Opinion issued December 29, 2011

In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-00749-CR & 01-10-00906-CR

FREDRIC TYRES HORTON, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case Nos. 09CR3646 and 09CR3647

MEMORANDUM OPINION

Appellant, Fredric Tyres Horton, was charged with indecency with a child[1] and aggravated sexual assault of a child.[2] Appellant pleaded guilty to the

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1 *See* TEX. PENAL CODE ANN. § 21.11 (Vernon 2011).

indecency with a child charge, and he proceeded to a bench trial on the aggravated sexual assault of a child charge.[3] The trial court found him guilty and assessed his punishment at twenty years' imprisonment for each offense, to run concurrently. In two issues, appellant argues that (1) the trial court erred in denying his motion for new trial and his plea was involuntary and (2) he was denied effective assistance of counsel.

We affirm.

Background

Appellant was charged with indecency with a child and aggravated sexual assault of a child, his step-daughter. He pleaded guilty to indecency with a child and signed written admonishments and waivers. Appellant's trial counsel and the trial court both admonished him on the record at a pretrial hearing regarding his guilty plea, and he acknowledged that he was entering his plea freely and voluntarily. Appellant pleaded "not guilty" to the offense of aggravated sexual assault of a child and proceeded to a bench trial on that charge.

The complainant was thirteen years old at the time of trial. She testified that appellant touched her chest and genitals with his hand "a lot" and that he made her

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2 *See* TEX. PENAL CODE ANN. § 22.021 (Vernon Supp. 2011).

3 The charge for aggravated sexual assault of a child was assigned trial court cause number 09CR3646 and resulted in appeal number 01-10-00749-CR. The charge for indecency with a child was assigned trial court cause number 09CR3647 and resulted in appeal number 01-10-00906-CR.

touch his genitals with her hand "a lot." She also testified that appellant touched her genitals with his mouth on "a couple" of occasions. She testified that on some occasions appellant would have on clothes, and on others, he would not. She also testified that sometimes she had on clothes and sometimes she did not. She testified that the touching began when she was about five or six years old and continued until she was approximately ten years old.

Shannon Samuelson, the outreach coordinator and a forensic interviewer at the Advocacy Center for Children of Galveston County, testified as the outcry witness. She testified that the complainant told her that appellant first made her touch his "thingy" when she was five years old and that subsequent incidents occurred, including an incident on New Year's Day when she was ten. Samuelson testified that the complainant related that appellant had put his mouth on her genitals and had made her put her mouth on his genitals. The complainant also told Samuelson that appellant told her not to tell anyone about these incidents or "she would have to leave and never come back."

Dr. Collier Cole, a psychologist specializing in treating sex offenders, testified on behalf of appellant. Dr. Cole testified that he first met appellant in June 2006. Appellant indicated to Dr. Cole that he had offended against his step-daughter, the complainant, and had reported "on his own to CPS." Dr. Cole had been treating appellant since that time, and he testified that appellant had been

"showing good progress." Dr. Cole testified that appellant kept his appointments and that his wife was cooperative in his treatment and agreed to act as a chaperone—to be physically present when he was around their children—which persuaded CPS to allow him to move back into the home in 2007. Appellant eventually related to Dr. Cole an incident that had occurred some months previously in which appellant claimed that he awoke to find the complainant in his bed with her hand in his pants and that she then put his hand in her pants. Dr. Cole recommended that appellant and his wife get counseling for the complainant and focus on providing proper supervision of contact between appellant and the complainant, but he did not report this incident because appellant did not initiate the contact. Appellant did not mention any instances in which he reoffended against the complainant, nor did appellant mention any incidents involving oral sex with the complainant, although appellant did tell Dr. Cole that he was using drugs when some of the earlier instances of touching occurred and that he could not remember everything clearly.

Dr. Cole also testified that there were some instances in which appellant talked to him about a concern that the complainant would make up allegations against him. He testified that, on one occasion, appellant refused to allow the complainant to go to a pool party, and she wrote a note saying, "'You're going to let me go to this party if I take my clothes off,' or something to that effect." Dr.

Cole testified that appellant told him that this was an incident the complainant made up to try to "get [appellant] in trouble."

Appellant's father, Freddie Lee Horton, also testified on appellant's behalf. Mr. Horton testified that appellant confessed "what he had done" and told him that he was thinking about committing suicide. Mr. Horton took appellant to the hospital and informed hospital personnel and police about appellant's confession and suicidal thoughts. Mr. Horton testified that appellant never admitted that he had oral sex with the complainant. Mr. Horton also testified that the complainant, his granddaughter, never said anything to him about the alleged sexual abuse.

Finally, appellant himself testified. He testified that he decided to confess what he had done to his father as part of a spiritual journey. He testified that the first time he touched the complainant was "right before school was out before her eighth birthday" and that he did not touch her again after that. However, he testified that there was a second incident in which she grabbed him. He stated that he had never had oral sex with the complainant.

His attorney asked appellant about a videotaped statement that he had made in 2009 in which the interviewer asked him about oral sex and he replied, "yes." Appellant explained that his response was related to an incident in which the complainant wanted a cell phone that her parents would not let her have. He testified that Dr. Cole had gotten this incident confused somehow, and it was not

related to a pool party. He testified that the complainant gave a note to his wife that was in a child's handwriting, but was written as if it were from appellant to the complainant. It said, "If you let me see you naked, I will give you the phone back." Appellant then testified, "And I come to find out that [the complainant] has been, you know, throwing away letters and she's denying everything that it ever happened." His counsel also asked him about a polygraph test he took in 2009, in which the questioner asked, "Did you have oral sex?" and appellant answered, "both." He testified that he answered in the affirmative because the complainant had told him that they did in 2004. Appellant also testified that he had been drug free since 2005 and that his memory was better from that time forward.

Appellant testified that he originally believed that the complainant would tell the truth about what happened between them, but, "[s]ince then, she's wrote a letter. Since then, she's stolen money from her mother and her aunt." He testified that he no longer believed the complainant's assertion that he had had oral sex with her.

The trial court found appellant guilty of aggravated sexual assault of a child and assessed his punishment at twenty years' imprisonment.

Appellant filed a timely motion for new trial, asserting that material evidence favorable to him had been discovered since the trial. Appellant provided the affidavit testimony of his sister, Alisha Horton, who stated that the complainant

informed her that she was not being truthful and that appellant did not sexually assault her. Appellant also alleged that he received ineffective assistance of counsel because his trial counsel failed to procure trial witnesses with material information. Regarding his guilty plea to the charge of indecency with a child, appellant argued that had the evidence from additional witnesses been known to him at the time of his plea, he might not have entered a guilty plea.

At the hearing on the motion for new trial, Alisha Horton testified that she spoke with the complainant about the allegations sometime after "they added the second charge" for aggravated sexual assault. She asked, "Did [appellant] really do this to you while your mother was watching?" and she told the complainant that, even though appellant was her brother, if he really did do the things the complainant accused him of, she wanted to know because "right is right." Alisha stated that the complainant told her, "No, it didn't happen." When Alisha asked her why she said it did, the complainant told her that "she said it because she wanted to go to a pool party and she wanted her cell phone back." Alisha testified that she told the complainant that she needed to tell people the truth. However, Alisha never told police, the district attorney, or anyone else what the complainant had said, and she did not have an opportunity to speak to appellant's counsel. Alisha testified that she told appellant's trial counsel after the guilty verdict that she would have testified that the complainant had recanted to her, and the attorney

responded, "Well, I didn't know. Nobody told me." Alisha clarified that the complainant did not recant all of the alleged abuse and stated, "The initial charge [relating to indecency with a child], [the complainant] did tell me that it happened." Alisha also testified that she had a low opinion of the complainant's truthfulness in general.

Lois Horton, appellant's mother, also testified at the motion for new trial hearing. She testified that she had lived with appellant and his family on two occasions, including the time when the alleged aggravated sexual assault occurred. She testified that she was present in the household "a lot" and observed appellant interact with the complainant and his other children regularly. She never saw any indication that sexual abuse might have occurred. Lois stated that she talked with appellant's trial counsel on two occasions. Counsel asked her about the time period in which she lived with appellant's family and about the family's schedules. Lois also testified that appellant's trial counsel talked to her about serving as a witness, but Lois did not actually testify. Lois related that appellant's counsel "said she decided that she was not going to call me because I had temporary custody of the children, that she felt that it was in the best interest that I not testify." Regarding her opinion of the complainant's truthfulness, Lois testified that the complainant would "bend the truth if she thinks it's going to please you.

She's very lovable and she does for the most point tell the truth. But she will at times when she feels like, you know, it's going to hurt her, she'll lie."

Appellant's trial counsel did not testify at the motion for new trial hearing, nor did she provide an affidavit.

Motion for New Trial

In his first issue, appellant argues that the trial court erred in denying his motion for new trial. Appellant also argues, in part of his first issue, that his plea to the indecency with a child charge was involuntary. In his second issue, appellant argues that he received ineffective assistance of counsel. Appellant moved for a new trial on the ground that material evidence favorable to him had been discovered since the trial. He also argued that his trial counsel's failure to discover this evidence and to call favorable witnesses constituted ineffective assistance of counsel and that his guilty plea in the indecency with a child case was involuntary because he did not have this information at the time he made his guilty plea.

A. Standard of Review

Article 40.001 of the Code of Criminal Procedure provides that "[a] new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." TEX. CODE CRIM. PROC. ANN. art. 40.001 (Vernon 2006); *Wallace v. State*, 106 S.W.3d 103, 107 (Tex. Crim. App. 2003).

Thus, a defendant is entitled to have his motion for new trial granted if (1) the newly discovered evidence was unknown to him at the time of trial; (2) his failure to discover the new evidence was not due to his lack of due diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably bring about a different result in a new trial. *Wallace*, 106 S.W.3d at 108 (citing *Keeter v. State*, 74 S.W.3d 31, 36–37 (Tex. Crim. App. 2002)). A movant's failure to establish any of these four requirements warrants the denial of the motion for new trial. *Delamora v. State*, 128 S.W.3d 344, 354 (Tex. App.—Austin 2004, pet. ref'd).

We review the denial of a motion for new trial for an abuse of discretion. *State v. Herndon*, 215 S.W.3d 901, 906 (Tex. Crim. App. 2007). In reviewing the trial court's ruling, we are mindful of the fact that the trial court is the sole arbiter of the credibility of the witnesses and evidence offered. *Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001); *see also Etter v. State*, 679 S.W.2d 511, 515 (Tex. Crim. App. 1984) (holding that credibility of witnesses presented in motion for new trial and probable truth of new evidence are matters to be determined by trial court). We defer to the trial court's determination of historical facts, presume all reasonable factual findings that could have been made against the losing party were made against that party, and defer to all reasonable implied

factual findings that the trial court might have made. *Quinn v. State*, 958 S.W.2d 395, 402 (Tex. Crim. App. 1997). Then, in light of the implied factual findings, we determine whether the trial court, in denying the motion for new trial, was arbitrary and unreasonable. *Herndon*, 215 S.W.3d at 907; *see also* TEX. R. APP. P. 21.3 (proving list of non-exclusive grounds for granting new trial, including when appellant is "denied counsel" or "when the verdict is contrary to the law and the evidence"); *Jones v. State*, 711 S.W.2d 35, 37 (Tex. Crim. App. 1986) (holding that if it appears to trial court that, under circumstances of case, weight or credibility of new evidence is not such that it would probably bring about different result in new trial, it is within trial court's discretion to deny motion).

B. Presentation of New Evidence

Alisha Horton testified about a conversation she had had with the complainant sometime after appellant was charged with aggravated sexual assault. Alisha asked, "Did [appellant] really do this to you while your mother was watching," and complainant answered, "No, it didn't happen." Alisha testified that the complainant explained that she was motivated to lie because she wanted to go to a pool party and get her cell phone back.

Given the nature of the testimony offered, the trial court could have reasonably concluded that the new evidence was not likely to "bring about a different result in a new trial." *See Wallace*, 106 S.W.3d at 108. Alisha's

statement does not indicate that the complainant made a clear recantation of the alleged aggravated sexual assault, and the complainant made the statement to appellant's sister, which indicates that the complainant might have felt some pressure to comply with the wishes of Alisha, her aunt. Under the circumstances of this case—especially in light of the complainant's subsequent testimony at trial that the alleged aggravated sexual assault did occur—the trial court may have determined that the weight or credibility of this new evidence was not such that it would probably bring about a different result in a new trial. *See Jones*, 711 S.W.2d at 37. Furthermore, the trial court could have concluded that the evidence was merely impeaching, cumulative, or corroborative and so was not a valid basis for the granting of a new trial. While Alisha's testimony could have been admitted, as appellant argues, to impeach the complainant and to challenge her character and credibility, such new evidence is not a valid basis for granting a new trial. *See Shafer v. State*, 82 S.W.3d 553, 557 (Tex. App.—San Antonio 2002, pet. ref'd) (holding that when only purpose of new evidence is to impeach witness's trial testimony, this is "an impermissible reason to grant a second trial based on new evidence"). Additionally, both Dr. Cole and appellant testified at trial about an incident in which the complainant lied about appellant's conduct toward her in an effort to get her way regarding attending a pool party or having her cell phone returned. Thus, further testimony that the complainant had lied about allegations

against appellant for those same reasons was cumulative or corroborative and, therefore, does not support granting a new trial. *See Wallace*, 106 S.W.3d at 108.

Lois Horton, appellant's mother, testified only that she was living with appellant and his family during the time period that the alleged aggravated sexual assault occurred and that she did not observe any abuse or inappropriate behavior. Again, the trial court could have concluded that this testimony, in the circumstances of this case, was not likely to produce a different result in a new trial, as Lois could only testify that she did not see anything. *See Wallace*, 106 S.W.3d at 108; *Jones*, 711 S.W.2d at 37. Likewise, Lois's testimony about the complainant's reputation for truthfulness could have been admitted to impeach the complainant and attack her credibility, but impeachment is not a valid ground for granting a new trial. *See Shafer*, 82 S.W.3d at 557.

We overrule appellant's first issue as it relates to his claim that the trial court erred in denying his motion for new trial on the ground of introduction of newly discovered evidence.

C. Ineffective Assistance of Counsel

In his second issue, appellant argues that he was denied effective assistance of counsel because his trial counsel failed to properly investigate his case and thus failed to discover Alisha Horton's testimony.

1. Standard of Review

To make a showing of ineffective assistance of counsel, an appellant must demonstrate that (1) his counsel's performance was deficient and (2) there is a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Cannon v. State*, 252 S.W.3d 342, 348–49 (Tex. Crim. App. 2008). The appellant must prove ineffectiveness by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010).

The appellant must first show that his counsel's performance fell below an objective standard of reasonableness. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The second prong of *Strickland* requires the appellant to demonstrate prejudice—a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Thompson*, 9 S.W.3d at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and, therefore, the appellant must

overcome the presumption that the challenged action constituted "sound trial strategy." *Id.* at 689, 104 S. Ct. at 2065; *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009). Our review is highly deferential to counsel, and we do not speculate regarding counsel's trial strategy. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). To prevail, the appellant must provide an appellate record that affirmatively demonstrates that counsel's performance was not based on sound strategy. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *see Thompson*, 9 S.W.3d at 813 (holding that record must affirmatively demonstrate alleged ineffectiveness).

2. Analysis

Here, appellant has failed to provide any record of trial counsel's strategy in investigating the case and in determining whom to call as witnesses, and we will not speculate regarding her strategy. *See Bone*, 77 S.W.3d at 833. Thus, appellant has failed to affirmatively demonstrate trial counsel's alleged ineffectiveness and has not overcome the strong presumption that trial counsel acted pursuant to a sound trial strategy. *See Williams*, 301 S.W.3d at 687; *Thompson*, 9 S.W.3d at 813. Furthermore, as we have already discussed in our analysis of appellant's claims that he was entitled to a new trial based on newly discovered evidence, the testimony of Alisha and Lois Horton was not likely to lead to a different result in a new trial. Thus, appellant cannot show a reasonable probability that, but for his

trial counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Thompson*, 9 S.W.3d at 812.

We overrule appellant's second issue.

D. Voluntariness of Appellant's Guilty Plea

Finally, appellant argues in part of his first issue that his plea of guilty to the indecency with a child charge was unknowing because he "was not aware of all of the facts and, therefore, not aware of all of his possible defenses."

To satisfy due process, a guilty plea "must be entered knowingly, intelligently, and voluntarily." *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon Supp. 2011) (requiring that guilty plea be made voluntarily and freely). In examining the voluntariness of a guilty plea, we examine the record as a whole. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). When the record reflects that a defendant was duly admonished by the trial court before entering a guilty plea, it constitutes a prima facie showing that the plea was both knowing and voluntary. *Id.* The burden then shifts to the defendant to show that he entered the plea without understanding the consequences of his actions and was harmed as a result. *Id.* A plea is not involuntary because the defendant did not correctly assess every

relevant factor entering into his decision. *Ex parte Evans*, 690 S.W.2d 274, 277 (Tex. Crim. App. 1985).

Here, the record reflects that appellant received comprehensive oral and written admonishments from the trial court and his trial counsel prior to entering his guilty plea. Appellant signed written admonishments, and he orally assured the trial court on the record that he understood the charges and the range of punishment, that he discussed his plea with his attorney and was satisfied with her representation of him, and that he entered the plea freely and voluntarily because he was "guilty and for no other reason." These admonishments and appellant's assurances of his understanding create a prima facie showing that he entered his plea knowingly and voluntarily. *See Martinez*, 981 S.W.2d at 197.

To meet his burden of showing that he entered the plea without understanding the consequences of his actions and was harmed as a result, appellant argues that he would not have pleaded guilty if he had been aware that the complainant had recanted her allegations to Alisha Horton. However, Alisha Horton's affirmative testified at the motion for new trial hearing that the complainant did not recant any of the allegations resulting in the charge for indecency with a child—the charge to which appellant pleaded guilty. Thus, appellant has failed to meet his burden that his plea was unknowing or involuntary due to lack of important information or testimony. *See id.*

We overrule the remainder of appellant's first issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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