

Affirmed and Memorandum Opinion filed July 15, 2010.



In The

**Fourteenth Court of Appeals**

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NO. 14-09-00292-CR

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**CHRISTOPHER RAY BARTEN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 232nd District Court  
Harris County, Texas  
Trial Court Cause No. 1111900**

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

Appellant, Christopher Ray Barten, was convicted by a jury of sexual assault of a child. Finding true an enhancement paragraph alleging a prior sexual assault conviction, the trial court sentenced appellant to life in prison. In his sole issue, appellant contends that he received ineffective assistance of counsel because his trial attorney failed to make a timely objection to inadmissible opinion testimony. We affirm.

**BACKGROUND**

On July 9, 2007, appellant was indicted for the felony offense of sexual assault of a child, age 14. The indictment also alleged a previous conviction for sexual assault of a

child for enhancement purposes. Appellant entered a plea of not guilty to the charged offense and a plea of not true to the enhancement allegation. At trial, the complainant described the assault. The complainant's brother, to whom the first outcry was made, also testified at trial. The brother testified that the complainant had confided in him regarding the sexual assault. When asked by the State, the brother told the jury that he believed the complainant's story about the assault. Only after did defense counsel object to the brother's statement as improper. The trial court overruled counsel's objection as untimely.

After hearing additional testimony from the two investigating officers and a clinical psychologist at the Children's Assessment Center, the jury convicted appellant of sexual assault of a child as charged in the indictment. The trial court found the indictment's enhancement allegation true, enhanced appellant's punishment, and sentenced him to life in prison. Appellant now challenges his conviction, claiming that he was denied effective assistance of counsel because trial counsel failed to make a timely objection to the opinion testimony of the complainant's brother.

### **INEFFECTIVE ASSISTANCE**

To prove ineffective assistance of counsel, appellant must demonstrate that: (1) his counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and we will sustain allegations of ineffectiveness only if they are firmly founded in the record. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We also indulge a strong presumption that counsel's actions were motivated by sound trial strategy, and we will not conclude that the action was deficient unless it was so outrageous that no competent attorney would have engaged in such

conduct. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). We look to the totality of the representation and not to isolated instances of error or to only a portion of the proceedings. *Thompson*, 9 S.W.3d at 813; *Rivera-Reyes v. State*, 252 S.W.3d 781, 788–89 (Tex. App.—Houston [14th Dist.] 2008, no pet.). In the absence of evidence regarding counsel’s reasons for the challenged conduct, the record on direct appeal is simply undeveloped and cannot adequately reflect the alleged failings of trial counsel. *Freeman v. State*, 125 S.W.3d 505, 506–507 (Tex. Crim. App. 2003).

Here, appellant contends that his counsel’s performance was deficient based on the untimely objection to the brother’s opinion testimony validating the complainant’s claim of sexual assault. But, because the record is completely silent regarding trial counsel’s reasons for not asserting a quicker objection to the State’s elicited testimony, we cannot speculate that counsel acted without reasonable trial strategy. *See Mata v. State*, 226 S.W.3d 425, 430–32 (Tex. Crim. App. 2007). Possibly, trial counsel could have not anticipated the elicited testimony or believed that in light of the preceding questions, the brother’s response would have been favorable to the defense. At trial, the complainant’s brother testified as follows:

**The State:** Did she [the complainant] tell lies about small things?

**Complainant’s brother:** Yes.

**The State:** Like what?

**Complainant’s brother:** Like not going to school, doing chores, little things like that.

**The State:** So she would tell lies to stay out of trouble?

**Complainant’s brother:** Yes.

**The State:** Do you believe that your sister was sexually assaulted?

**Complainant’s brother:** Yes.

**The State:** Pass the witness

**Defense Counsel:** Your Honor, I object to the question and the response. Improper.

**The Court:** It's an untimely objection.

Trial counsel reasonably may have not anticipated that the State would elicit testimony validating the truthfulness of the complainant's sexual assault allegations after the brother had acknowledged the complainant's history of lying. Furthermore, because the brother acknowledged the complainant's history of lying, trial counsel may have believed that the brother's response would have been favorable. Thus, we cannot determine whether the alleged failure was strategy or incompetency. Because the record is silent, appellant cannot overcome the strong presumption that counsel's performance was competent. *See Thompson*, 9 S.W.3d at 814 (reversing ineffective assistance finding because the record did not reveal why counsel failed to object to the State's attempts to elicit inadmissible hearsay). Appellant has not established the first *Strickland* prong that counsel's performance fell below an objective standard of reasonableness. Accordingly, we overrule appellant's sole issue and affirm the trial court's judgment.

/s/ Adele Hedges  
Chief Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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