AFFIRM; and Opinion Filed November 27, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01246-CR

ERIC QUINONES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-82399-2015

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Lang-Miers

Appellant was convicted of aggravated sexual assault of a child under the age of six and sentenced to thirty-two years imprisonment. In two issues on appeal Appellant claims that the trial court erred in denying his motion for new trial claiming ineffective assistance of counsel and that he was egregiously harmed by the jury instructions and verdict forms. We affirm.

Background

J.S. met appellant when she was about four years old; he was dating her mother. At that time, J.S. and her mother lived in an apartment in Collin County that belonged to her uncle. J.S. usually slept in a bed next to her mother's bed. Appellant sometimes slept at their apartment; he would sleep in her mother's bed, and J.S. would sleep in her own bed. Sometimes J.S. was allowed to sleep in the same bed as Appellant because her mother said she could before she went to work. J.S.'s mother often left for work before appellant.

There were times when J.S. was in bed with appellant when appellant would touch her "front private part" with his hand. She later clarified that she meant his fingers. Appellant would touch her "between the line" of her private area. This happened in the apartment she shared with her mother; she would be wearing pajamas. Appellant's hand would move. Her clothes would be around her ankles and appellant would touch her on her skin. J.S. felt violated.

The State was allowed to present evidence of other instances of sexual abuse to show conformity with appellant's character. TEX. CODE CRIM. PROC. ANN. art. 38.37 (2) (b). These other instances did not occur in Collin County.

J.S. remembered instances of touching at appellant's house in Dallas when she and her mother would spend the night. Appellant would touch her private part with his hand. Appellant had a roommate at this house. During one of these instances, Appellant's roommate walked into the bedroom where they were both in bed. J.S. did not think that the roommate saw anything because her body, except for her head, was under the covers and because the roommate did not say anything. Her pants had been removed by appellant and he was touching her with his hand.

Another instance of abuse occurred around J.S.'s sixth or seventh birthday when she camped out with friends in a tent in the backyard; she and her mother were living with appellant at this time. She and her friends all slept inside the tent, but appellant slept outside the tent. J.S. remembered waking up with appellant touching her private part with his hand.

J.S. related that there was one occasion when appellant touched her front part with his private part. It hurt. She thought it was summertime because she was not in school. Appellant would also occasionally touch her "butt cheeks."

J.S. testified that she could sometimes see Appellant's "front part" through the little hole in his boxers. She testified that it was "lighter than his skin tone" and had black hair on it. She never saw anything coming out of appellant's front part and it always looked the same.

J.S. testified that she was about 8 years old the last time anything happened. She did not see appellant after he and her mother broke up.

Several years later after seeing a television show, J.S. told a friend about this abuse. She later told her grandmother, her mother, and a female detective.

Motion for New Trial: Allegations and Testimony

Appellant, through new counsel, filed a motion for new trial contending that he received ineffective assistance at trial. Appellant claims that his trial counsel should have called his roommate, Daniel Harmon, as a witness to refute a portion of J.S.'s testimony concerning one of the extraneous acts offered to show conformity. Appellant further claims that physical and other evidence existed which trial counsel should have presented to impeach J.S.'s description of his penis.

The trial court held a hearing on the motion for new trial. At this hearing, Harmon testified that he and appellant had lived together in two residences in Carrollton. They each had separate bedrooms. J.S. and her mother would visit during the time that appellant was dating J.S.'s mother and the two would often spend the night and sleep in appellant's room. Harmon saw appellant and J.S. alone together in these houses multiple times. He never witnessed any sexual misconduct between appellant and J.S., nor did he ever witness appellant sexually assault J.S. He would have been very upset if he thought appellant was sexually assaulting or sexually abusing J.S.

Harmon occasionally went into appellant's bedroom, though he usually knocked first. He testified that J.S. and appellant would hang out together in that bedroom and watch movies and television on appellant's bed. It would not have seemed strange to Harmon if appellant and J.S. were lying under the covers watching television. He never saw them lying in bed in a sexual manner. Harmon never saw appellant hiding J.S. under the covers while she was in bed with

him; he thought this was something he would have noticed easily. Harmon also testified that it would have caught his attention if appellant had shoved J.S. under the covers. If she was already under the covers when he entered the bedroom, however, that would not have stood out to him.

Harmon had spoken with the investigating detective about Appellant. The detective told him about a story wherein J.S. alleged that Harmon walked in while appellant was sexually assaulting her with his hand. Harmon told the detective that he did not notice anything out of the ordinary when he entered the bedroom.

The detective's report accurately listed Harmon's address at the time of the detective's interview as well as Harmon's employer. His employer's information was still current at the time of trial. He had done nothing to suppress his whereabouts from anyone in the case. The name of appellant's trial attorney, however, did not "even ring a bell."

Appellant testified at the hearing on the motion for new trial that he had discussed witnesses he wanted subpoenaed with his trial attorney. Specifically, appellant wanted to call Harmon as a witness. According to appellant, Harmon was a "direct witness" whose testimony could confirm or deny what actually happened with respect to one of the conformity offenses from Dallas. Appellant testified that his counsel told him that he did not think it would be necessary as it was the State's burden to prove appellant's guilt.

Appellant's trial attorney, Edward B. Klein, testified that he represented appellant for a year and a half to two years prior to trial. Klein and appellant had multiple discussions about his case. Klein also received what he believed was complete discovery from the State. Because Klein had given his entire physical file to new counsel after the conclusion of the trial, he had not been able to review that file prior to the hearing on the motion for new trial.

Klein recalled that Harmon's potential testimony would have concerned "something that may or may not have occurred" at appellant's house when Harmon was living with appellant.

Klein did not recall anything specific that Harmon may have seen or witnessed. Klein and appellant discussed calling Harmon as a witness, and the potential of Harmon's testimony, but Klein did not recall if Appellant wanted Harmon called as a witness.

Klein had only a vague recollection of J.S. testifying at trial about being sexually abused by appellant at his home in Dallas where appellant's roommate walked in on them. While Klein did not specifically recall the Dallas incident being brought up at trial, he admitted, hypothetically, that it was something he would wish to defend against.

Klein also testified as to his trial strategy. While J.S. had made approximately four allegations of sexual abuse against appellant, Klein chose to concentrate on the Collin County allegations "because we were dealing with allegations of conduct that may or may not have occurred in Collin County as opposed to Dallas County." His strategy was "not to highlight anything that may have happened in Dallas County, but to concentrate on what may or may not have occurred in Collin County." Under further questioning, Klein testified as follows:

> Q. Okay. But in this case, Daniel Harmon, his testimony, in your estimation, would have been something that would not have corroborated what [J.S.] was saying?
>
> A. Right.
>
> Q. Okay.
>
> A. It would not have corroborated. It would have been an opposition to something that [J.S.] may have said.
>
> Q. Okay. And that could have helped Eric obtain a not guilty verdict from the jury, correct?
>
> A. I guess so, sure.

Klein had information that appeared to have come from the investigating detective about Harmon's whereabouts. Klein did investigate Harmon's whereabouts. He could not, however, recall the exact efforts he made, but admitted he did not follow up in trying to find Harmon. He stated that he "probably should have" tried to find Harmon prior to trial.

Appellant also claims that trial counsel should have attempted to refute J.S.'s testimony regarding the description of Appellant's penis. During trial, J.S. described appellant's "front part," *i.e.*, his penis, as "lighter than his skin tone" with black hair on it. J.S. had described appellant's penis to the investigating detective as follows: "it was hairy, sometimes pointy, and it was lighter than his normal skin color." (RR2: 205). When Klein told appellant how his penis was described, appellant told Klein "on the contrary, that's not what it looks like." Appellant testified that his penis is a dark color and the rest of his body skin color is lighter. Appellant told Klein about this discrepancy before trial. Appellant also raised the issue with Klein after J.S.'s testimony, but, according to appellant, Klein did not think it important.

Appellant identified two photographs as an accurate representation of his penis. These photographs were "selfies" that he took and sent to his girlfriend. His hand also appears in those photographs and was shown as being "much, much lighter" than his penis. He testified that this was a consistent theme with all men – their penis is darker than the rest of their body. Appellant felt the jury would have found him not guilty if those pictures had been admitted into evidence because they contradicted J. S.'s testimony.

Klein recalled the testimony that J. S. gave concerning appellant's penis. He did not recall her exact words, but thought she had said "dark and hairy." Klein stated that he "had no idea that [J. S.] was going to describe his (appellant's) penis, so I wasn't prepared for that." While Klein had tried other child sexual abuse cases, this was the first trial where the complaining witness was asked in front of the jury to describe the defendant's penis. Klein recalled having a discussion with appellant as to whether J.S.'s description was consistent with what appellant's penis actually looked like.

Klein also recalled the prosecutor referring to that description in jury argument as follows: "She gave you sensory details. What 11-year-old can describe a grown man's penis? It

was a little bit lighter than skin. It was hairy. The hair was dark. What 11-year-old knows that?" Appellant argues that the description of his penis was not a collateral issue.

Klein remembered asking appellant if the description J.S. gave was consistent with what his penis looked like. They had a conversation about the strategy concerning whether or not to try and oppose that evidence. Klein did not specifically testify as to why he chose not to rebut J.S.'s testimony regarding the description of appellant's penis.

Klein admitted that he could have rebutted the description if it was not accurate. Klein knew that appellant had a girlfriend prior to trial. He admitted that it was possible that the girlfriend could have testified as to the description of appellant's penis, as it would not have been unreasonable to assume that she knew what appellant's penis looked like, and possibly even provided photographs.

Appellant's Arguments

In support of the motion for new trial, counsel for appellant argued that a reasonable trial attorney would have presented Harmon's testimony to the jury. As appellant argued to the trial court:

> [W]ith regard to Daniel Harmon, the testimony that he could have given really could have come down to two different scenarios … clearly [J. S.] says that her head was above the covers. And so if Daniel Harmon walked in like she described, then he would have seen that sexual abuse happening.
>
> So he either came to court to lie on behalf of Eric Quinones, which there's no reason or evidence to believe that that's the case at all or that just didn't happen. It never happened.

Counsel pointed out that there was a seven year delay between the commission of the Collin County offense and outcry. He claimed the State's case was "very weak" and dependent on the theory that there was an ongoing relationship between appellant and J.S. Appellant argued to the trial court that it was doubtful the State could have obtained a conviction without evidence of the conformity bad acts.

Appellant further argued there was no reasonable trial strategy not to present the evidence of the inaccuracy of J.S.'s description of appellant's penis. As counsel argued: "there's clear evidence, photographic evidence…my client could have dropped his pants in front of the jury. There could have been other testimony from (the girlfriend) with photographs or pictures. That could have easily been presented to the jury and wasn't."

The State's Arguments

The State responded that Harmon's evidence was cumulative. The offense report stated that J.S. was under the covers; it did not specify how far under the covers. J.S. testified that only her head was sticking out. Since her testimony was that appellant's hand was touching her genitals, and since all parts of her body except for her head were under the covers, Harmon would not have seen the sexual conduct she described when he walked into the bedroom. The State also noted that J.S., in her forensic interview, said she did not think Harmon saw anything and again, at trial, testified she did not think he saw anything because her body was under the covers. Harmon's testimony that he didn't see anything neither added to J.S.'s testimony nor directly contradicted it. The State concluded that Harmon's testimony was not important to Appellant's overall trial strategy – *i.e.*, attacking the Collin County allegation and the age of the child allegation.

With respect to the description of appellant's penis, the State relied on the overall testimony of J.S. in which she noticed a discrepancy between the color of appellant's penis and the rest of his skin. The prosecutor argued to the trial court as follows:

> Even if she's (J.S.) confusing the hand versus the penis as to which one is darker, which one is lighter she's still describing a difference in skin color between those two very different parts of a man, which is a clear description. So to say that this is something that in and of itself means he should get a new trial is inaccurate. To not present it doesn't reach the burden of not giving an objectively unreasonable strategy. And it also doesn't amount to harmful error that he was not given a fair trial because the jury didn't see pictures of his penis.

Trial Court's Holding

At the conclusion of the hearing, the trial court found that neither prong of the well-established test for ineffective assistance of trial counsel had been met. The trial court denied the motion for new trial.

Motion for New Trial: Standard of Review

We review a trial court's denial of a motion for new trial alleging ineffective assistance of trial counsel under an abuse of discretion standard. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. *Id*. We review the evidence in the light most favorable to the trial court's ruling and reverse only if the trial court's denial of that motion was clearly erroneous and arbitrary. *Id*. We do not substitute our own judgment for that of the trial court and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Id*. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*

Ineffective Assistance of Counsel

A defendant in a criminal case has a Sixth Amendment right to effective assistance of counsel. U.S. CONST. amends. VI and XIV. It is the function of effective trial counsel "to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *Ex parte Martinez*, 330 S.W.3d 891, 900 (Tex. Crim. App. 2011).

In order to establish ineffective assistance of trial counsel, an appellant must prove that (1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-89; *Hernandez v. State*, 726 S.W.2d 53, 54–57 (Tex. Crim. App. 1986). The prejudice prong requires a showing that, but for counsel's errors, there was a

reasonable probability that the result of the proceedings would have been different. *Hernandez*, 726 S.W.2d at 55. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. Both the "performance" and "prejudice" prongs of the inquiry are mixed questions of law and fact, but the prejudice prong often turns upon the credibility and demeanor of witnesses. *Riley*, 378 S.W.3d at 458. We grant "almost total deference to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor." *Id.*

Motion for New Trial Analysis

Deficient Performance

With respect to the first prong of the *Strickland* test, there is a strong presumption that the conduct of counsel was not deficient. *Strickland,* 466 U.S. at 689; *Nava v. State,* 415 S.W.3d 289, 307–08 (Tex. Crim. App. 2013). To establish deficient performance, appellant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." *Strickland,* 466 U.S. at 689. We "commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it." *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). We judge the reasonableness of counsel's challenged conduct on the facts of the particular case and view it as of the time of the counsel's conduct. *Strickland,* 466 U.S. at 690; *Andrews*, 159 S.W.3d at 101. We look to the totality of the representation, not isolated instances of counsel's performance, to determine whether counsel provided effective assistance. *Moore v. State,* 694 S.W.2d 528, 531 (Tex. Crim. App. 1985); *Melton v. State,* 987 S.W.2d 72, 76 (Tex. App. – Dallas 1998, no pet.).

Absent Witness

With respect to whether trial counsel should have called Harmon as a witness, we need not assume a strategic motive because Klein's testimony at the hearing on the motion for new trial detailed his trial strategy. Klein testified that his trial strategy had been to concentrate on the alleged commission of the offense in Collin County and not to focus attention on the extraneous acts allegedly committed in Dallas County. Trial counsel was consistent with this strategy throughout trial. In particular, counsel concentrated his final jury arguments strictly on the evidence concerning the offense alleged to have occurred in Collin County and urged the jury to discount any extraneous bad acts. At most, appellant could only establish that trial counsel thought, in hindsight, he could have called Harmon to testify.

Strategic decisions of trial counsel are "virtually unchallengeable." *Strickland,* 466 U.S. at 690; *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim. App. 2007). In order to successfully challenge a strategic decision of trial counsel, an appellant must show that "no reasonable trial attorney would pursue such a strategy under the facts of [the] case." *Ex parte Ellis*, 233 S.W.3d at 331. The fact that another attorney might have pursued a different strategy will not support a finding of ineffectiveness of counsel. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App.1979). Counsel's competency is not judged by hindsight or by facts unknown at the time of trial. *Strickland*, 466 U.S. at 689.

Harmon's testimony would not necessarily have helped appellant. At the hearing, Harmon testified that he entered appellant's bedroom on one occasion when appellant and J.S. were in bed together and did not notice anything unusual. But his testimony does not directly contradict J.S.'s testimony that she did not think Harmon saw anything on that same occasion because she was under the covers and Harmon did not say anything. Harmon's testimony also established that J.S. was in appellant's bed on multiple occasions when her mother was not present. This demonstrated that appellant had frequent access to J.S. and the opportunity to

sexually abuse and/or sexually assault her. And, whether Harmon saw anything or not between appellant and J.S. in Dallas was not relevant to whether or not the allegations of a crime in Collin County could be proven by the prosecution.

Consequently, trial counsel's strategy of concentrating on whether the State could prove the Collin County offense was not so unsound that it rises to the level of constitutionally deficient representation. Harmon was not a critical witness to any act in Collin County. At most, his testimony would have called into question J.S.'s credibility with respect to only one of the conformity offenses. The State had, however, presented evidence of at least three conformity offenses. As a result, we conclude that Appellant has not established deficient performance.

Prejudice

Even if we agreed that trial counsel's performance was deficient for failing to call Harmon as a witness, we conclude that Appellant cannot satisfy the prejudice prong of the *Strickland* test because the record does not establish that the result of the trial would have been different had counsel presented Harmon's testimony.

At most, Harmon's testimony would only have served to conflict with one portion of J.S.'s testimony regarding a collateral circumstance surrounding one of the conformity offenses alleged to have occurred in Dallas County. His testimony would not have contradicted J.S.'s testimony regarding the other aspects of that offense, nor would Harmon's testimony have contradicted J.S.'s testimony with respect to the other conformity offenses. Most significantly, Harmon's testimony would not have contradicted J.S.'s testimony regarding the Collin County offense for which appellant was on trial. As a result, we conclude that appellant has not established prejudice to the extent that he was denied a fair trial.

Description of Appellant's Penis

The State did not allege contact between appellant's penis and any portion of J.S.'s body, nor was penetration by appellant's penis alleged. The appearance of appellant's penis was not a key issue in this prosecution. Even if we were to accept that the defense could have proved a discrepancy between J.S.'s description of appellant's penis and the actual appearance of his penis, that evidence would not have undermined the State's case of digital penetration or "hand to genital" contact.

We conclude that the record does not establish that trial counsel was deficient for failing to present this testimony, or that appellant was prejudiced by the absence of this testimony to the extent that he was denied a fair trial.

Jury Charge and Verdict Forms

Appellant claims that the trial court erroneously instructed the jury that it could not consider Count II of the indictment unless if first found appellant not guilty on Count I and its lesser included offense. According to appellant, the jury should have been afforded an opportunity, through the jury charge and the verdict forms, to contemporaneously consider his guilt on both Count I and Count II of the indictment.

The indictment charged appellant with (1) causing the penetration of the female sexual organ of J.S. a child younger that six years of age, by means of defendant's finger and/or (2) with the intent to arouse and gratify the sexual desire of any person, engaging in sexual contact by touching the genitals of J.S., a child younger that seventeen years of age by means of his hand. In addition to providing instructions for those offenses, the trial court also included, over appellant's objection, an instruction for the lesser included offense of aggravated sexual assault of a child under the age of fourteen.

The trial court's instructions permitted the jury to convict Appellant of (1) aggravated sexual assault of a child younger than six, as charged in count one of the indictment, (2)

aggravated sexual assault of a child younger than 14, as included in count one, or (3) indecency with a child by contact, as charged in count two of the indictment, or (4) to find appellant not guilty. In the application paragraph for each offense, the jury was instructed that, unless they found appellant guilty beyond a reasonable doubt of that offense, they would acquit appellant and consider the next option. The charge contained four verdict forms, one for each offense and one for not guilty; those options were separated by the word "or" on the verdict form.

The code of criminal procedure provides that the verdict in every criminal action must be general. TEX. CRIM. PROC. CODE ANN. § 37.07 §1(a). Where, as in this case, the charging instrument contains more than one count the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them. *Id*., § 1 (c). The verdict forms are a part of the jury charge. *Jennings v. State*, 302 S.W.3d 306, 307 (Tex. Crim. App. 2010).

All jury charge errors, including errors in the verdict form, are cognizable on appeal. *Id*., at 311 (relying on *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985)). We review unobjected-to error for "egregious harm," while objected-to error is reviewed for "some harm." *Almanza*, 686 S.W.2d at 171. "Egregious harm" is harm which affects the basis of the case, deprives a defendant of a valuable right, or vitally affects a defensive theory. *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006).

In this case, appellant did not object to the jury charge or to the verdict form on the same grounds he now raises on appeal. We must therefore determine whether any harm suffered by appellant constituted egregious harm. *Jennings*, 302 S.W.3d at 311; *see also Render v. State*, 316 S.W.3d 846, 852 (Tex. App.—Dallas 2010, pet. ref'd).

We need not decide the issue of whether there was error in the charge because we conclude that, even if error was present, appellant did not suffer egregious harm. Because the

charge contained four verdict forms, and because the verdict form for each offense was separated by the word "or," and because there was a final verdict form for "not guilty," the jury could not have been confused into believing that they had no option but to convict appellant of one of the three offenses on which the charge permitted conviction. The specificity of the verdict form also eliminates any confusion that might have caused conviction for multiple offenses.

Trial counsel's strategy was to defend against the State's allegations that any offense occurred in Collin County. Trial counsel never argued in favor of the lesser included offense or for a conviction on the indecency with a child charge under Count II of the indictment. Counsel argued for a general verdict of not guilty to all charges. One of the prosecutors explained the role of the lesser included offense and Count II to the jurors, but did not argue in favor of conviction on either charge and stated that those options were given only in case the jury was unable to reach a unanimous verdict on Court I. The lead prosecutor argued strictly in favor of a verdict of aggravated sexual assault of a child under the age of six and never mentioned the lesser included offense or Count II. Appellant's defense was not hampered by either the jury charge, the verdict forms, or by the arguments of the prosecutors referencing that charge. We conclude that appellant did not suffer egregious harm.

Conclusion

We overrule appellant's issues and affirm.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ERIC QUINONES, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-16-01246-CR V.	Trial Court Cause No. 380-82399-2015.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Brown and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 27th day of November, 2017.