Opinion issued December 21, 2017

In The

Court of Appeals

For The

First District of Texas

NOS. 01-16-00743-CR
01-16-00744-CR

ALI MAYBERRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case Nos. 1497306 & 1497307

MEMORANDUM OPINION

Ali Mayberry was indicted on two charges of aggravated sexual assault. *See* TEX. PENAL CODE § 22.021. He pleaded not guilty and the cases proceeded to a jury trial. The jury found Mayberry guilty of both charges and found that he used a

deadly weapon in committing the offenses. The trial court assessed his punishment at 40 years' incarceration.

On appeal, Mayberry contends that the trial court erred in (1) refusing to grant his request for a hearing on his motion for new trial; (2) refusing to grant a 10-day postponement of trial due to appointment of new counsel; and (3) allowing the state's medical expert to testify that the absence of visual injuries on the complainant did not mean that statements the complainant made to her were not true. We affirm.

BACKGROUND

In the early fall of 2014, Dana Jones,[1] the complainant, was 17 years old. She shared a one-bedroom apartment with Ashley Preston in the Greenspoint area of northwest Houston. Preston had encountered Jones and her boyfriend, Devonte Jackson, at a gas station in the area. When Preston learned that Jones and Jackson had nowhere to go, she offered to let them stay at her apartment. The lock on the front door of the apartment was broken. Jones and Jackson were usually in the apartment.

Ali Mayberry was also Preston's friend. He met Jones when he was visiting Preston. One night in late November, Mayberry entered the apartment while Jones and Jackson were in the bedroom. Jones did not notice that Mayberry was there until she saw him pass the bedroom door on his way to the kitchen. Jones and

[1] This is a pseudonym. *Cf.* TEX. R. APP. P. 9.8.

Jackson went together into the bathroom to take a shower. The bathroom door was in the hall and adjacent to the bedroom. Because the bathroom door did not have a lock, Jones opened a bathroom vanity drawer to block the door from opening.

Jackson was using the toilet and Jones was sitting on the counter by the sink when she felt a push on the door. She told the person on the other side of the door to wait, got off of the counter, and shut the cabinet drawer. She opened the door and found Mayberry standing there, wearing a black shirt and boxers. He held a handgun in his gloved hand.

Mayberry entered the bathroom. He held the gun to Jones's head, told her to get on her knees, and then forced her to perform oral sex on him. Next, he made Jones and Jackson go to the bedroom and remove their clothing. Still holding the gun, Mayberry ordered Jones to lie down. While Mayberry penetrated Jones vaginally, he forced Jackson to put his penis in Jones's mouth.

During the assault, Jones heard Preston and a male friend talking as they came up the stairs to the apartment. Preston and her friend tried to enter the apartment, but Mayberry chased them out. When they were gone, Mayberry returned to the bedroom and told Jones and Jackson to put their clothes on.

After Jones and Jackson were dressed, Mayberry ordered them to leave the apartment while he walked behind them, still holding the gun. Mayberry had them walk to another apartment complex nearby. Mayberry led them to a vacant

townhouse. Once they were inside, Mayberry ordered Jones and Jackson upstairs and had them remove their clothes again. He raped Jones in the same manner as before and again ordered Jackson to place his penis in Jones's mouth.

Jones noticed two flashlight beams cast onto a wall in the room. Jones and Jackson dressed hurriedly, and Mayberry told them to get downstairs and run when he opened the door. When they got downstairs, Mayberry and Jackson ran; Jones walked. When Jackson realized Jones was walking, he turned around and came back to her. Jones spotted a female security guard. She walked up to her and told her what had happened. Another security guard joined them. He called the police and an ambulance for Jones.

When Jones arrived at the hospital, she underwent a sexual assault exam. DNA testing showed that Mayberry could not be excluded as a contributor to the DNA recovered from Jones's vagina and mouth.

DISCUSSION

I. The trial court acted within its discretion in declining to set an evidentiary hearing on Mayberry's motion for new trial.

Mayberry contends that the trial court improperly denied him an evidentiary hearing on his motion for new trial, in which he claimed ineffective assistance of counsel. We review a trial court's denial of a motion for new trial for an abuse of discretion. *Lucero v. State*, 246 S.W.3d 86, 94 (Tex. Crim. App. 2008).

A defendant does not have an absolute right to a hearing on a motion for new trial. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009). "[A] hearing is not required when the matters raised in the motion for new trial are subject to being determined from the record." *Smith v. State*, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009) (emphasis omitted) (quoting *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993)). Conversely, a trial court is obligated to hold a hearing if the motion and the accompanying affidavits (1) raise matters that are not determinable from the record; and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. *Id.* at 338–40.

Mayberry's motion for new trial complains that he received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution, Article I, Section 10 of the Texas Constitution, and Article 1.05(a) of the Texas Code of Criminal Procedure. *See generally Strickland v. Washington*, 466 U.S. 668, 687–96, 104 S. Ct. 2052, 2064–69 (1984); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). A defendant complaining of ineffective assistance of counsel in a motion for new trial is entitled to a hearing if he alleges sufficient facts from which a trial court could reasonably conclude that (1) counsel failed to act as a reasonably competent attorney; and (2) there is a reasonable likelihood the outcome of the trial could have been different without counsel's error. *See Smith*, 286 S.W.3d at 340–41; *Goody v. State*, 433 S.W.3d 74, 81 (Tex. App.—Houston [1st Dist.] 2014,

pet. ref'd); *see also Hobbs*, 298 S.W.3d at 199–200 (explaining that, although defendant need not plead prima facie case in motion for new trial, "he must at least allege sufficient facts that show reasonable grounds to demonstrate that he could prevail"). The likelihood of a different result must be substantial, not merely conceivable. *Goody*, 433 S.W.3d at 81 (quoting *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 792 (2011)); *see also Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (holding that bare allegation that trial counsel failed to subpoena two witnesses without stating what they would have said to exculpate defendant was insufficient to require court to hold hearing on motion for new trial).

Mayberry's motion contends that trial counsel failed to provide reasonably effective assistance in failing to (1) request a continuance or otherwise object to the failure of the trial court to allow him 10 days to prepare for trial; (2) familiarize himself with the facts and the law applicable to the case, including potential defenses; (3) call witnesses at the punishment stage that could have benefited Mayberry through their testimony; and (4) inform Mayberry of the consequences of an affirmative deadly-weapon finding. But Mayberry's affidavit accompanying the motion does not set out a factual basis to support his ineffective-assistance claim. *See Smith*, 286 S.W.3d at 339. It does not identify any potential witness that trial counsel failed to interview or call, or evidence of any specific facts or circumstances that should have been adduced at trial but were not. Nor does it identify any legal

theory or potential defense that was not raised but would have been viable in this case.

Because Mayberry's affidavit lacks specific factual allegations, his motion for new trial neither raises matters that are not determinable from the record nor establishes reasonable grounds showing that the defendant could potentially be entitled to relief. We therefore hold that the trial court acted within its discretion in declining to hold a hearing on the motion.

II. Mayberry has not met his burden to show that he received ineffective assistance of counsel.

Mayberry raises on appeal the same challenges that he raised in his motion for new trial. *Strickland* sets the standard of review for claims of ineffective assistance of counsel. 466 U.S. at 687–96, 104 S. Ct. at 2064–69; *Bone*, 77 S.W.3d at 833. To prevail, Mayberry must first show that his counsel's performance was deficient. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Bone*, 77 S.W.3d at 833. This prong requires Mayberry to "prove, by a preponderance of the evidence, that his counsel's representation fell below the objective standard of professional norms." *Bone*, 77 S.W.3d at 833. Under the second prong of the *Strickland* test, Mayberry "must show that this deficient performance prejudiced his defense," meaning that he "must show a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Thus, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064.

The record must affirmatively support any allegation of ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). In assessing counsel's performance, we consider the entire representation, indulging a strong presumption that the attorney's performance falls within the wide range of reasonable professional assistance. *Id.* If we can imagine any strategic motivation for counsel's conduct, we presume that counsel acted for strategic reasons. *Thompson v. State*, 445 S.W.3d 408, 411 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citing *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). We therefore examine the record to determine whether it supports Mayberry's contentions.

Failure to request a continuance

Mayberry complains that his trial attorney, Craig Still, was appointed to take his former attorney's place only a day before trial and that Still rendered ineffective assistance by failing to request a continuance, either under Article 1.051(e) of the Texas Code of Criminal Procedure or as a matter of the trial court's discretion. The record reflects that both attorneys worked for the Harris County Public Defender's Office and that Mayberry's former attorney, Mark Hochglaube, was not formally removed from the case. In addition, Amalia Beckner, another assistant public

defender, served as second chair throughout Mayberry's trial, presenting the opening statement, cross-examining about half of the State's witnesses, and examining half of the defense's witnesses. She took the lead in objecting during the jury charge conference and presented the closing statement during the punishment phase. Mayberry's affidavit does not specify when Hochglaube left the Public Defender's Office or any arrangements made with Still and Beckner for taking over the case after his departure. Absent evidence to the contrary, we presume that the Public Defender's Office ensured continuity in Mayberry's representation while transferring the case from one lawyer to another within the office and that Hochglaube's work product and his other trial preparation assisted trial counsel in readying Mayberry's case for trial. Thus, we hold that the record does not demonstrate that trial counsel's representation fell below the standard of reasonably effective assistance required by *Strickland*.

Trial preparation

Similarly, Mayberry contends that trial counsel rendered ineffective assistance by failing to familiarize himself with the facts and the law applicable to the case, including potential defenses, and in failing to call witnesses at the punishment stage who could have benefited Mayberry through their testimony. The record does not bear out Mayberry's allegation that trial counsel lacked preparation. Counsel raised consent as a defensive theory, and in questioning witnesses, brought

out factual inconsistencies in their testimony in an effort to cultivate reasonable doubt. Mayberry does not suggest another defensive theory that would have been more effective. Based on the record, we defer to trial counsel's strategic decisions in handling the case.

Mayberry also complains that trial counsel rendered ineffective assistance by failing to present any defense witnesses during the punishment phase. "A defendant who complains about trial counsel's failure to call witnesses must show the witnesses were available and that he would have benefitted from their testimony." *Cantu v. State*, 993 S.W.2d 712, 719 (Tex. App.—San Antonio 1999, pet. ref'd) (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983); *Kizzee v. State*, 788 S.W.2d 413, 416–17 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd)). As noted above, Mayberry has not identified any such witnesses.

"The decision whether to present witnesses is largely a matter of trial strategy." *Lopez v. State*, 462 S.W.3d 180, 185 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (quoting *Lair v. State*, 265 S.W.3d 580, 594 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd)). *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence, but counsel can reasonably decide to forgo presentation of mitigating evidence only after evaluating available testimony and determining that it would not be helpful. *Goody*, 433 S.W.3d at 80–81 (quoting *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S. Ct. 2527, 2537 (2003)). Mayberry has

not carried his burden to demonstrate that the lack of witnesses resulted from a failure to investigate rather than a reasoned, strategic decision.

Information about the consequences of a deadly-weapon finding

Mayberry contends that trial counsel rendered ineffective assistance by failing to inform him of the effect that a deadly-weapon finding would have on his eligibility for parole. The alleged lack of that information, however, had no material effect on Mayberry because a finding that Mayberry used a deadly weapon is subsumed in the jury's finding that he was guilty of aggravated sexual assault. A person commits aggravated assault either (1) by causing serious bodily injury; or (2) by using or exhibiting a deadly weapon during the commission of the assault. TEX. PENAL CODE § 22.021(a)(1), (2). Both of these necessarily involves the use of a deadly weapon. *Reyes v. State*, No. 08-15-00311-CR, 2017 WL 1164592, at *7 (Tex. App.—El Paso Mar. 29, 2017, pet. ref'd) (citing *Blount v. State*, 257 S.W.3d 712, 714 (Tex. Crim. App. 2008). "The first way of committing aggravated assault—causing serious bodily injury—necessarily implies the use of a deadly weapon," and "the second way of committing aggravated assault expressly describes use or exhibition of a deadly weapon." *Id.* (citing TEX. PENAL CODE § 1.07(17)(B)). The evidence supported the deadly-weapon finding, based on testimony that Mayberry sexually assaulted Jones while using a gun during the commission of the assault. We

therefore hold that Mayberry has not met his burden to show ineffective assistance under *Strickland*.

III. The trial court did not err in admitting the nurse's testimony.

Finally, Mayberry complains that the trial court erred in admitting the following testimony of Elizabeth Williams, the sexual assault nurse examiner (SANE):

> STATE: And just to be very clear. The fact that she did not have any visual injuries does not mean that anything that she told you was not true?
>
> WILLIAMS: Correct.
>
> DEFENSE COUNSEL: Objection, speculation and improper opinion testimony.
>
> THE COURT: Well, those objections are overruled.

We review a trial court's decision to admit expert testimony for an abuse of discretion. *Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *See Blasdell v. State*, 470 S.W.3d 59, 62 (Tex. Crim. App. 2015). To be admissible, expert testimony must "assist" the trier of fact. *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997); *see* TEX. R. EVID. 702. "Expert testimony does not assist the jury if it constitutes 'a direct opinion on the truthfulness' of a . . . complainant's allegations." *Schutz*, 957 S.W.2d at 59 (quoting *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993)); *see also Blackwell v. State*, 193 S.W.3d

1, 21 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) ("It is generally improper for a witness to offer a direct opinion as to the truthfulness of another witness and such opinion is therefore inadmissible evidence."). The Court of Criminal Appeals has held that an expert who testifies that a class of persons to which the victim belongs, such as child sexual-abuse complainants, is truthful is "essentially telling the jury that they can believe the victim in the instant case as well," and this is not expert testimony that will assist the trier of fact. *Yount*, 872 S.W.2d at 711.

We disagree with Mayberry's characterization of Williams's statement as an opinion on a sexual assault complainant's' truthfulness. The gist of the question and answer sought to inform the jury that an absence of physical manifestation of an injury did not exclude the possibility that the person had been sexually assaulted. To the extent that Williams's testimony placed Jones in the class of persons who had no physical manifestation of injury but who were sexually assaulted, she did not weigh in on whether that class was truthful; rather, she sought to impart that the lack of physical manifestation, standing alone, is not determinative. As a result, we hold that the trial court acted within its discretion in overruling Mayberry's objection to the testimony.

CONCLUSION

We affirm the judgment of the trial court.

Jane Bland
Justice

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

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