Opinion issued October 20, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00302-CR

PABLO LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Case No. 1115181

MEMORANDUM OPINION

A jury convicted appellant, Pablo Lopez, of the first-degree felony offense of aggravated sexual assault of a child.[1] The jury assessed punishment at 50 years in prison.

In his sole issue, appellant contends that he was denied effective assistance of counsel at trial because "counsel failed to object to the admission of hearsay testimony by allowing numerous witnesses to testify about the sexual abuse of the complainant, and by making errors that helped convict appellant." On original submission, we held that appellant had received ineffective assistance at trial because his trial counsel had objected neither to the outcry testimony of three witnesses nor to the opinion testimony of two witnesses indicating that the complainant was credible.[2] We reversed the judgment of conviction and remanded the case for a new trial.[3] The Court of Criminal Appeals granted the State's petition for discretionary review, reversed our judgment, and remands this case to

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[1] *See* Act of May 15, 2001, 77th Leg., R.S., ch. 460, § 5, 2001 TEX. GEN. LAWS 893, 898, amended by Act of May 28, 2003, 78th Leg., R.S., 2003 TEX. GEN. LAWS 1805, 1806 (current version at Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), (a)(2)(B) (Vernon 2011)). The 2003 amendments apply only to an offense that was committed on or after September 1, 2003, the effective date of the amendments. Here, the offense at issue was committed on or about July 1, 2001. Accordingly, the former version of section 22.021 applies to this case.

[2] *Lopez v. State*, 315 S.W.3d 90, 102 (Tex. App.—Houston [1st Dist.] 2010, pet. granted).

[3] *Id.*

us to "address appellant's remaining issues."[4] The issues that remain are additional grounds on which appellant claims that he was denied effective assistance of counsel at trial and his assertion that the State engaged in "prosecutorial vindictiveness."

We affirm.

Background

In 2007, appellant was charged with sexually assaulting his nine-year old step-daughter, B.R. The indictment alleged that the sexual assault had occurred in 2001. The case proceeded to trial in 2008. At trial, then 16-year old B.R. testified that appellant began sexually abusing her when she was five years old. B.R. stated that the abuse continued until she was 12 years old. At that time, her mother divorced appellant. In 2006, when she was a sophomore in high school, B.R. told a close friend about the sexual abuse. The friend reported it to her aunt, who called Toni Sika, B.R.'s school counselor. B.R. spoke to Sika about the abuse and also to her school mentor, Maria Benavides. B.R. also was interviewed by Claudia Mullin of the Harris County Children's Assessment Center. Officer M. Parrie, of the Houston Police Department, viewed B.R.'s videotaped interview but did not speak with her. Officer Parrie interviewed appellant and, based in part on the interview, arrested him.

[4] *Lopez v. State*, 343 S.W.3d 137, 143–44 (Tex. Crim. App. 2011).

At trial, the State offered the testimony of Toni Sika, Maria Benavides, and Claudia Mullins without objection from the defense. Each of these witnesses presented outcry testimony regarding the sexual abuse underlying the charged offense. Claudia Mullin and Officer Parrie gave testimony indicating that they believed B.R. to be credible.

Appellant testified in his own defense. He stated that he had never been left alone with B.R. and denied the abuse allegations. Appellant claimed that B.R. had fabricated the claims against him.

The jury found appellant guilty of aggravated sexual assault of a child and assessed his punishment at 50 years in prison. Appellant filed a motion for new trial asserting that he was denied effective assistance of counsel at trial. In his motion, appellant presented numerous contentions to support his ineffective assistance of counsel claim. Of these contentions, the only one pertinent to this appeal is appellant's claim that trial counsel "failed to exercise due diligence in voir dire of sixty five jurors by utilizing only 24 minutes." The record shows that, by agreement of the parties, the trial court determined the motion for new trial on the affidavits submitted by each side, including the affidavit of appellant's trial counsel.

The trial court denied appellant's motion for new trial. This appeal followed. In his brief, appellant defines his sole issue as follows: "Appellant was

denied effective assistance of counsel [because] trial counsel failed to object to the admission of hearsay testimony by allowing numerous witnesses to testify about the sexual abuse of the complainant, and by making errors that helped convict appellant."

On original submission, we held that appellant had received ineffective assistance of counsel for two reasons: (1) trial counsel failed to utilize the provisions of Code of Criminal Procedure article 38.072 to limit the hearsay testimony elicited through the three outcry witnesses regarding the details of the charged offense, and (2) trial counsel did not object to the opinion testimony given by two witnesses indicating that B.R. was credible.[5] In reversing our judgment, the Court of Criminal Appeals held that, because the record was silent regarding why counsel had not objected to the outcry or opinion testimony, we had erred in concluding that appellant had met his burden to show his trial counsel was ineffective.[6] The Court of Criminal Appeals remands this case to us to determine the issues raised by appellant that were not addressed on original submission.

On remand, we construe the remaining sub-points raised by appellant in support of his ineffective assistance of counsel claim to be appellant's assertions that (1) trial counsel did not conduct a proper voir dire during jury selection, (2)

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5 *Lopez*, 315 S.W.3d at 93.

6 *Id.* at 144.

counsel failed to request a hearing pursuant to article 38.072 of the Code of Criminal Procedure, (3) counsel permitted testimony during the punishment phase regarding an unadjudicated extraneous offense involving the sexual abuse of another child; and (4) counsel did not file appellant's sworn application for community supervision before trial. Appellant also asserts that he is entitled to an acquittal because the State engaged in "prosecutorial vindictiveness."

Ineffective Assistance of Counsel

A. Applicable Legal Principles

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. *See* U.S. CONST. amend. VI. To show ineffective assistance of counsel, a defendant must demonstrate both (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). A failure to make a showing under either prong defeats a claim of ineffective assistance of counsel. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003).

An appellant bears the burden of proving by a preponderance of the evidence that his counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. at 814. We presume that a counsel's conduct falls within the wide range of reasonable professional assistance, and we will find a counsel's performance deficient only if the conduct is so outrageous that no competent attorney would have engaged in it. *Andrews*, 159 S.W.3d at 101.

B. Analysis

1. Voir Dire

Appellant complains of his trial counsel's conduct during voir dire. In this regard, appellant writes:

> At the outset of Appellant's voir dire, trial counsel asserted that he did not know if he could be impartial and unbiased in this type of case because he has a five year old daughter. Trial counsel failed to voir dire the jury on the punishment issue. He asked one improper question about probation and terminated his voir dire. His voir dire lasted twenty four minutes.

As mentioned, appellant's trial counsel offered his affidavit in response to appellant's motion for new trial. Regarding voir dire, trial counsel attested, "I covered those issues that I thought were necessary to the strategy of my case. The Judge and the State had each conducted lengthy examination of the jurors and covered many topics that I wished to cover. I thought it would be redundant to

cover them again." Indeed, the record reflects that the trial judge informed the venire of the punishment range for the charged offense and questioned the venire regarding punishment. *See Williams v. State*, 970 S.W.2d 182, 184 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) ("In light of the trial judge's extensive participation in the voir dire examination, we cannot characterize the decision of [appellant's] counsel to forego further questioning as anything other than trial strategy."). In light of the record, trial counsel's explanation provides a plausible reason regarding why he did not ask certain questions or question the venire for a longer time period. *See Goodspeed*, 187 S.W.3d at 391–93 (stating that counsel's failure to ask any voir dire questions, including inquiries concerning consideration of full range of punishment or probation, could have been legitimate trial strategy based on counsel's comments to jury panel that State had fully addressed his concerns); *Jackson v. State*, 491 S.W.2d 155, 156 (Tex. Crim. App. 1973) (indicating that length of voir dire questioning could be dictated by trial strategy).

In addition, trial counsel's statement to the venire that he did not know if he could be impartial because he had a five-year-old daughter could have been trial strategy to build a rapport with the jury panel. In any event, the record is silent with regard to why counsel made this statement. Thus, we will not speculate why counsel made this statement to the venire. *See Lopez v. State*, 343 S.W.3d 137, 143–144 (Tex. Crim. App. 2011); *see also Ortiz v. State*, 93 S.W.3d 79, 88–89

(Tex. Crim. App. 2002) ("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, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal.").

Appellant has not met his burden to show that his trial counsel's performance fell below an objective standard of reasonableness with regard to how he conducted voir dire. *See Strickland*, 466 U.S. at 687–88, 694, 104 S. Ct. at 2064. Appellant has not satisfied the first *Strickland* prong. *See id.*

2. Article 38.072 Hearing

Appellant also contends that his attorney rendered deficient performance because he did not request an article 38.072 hearing in order to limit the number of outcry witnesses. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 2010). Article 38.072 provides that, in some circumstances, an out-of-court statement describing the alleged offense that is made by a sexual assault complainant who is under the age of 14 years, is not inadmissible based on the hearsay rule if, among other conditions, the "trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement." *Id*. art. 38.072, §§ 1(1), 2(a)(1), (b)(2).

Appellant's contention regarding counsel's failure to request an article 38.072 hearing is intertwined with his claim that we reviewed on original submission concerning the lack of objection to the testimony of the three outcry witnesses. As with that claim, the record is silent regarding why counsel did not request a hearing. Therefore, as explained by the Court of Criminal Appeals with regard to that claim, appellant has failed to meet his burden under the first prong of *Strickland*. *See Lopez*, 343 S.W.3d at 144.

3. Unadjudicated Extraneous Offense

Appellant also intimates that his counsel was ineffective during the punishment phase for allowing testimony without objection regarding appellant's 1988 arrest and indictment for the offense of indecency with a child.[7] The evidence showed that the charge was later dismissed. Appellant points out that the victim could not identify appellant as her abuser. Rather, the State offered the testimony of the investigating police officer to show how appellant was identified as the offender in that case. Appellant complains that his trial counsel should have lodged a hearsay objection to this testimony.

The Court of Criminal Appeals has concluded that if a statement is introduced to explain how a defendant became a suspect or how the investigation

[7] Unadjudicated extraneous offenses are admissible during punishment if the State proves them beyond a reasonable doubt. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a); *see Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996).

focused on a defendant, then the statement is not hearsay because it is not offered for the truth of the matter asserted. *See Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995); *see also Thornton v. State*, 994 S.W.2d 845, 854 (Tex. App.—Fort Worth 1999, pet. ref'd) ("An officer's testimony is not hearsay when it is admitted, not for the truth, but to establish the course of events and circumstances leading to the arrest."). Appellant does not argue that this precept does not apply to the officer's testimony in this case.

Moreover, the record is silent as to why trial counsel did not object to the officer's testimony regarding how appellant was identified as the perpetrator with regard to the 1988 offense. Again, appellant has not shown through the record that counsel's conduct was not the product of a strategic decision, and we cannot conclude that counsel's performance in this regard was so outrageous that no competent counsel would have engaged in it. *See Lopez*, 343 S.W.3d at 143–44.

4. Community Supervision Application

Finally, appellant contends, "In another example of ineffective assistance, trial counsel has to reopen the evidence because he FAILED to file a sworn application by Appellant for community supervision before trial commenced. Had the prosecutor not agreed to stipulate, Appellant would have been shut out from consideration for probation."

Appellant's statement shows that community supervision was a possible punishment in this case. Nothing in the record indicates that any deficient performance by trial counsel in failing to file the sworn application in a more timely manner resulted in any prejudice to appellant with regard to punishment. Thus, appellant has not met his burden of proof with regard to the second *Strickland* prong to show that the outcome of the proceeding would have been different. *See Lopez*, 343 S.W.3d at 142 ("Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective.").

After reviewing the totality of trial counsel's representation and employing the strong presumption that counsel's conduct might reasonably be considered sound trial strategy, as we must, we conclude that appellant has not met his burden under *Strickland* to show that his counsel was ineffective. We overrule the sub-points offered by appellant to support his ineffective assistance of counsel point of error that were not addressed on original submission.

Prosecutorial Vindictiveness

Appellant concludes his brief by asserting that he is entitled to acquittal under the double jeopardy clauses of the state and federal constitutions because the prosecutor "used every ounce of inadmissible evidence in convicting Appellant" and took advantage of an inexperienced defense attorney. In advancing this argument, appellant offers no cogent argument, no record citations, and no legal

authority beyond citing the bare constitutional provisions. Accordingly, this argument is inadequately briefed, and appellant has presented nothing for review. *See* TEX. R. APP. P. 38.1(i); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008). Appellant's prosecutorial vindictiveness contention is overruled.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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