In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00287-CR

ALAN EDWARD MILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 260th District Court
Orange County, Texas
Trial Cause No. D140297-R

MEMORANDUM OPINION

Claiming that his attorney rendered ineffective assistance of counsel, Alan Edward Miller appealed and challenges his conviction for aggravated sexual assault of a child. *See* Tex. Penal Code Ann. § 22.021 (West Supp. 2016).[1] We affirm the trial court's judgment.

[1] Although section 22.021 has been amended since the date Miller allegedly committed the offense, the changes to the section are not material to the issue Miller presents in his appeal. Therefore, for convenience, we cite the current version of the statute.

A two-prong test is used on appeal to resolve claims alleging that a defendant received ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Under *Strickland's* first prong, Miller is required to show that his trial attorney performed below the standard that is expected of counsel under an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687–88; *Thompson*, 9 S.W.3d at 812. Under that standard, Miller must demonstrate that his attorney rendered ineffective assistance by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 813. If the first *Strickland* prong is satisfied, the defendant claiming he received ineffective assistance must also demonstrate that had his attorney's assistance not been deficient, a reasonable probability exists that the outcome of his trial would have been different. *See Strickland*, 466 U.S. at 687–88, 694; *Thompson*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson*, 9 S.W.3d at 812.

Our review of ineffective assistance claims is highly deferential to trial counsel. Generally, we begin with the presumption "that counsel's actions fell within the wide range of reasonable and professional assistance." *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). On appeal, a ruling denying a motion for new trial based on a claim alleging ineffective assistance is reviewed for abuse of

discretion. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). Because an abuse-of-discretion standard applies to such claims, appeals courts will not reverse the trial court's ruling unless the ruling is clearly erroneous. *Id*. "A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling." *Id*. However, in direct appeals from judgments, claims alleging ineffective assistance of counsel are generally unsuccessful because rarely has the record in the trial court been sufficiently developed to support the claim. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

Miller's complaints relate to whether his attorney conducted an adequate investigation into obtaining an expert to testify on his behalf during the trial. In handling a case, trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Counsel has a duty "to investigate the facts of the case and determine if an expert is necessary to present the defendant's case to the jury and, if so, to obtain

competent expert assistance." *Ex parte Flores*, 387 S.W.3d 626, 636 (Tex. Crim. App. 2012).

Miller raises one issue in his appeal, complaining that his trial attorney was deficient because he failed to hire and present a medical expert supporting Miller's defensive theory that the injury the child received could be explained by activities unrelated to an alleged sexual assault. According to Miller, the State's case centered on the medical testimony of the State's medical experts, which consisted of a doctor and two sexual assault nurse examiners. Miller argues that his attorney should have presented testimony from a physician experienced in handling cases that involved the physical and sexual abuse of children, and that such an expert could have provided testimony supporting his theory that the victim Miller was charged with assaulting had sustained an accidental injury. In its brief, the State argues Miller failed to overcome the presumption that his attorney employed a sound trial strategy by relying on a strategy of developing his defense through the medical witnesses called by the State.

Miller raised his claim for ineffective assistance of counsel in his amended motion for new trial. The record shows that the trial court conducted an evidentiary hearing on the motion. Two witnesses testified during the hearing, Miller and Dr. Reena Isaac, a pediatrician employed by the Baylor College of Medicine who works

in the child abuse pediatric program at Texas Children's Hospital. Miller testified that he believed his trial counsel did not consult with an expert because his attorney did not charge him for an expert's fee. Nevertheless, the attorney who represented Miller in the trial did not testify in the hearing, so the record does not show that the attorney did not consult or retain an expert in preparing Miller's case for trial. Miller's testimony also indicates that several days before the trial started, his attorney advised him that he had talked to an expert, but the expert could not "make it and that he felt like he didn't need him." Because the attorney who represented Miller in the trial did not testify and did not provide an affidavit regarding the matters that are addressed in Miller's motion, the record is silent regarding the specific reasons that Miller's trial attorney decided that the defendant did not need a medical expert in presenting Miller's defense.

In his appeal, Miller claims his trial counsel was also deficient because he failed to challenge the competency and credibility of the State's expert witnesses. However, the record of the trial reveals that Miller's attorney developed the theory that the child's injuries resulted from an accidental injury during his cross-examination of the pediatric surgeon who treated the child's injuries, a witness who was called by the State in Miller's trial. For example, during cross-examination, Miller's attorney developed evidence that the pediatric surgeon found nothing in

examining the child to indicate that Miller was the person who caused the child's injury. Additionally, while on cross-examination, the pediatric surgeon agreed that an injury like the one the child received could occur if the child struggled while being held down during an examination for an alleged rape. While the pediatric surgeon indicated that he was not given any history that the child had been injured in a fall, which was consistent with Miller's theory of the case, the pediatric surgeon nevertheless agreed that it is possible that a fall of two feet onto the corner of a board on a bleacher could enter a female child's sexual organ. The pediatric surgeon also agreed that the child had not taken a bath before he examined her, and that DNA would have been present if a person's finger or sexual organ contacted the child's genitals. During cross-examination, the pediatric surgeon also agreed that the child had no injuries past the hymen, and he agreed that he would expect a bilateral injury inside the child's vagina had something been repeatedly inserted there. On cross-examination, the pediatric surgeon agreed that the child had swelling on only one side of the labia, another finding that was consistent with the defendant's theory of how the child's injury occurred.

Finally, the pediatric surgeon made several other statements during cross-examination that were helpful to Miller's theory of the case: the pediatric surgeon agreed that it would be unusual for a child to act normally around a person who

injured her; he agreed that straddle and fall injuries are the most common types of injuries to the area of the body where the child's injury occurred; and he agreed that if the child was wearing a loose diaper when she fell on bleachers, the child's injury could be explained by the fall. "Counsel's decision to elicit testimony through cross-examination is presumed to be a strategic decision." *Humphrey v. State*, 501 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

In large part, Dr. Isaac's testimony about how the child's injuries might have occurred is consistent with the testimony that Miller's attorney developed by cross-examining the child's treating pediatric surgeon. Neither the pediatric surgeon who treated the child's injuries nor Dr. Isaac could rule out sexual assault as having caused the child's injury. However, both doctors also agreed that the child's injury could have been caused by falling onto the corner of a board on a bleacher. There are differences in the doctor's respective opinions about whether the child suffered a "burst laceration," as indicated by the child's pediatric surgeon, or a "crush injury" to the child's genitals, as indicated by Dr. Isaac. Nonetheless, the explanation of the differences between these two types of injuries was not crucial to Miller's defensive theory that the child's injury was accidental.

In this case, Miller's trial attorney was not called as a witness during the evidentiary hearing the trial court conducted on Miller's motion for new trial. The

actual reasons for the decision that Miller's attorney made to proceed without a medical expert are not in the record that is before us. "[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). When the record does not contain counsel's explanation regarding the deficiencies that are being leveled at counsel on appeal, courts generally presume that the explanation, had there been one, would have indicated that the choice counsel made concerned choosing between different trial strategies. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

On the current appellate record, we are unable to conclude that trial counsel's performance fell below an objective standard of reasonableness. *See id.* Because the choice Miller's counsel made regarding calling an expert appears to have been a strategic choice, Miller has not established that the trial court abused its discretion when it denied Miller's motion for new trial. *See Riley*, 378 S.W.3d at 457. We overrule Miller's sole issue, and we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on April 24, 2017
Opinion Delivered May 10, 2017
Do Not Publish
Before McKeithen, C.J., Kreger and Horton, JJ.