 9 S.W.3d at 814. In most cases, direct appeal is an inadequate vehicle for

raising such a claim because the record is generally undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson*, 9 S.W.3d at 813–14. When the record is silent regarding trial counsel's strategy, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

A. Consolidation of Cases for Trial

Appellant complains about his trial counsel's actions purportedly allowing a consolidated trial on both the sexual-assault and protective-order cases. On the day voir dire began, appellant's counsel objected to a consolidated trial on both charges. The trial court responded that the cases could be tried together if they arose from the same transaction, but it would consider a separate trial. However, the trial court warned that the sentences could be "stacked" if the cases were tried separately. After a brief recess for appellant to consider his options, the trial court announced it denied "that motion."

Appellant's counsel then fully explained his objection for the record: "yesterday when the defendant was arraigned, we understood he was going to be tried on one case and he was only arraigned on the sexual assault case. So, we feel that it's surprise now that the State wants to try both cases together when I thought it was an agreement - -." The trial court confirmed appellant's counsel had previously set both cases for trial and thus questioned that it was a "surprise." Appellant was then arraigned on the protective-order charge. His counsel requested additional time because he was prepared for only the sexual-assault case and had a "completely different defense" to the protective-order charge. The trial court replied it intended to start voir dire that day but would start trial the next day and counsel should be prepared on both cases. The trial court then formally overruled appellant's objection.

Appellant complains that counsel failed to file a pre-trial motion for severance pursuant to Texas Code of Criminal Procedure article 28.01. Under article 28.01, "The court may set any criminal case for a pre-trial hearing before it is set for trial upon its

merits . . . . to determine" certain matters including "[p]leadings of the defendant." Code Crim. Proc. Ann. art. 28.01, § 1 (Vernon 2006). "When a criminal case is set for such pre-trial hearing, any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown; provided that the defendant shall have sufficient notice of such hearing to allow him not less than 10 days in which to raise or file such preliminary matters." *Id.* art. 28.01, § 2. Appellant notes that the trial court had previously set two hearings for pre-trial motions, but counsel did not file any motion for severance; thus, appellant claims counsel waived the ability to request a severance.

As set forth above, the record indicates counsel had previously opted for one trial; thus, filing a timely motion for severance before any pre-trial hearing would have been contrary to his strategy. The record further indicates that counsel changed his strategy on the day voir dire began because appellant's arraignment on only one charge the previous day gave counsel the impression the cases would be tried separately. Article 28.01 allows a trial court to consider an untimely pleading of the defendant for good cause shown. *See id.* The trial court did consider counsel's motion to sever, albeit at the beginning of trial, although it denied the request. Accordingly, appellant has not demonstrated any further action counsel could have taken to obtain a severance once he decided to pursue separate trials.

As we have mentioned, the trial court seemed to deny the motion partly because appellant previously set both cases for one trial. To the extent appellant contends counsel performed deficiently by failing to ensure separate trials from the outset, the record does not support this claim. Appellant suggests that counsel's representation he had a "completely different defense" meant the defenses were "conflicting." However, he could have equally meant the defenses were simply unrelated, as opposed to conflicting. Without a record affirmatively showing the nature of the defense to the protective-order charge, we cannot conclude counsel was ineffective by failing to ensure the cases were tried separately. During counsel's cross-examination of witnesses, he attempted to

suggest appellant did not understand the protective order. If ignorance of the protective order was counsel's intended defense, there is no record indicating he was precluded from fully presenting this defense simply because the cases were tried together.

Appellant also asserts that, if counsel had ensured separate trials, significant incriminating evidence otherwise admissible only in the protective-order case would not have been admitted in the sexual-assault trial. Specifically, appellant suggests that issuance of the protective order and testimony of X.M.'s mother were relevant to only the protective-order case; thus, admission of this evidence in the joint trial improperly permitted the jury to consider appellant's character and past conduct when evaluating the sexual-assault charge. However, evidence regarding the relationship between appellant and X.M., including his past conduct sufficient to justify a protective order, was relevant to the sexual-assault case by showing she recanted her earlier accounts based on fear of appellant. Accordingly, we reject appellant's claim that counsel's actions caused admission of otherwise inadmissible evidence.

B. Preparation for Trial

Appellant also contends counsel was ineffective because he was unprepared for trial in two respects. First, appellant cites counsel's admission on the day voir dire began that he was not prepared to defend the protective-order case. However, the trial court did allow counsel an additional day to prepare for the remainder of the trial, and the record is silent on whether he was prepared that next day. Again, without a record affirmatively demonstrating the nature of the defense, we cannot conclude counsel was inadequately prepared once trial began.

Next, appellant complains that counsel failed to discover some letters which X.M. wrote to Garcia while he was incarcerated after the incident. During cross-examination of X.M., the State introduced portions of three such letters and questioned her regarding the contents of letters that were not admitted. In particular, the State asked X.M. whether she wrote in one letter that appellant "raped" her, although this letter was not admitted. X.M. responded that she was referring to a molestation she experienced as a child. In the

admitted letters, X.M. informed appellant that his lawyer instructed her not to "show up" in court, although she testified these statements were merely her opinions as opposed to actual instructions. The admitted letters also contained the following statement: "Your tellin me that its my fault that i have you in there and that i can take you out . . . Well NO you put yourself in there Actions speak way louder than words. . . ." [sic].

When the State first mentioned the letters during trial, appellant's counsel objected several times that he had no opportunity to examine them and on the basis of "Brady." Before the letters were admitted, the trial court allowed counsel to examine them. Counsel then stated he had no objection to admission of the letters.

Even if trial counsel was deficient by failing to discover the letters, we cannot conclude there is a reasonable probability the result of the trial would have been different but for the deficiency. Appellant suggests counsel might not have presented X.M. as a witness if he had discovered the letters because they alluded to appellant's guilt and made counsel appear unethical and unprofessional. However, there is no record indicating the approach counsel might have taken if he had known of the letters.

Appellant seems to contend that counsel's lack of preparation harmed his defense because, by presenting X.M., he allowed the State to inject the matters referenced in the letters. However, the most inculpatory references—that appellant "raped" X.M. and he was to blame for his incarceration—echoed matters already proven by the State through X.M.'s statements shortly after the assault. Additionally, the trial court allowed counsel to clarify that neither he nor his co-counsel ever instructed X.M. to refrain from appearing in court or to violate a subpoena. Because this testimony was not then controverted by the State, we cannot conclude the jury necessarily decided that trial counsel engaged in any such conduct.

Appellant also argues that counsel's failure to discover the letters precluded adequate preparation of X.M., subjected her to cross-examination by "ambush," and undermined her credibility and effectiveness as a witness. However, despite any lack of preparation, X.M. did provide explanations attempting to qualify some portions of the

letters when confronted with them. We cannot speculate that X.M. would have provided credible, inculpatory explanations for all portions of the letters admitted or referenced if she had been prepared to address them. Nevertheless, the jury was free to draw its own inferences from the letters notwithstanding any explanations by X.M. Thus, we cannot conclude that any further preparation of X.M. to address the letters would have affected the jury's evaluation of her credibility. Further, the jury heard ample other grounds on which to question X.M.'s credibility; thus, we cannot conclude that the few portions of the letters admitted or referenced at trial caused the jury to disbelieve X.M.'s testimony.

C. Cross-Examination of Officer Childers

Finally, we address appellant's contention that trial counsel was deficient in his cross-examination of Officer Childers by eliciting the following testimony which purportedly constituted legal conclusions damaging to appellant's defense: X.M. was "coerced" into the initial sex acts because she eventually consented after appellant pressured her; appellant stopped the vaginal sex only after "repeated nos"; and his statement that he would "beat [her] fucking ass" was a threat and not made to prevent X.M. from leaving the room naked. However, the entire exchange reflects that counsel tried to obtain testimony showing the whole episode was consensual, which was clearly his overall trial strategy. Accordingly, we cannot conclude counsel's cross-examination was "so outrageous that no competent attorney would have engaged in it" although he did not receive the favorable responses that he sought.

In sum, appellant has failed to demonstrate he received ineffective assistance of counsel. We overrule his second issue.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.

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