Opinion issued December 15, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. No-01-11-00480-CR

WILLIAM CLYDE CULBERSON JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 2nd 25th Judicial District Court
Colorado County, Texas
Trial Court Case No. CR 10-113

MEMORANDUM OPINION

Appellant, William Clyde Culberson, Jr., was charged by indictment with indecency with a child by sexual contact. *See* TEX. PENAL CODE ANN. § 21.11 (A)(1) (West 2011). Culberson pleaded not guilty, a jury found him guilty, and

after finding true one enhancement paragraph, the court assessed a mandatory sentence of life in prison. In his sole issue on appeal, Culberson asserts that he received ineffective assistance of counsel. We affirm the judgment of the trial court.

Background

In March 2009, Cheryl Henry received information from a cousin that prompted her to ask her nine-year old daughter, A.S., if she had been inappropriately touched by A.S.'s grandmother's boyfriend, Culberson. A.S. told her mother that, on more than one occasion, while she was at the home that her grandmother shared with Culberson, Culberson had touched her over her clothing on her "chest" and "private area." Henry took A.S., her son, and niece to the emergency room and met with Officer P. Hilley from the Weimer Police Department to discuss the allegations.

At trial, A.S. testified that on ten or more occasions, Culberson had touched her over her clothing on her breasts and vagina. She testified that the touching occurred at her grandmother's apartment, and later at the home her grandmother shared with Culberson. She also testified that Culberson had shown her a thong and pornography, and had attempted to kiss her. Henry testified that A.S. had told her that Culberson had touched her on her chest and private area. The State offered into evidence medical records from A.S.'s visit to the emergency room.

Officer Hilley testified as to Henry's demeanor at the emergency room, and as well as when the two met again for Hilley to take Henry's statement. Kara Janecek, A.S.'s counselor, testified that A.S. showed signs of post-traumatic stress disorder, and it was Janecek's belief that A.S. had been sexually abused. Officer W. Alley testified that while answering a disturbance call resulting from an argument between A.S.'s grandmother and Culberson, Alley noticed that A.S. looked terrified when A.S. looked at Culberson and refused to make eye contact with him. The defense did not offer any evidence. A jury found Culberson guilty and the court sentenced him to life in prison.

Discussion

In his sole issue on appeal, Culberson argues that he received ineffective assistance of counsel because, during closing arguments, his counsel failed to object to an argument made by the prosecutor.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002) (en banc). A reasonable probability is

"a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Mitchell*, 68 S.W.3d at 642. A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

There is a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Robertson v. State*, 187 S.W.3d 475, 482 (Tex. Crim. App. 2006) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2052). "In order for an appellate court to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation." *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) (citing *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). "When such direct evidence is not available, we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." *Lopez*, 343 S.W.3d at 143 (citing *Garcia v. State*, 9 S.W.3d 436, 440 (Tex. Crim. App. 2001)). "In making an assessment of effective assistance of counsel, an appellate court must review the totality of the representation and the circumstances of each case without the benefit of hindsight." *Lopez*, 343 S.W.3d at 143 (citing

Robertson, 187 S.W.3d at 483). Isolated instances of a failure to object to inadmissible argument or evidence do not necessarily render counsel ineffective. *See Robertson*, 187 S.W.3d at 483.

B. Analysis

Culberson argues that trial counsel was ineffective because he failed to object to the prosecutor's statement during closing argument to the effect that the prosecutor found the State's evidence credible. During closing argument, Culberson's trial counsel attacked the credibility of Henry and argued that Henry had been coaching A.S. about her testimony. Trial counsel also sought to undermine A.S.'s credibility by emphasizing that A.S. had been taking powerful psychotropic drugs. He told the jury that he would have to remain quiet while the State presented its interpretation of the evidence during its closing argument. Culberson's counsel ended his argument by stating, "My only hope is that you will take his argument in light of this charge, in light of the evidence that you've heard, in light of the documentation that exists, and argue for me what my responses would be."

During the State's closing, the prosecutor, after reviewing the evidence offered during the trial, stated, "I believe Wendy Alley. I believe Officer Hilley. I believe Tracy Henry. I believe [A.S.], and I believe Kara Janecek, and I believe those records." Culberson's counsel did not object. Culberson contends that this

argument constituted inadmissible, unsworn testimony of the prosecutor's belief in the witnesses. *See Menefee v. State*, 614 S.W.2d 167 (Tex. Crim. App. 1981). Culberson argues that his trial counsel's failure to object to this argument rendered counsel ineffective.

Assuming that the State's argument was objectionable, "the decision to object to particular statements uttered during closing argument is frequently a matter of legitimate trial strategy." *Evans v. State*, 60 S.W.3d 269, 273 (Tex. App.—Amarillo 2001, pet. ref'd.) (trial counsel not ineffective under first prong of *Strickland* for failing to object to prosecutor's argument about witness credibility); *see Alberts v. State*, 302 S.W.3d 495, 506 n.7 (Tex. App.—Texarkana 2009, no pet.) (trial counsel may have withheld objection to testimony to prevent calling attention to objectionable statement). Culberson's counsel's assertion during closing that he would have to remain quiet during the State's closing may be the reason he chose not to object during the State's closing, particularly because the prosecutor's arguments directly responded to defense counsel's statements of his own opinion as to A.S.'s truthfulness. But the record is silent as to his reasoning, and Culberson did not supplement the record through a hearing on a motion for new trial. *See Lopez*, 343 S.W.3d at 143–44.

The Court of Criminal Appeals has repeatedly emphasized that ineffective assistance of counsel claims are generally not successful on direct appeal and "are

more appropriately urged in a hearing on an application for a writ of habeas corpus." *Lopez*, 343 S.W.3d at 143 (citing *Bone v. State*, 77S.W.3d 828, 833 n.13 (Tex. Crim. App. 2002); *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002)). "On direct appeal, the record is usually inadequately developed and 'cannot adequately reflect the failings of trial counsel' for an appellate court 'to fairly evaluate the merits of such a serious allegation.'" *Id.* (quoting *Bone*, 77 S.W.3d at 833). We cannot say that "no reasonable trial strategy could justify" Culberson's counsel's decision to not object to the State's argument. *Lopez*, 343 S.W.3d 143 (citing *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2052; *Andrews v. State*, 159, S.W.3d 98, 102 (Tex. Crim. App. 2005)); *see Evans*, 60 S.W.3d at 273. We conclude that Culberson has not shown that trial counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064; *see also Lopez*, 343 S.W.3d at 143–44 (appellant failed to show trial counsel ineffective under first prong of *Strickland*, when record was silent as to why trial counsel failed to object to cumulative testimony of outcry witnesses who testified as to credibility of complainant in aggravated sexual assault of child case); *Gamble v. State*, 916 S.W.2d 92, 93 (Tex App.—Houston [1st Dist.] 1996, no pet.) (concluding, in face of silent record, trial counsel's failure, among other omissions, to object to improper jury argument, and opinion testimony, not ineffective assistance).

Because we have found that Culberson has failed to satisfy the first prong of *Strickland*, we need not address the second prong. *See Rylander*, 101 S.W.3d at 110.

Conclusion

We affirm the decision of the trial court.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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