Opinion issued January 9, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00689-CR

ROCKY JUAN LONGORIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 412th Judicial District Court
Brazoria County, Texas
Trial Court Case No. 75905-CR

MEMORANDUM OPINION

A jury convicted appellant Rocky Juan Longoria of three counts of aggravated sexual assault of a child and two counts of acts of indecency with a child by contact. In two points of error, Longoria contends that (1) his trial counsel rendered

ineffective assistance, and (2) the evidence was insufficient to support his convictions. We affirm.

Background

A custody order governed Y.W.'s living arrangements. During the school year, she lived with her mother, Amber Rau, and her stepfather, Longoria. During the summers, Y.W. lived with her father, Bret Welch, and her stepmother, Anastasia Welch. In 2014, when Y.W. was seven years old, Y.W. told Anastasia what Longoria had done to her. Anastasia and Bret contacted Child Protective Services, and Longoria was ultimately indicted for aggravated sexual assault of a child and acts of indecency with a child.

At trial, numerous witnesses offered testimony on the side of the State. Nine-year-old Y.W. testified to the following: Longoria made Y.W. "suck on his privates." It began when she was five. When Y.W. and Longoria were home alone, he would demand that she come to his room, he would lie down, make her lie on top of him, and he would pull down his pants. Y.W. also testified that she touched his private parts with her hands, although she could not remember the number of times it occurred. When asked what Longoria made her do to his private parts, Y.W. demonstrated by moving her hands in an up and down motion. Y.W. testified that when she was six years old, Longoria made her take a shower with him. Neither of them had clothes on and she touched his private parts.

Further, when she was asked to describe Longoria's private area, Y.W stated that it was longer than a girl's, "with skin all over it" that could be "pulled up," "two balls," "oval shaped," and had "a lot of hair around it." Y.W. also testified that she drew a picture of Longoria's private parts when she met with CPS worker Shana Sullivan. The State submitted the drawing into evidence (and Y.W. wrote the word "STOP" on it). Y.W. testified that Longoria told her not to tell anyone. She also averred that she had not seen her father or her two half-brothers naked. Finally, Y.W. testified that she told Anastasia about the incidents in summer 2014, and she had not told anyone but her half-brothers about this before then. She testified that she liked Longoria and did not want to hurt him.

Anastasia—designated as the outcry witness for Y.W.—offered the following testimony. In summer 2014, Y.W. was staying with Anastasia pursuant to a custody visitation schedule. In late June 2014, Anastasia's husband's 12-year-old son had a disturbing conversation with Anastasia that caused her to ask Y.W. if she had any secrets she needed to disclose. In response, Y.W.'s mouth fell open, she became red and nervous, her eyes welled up with tears, and she began crying. Through whispers and cries, Y.W. told Anastasia that Longoria would make her kiss and suck on his penis. Y.W. told her that it happened on multiple occasions and she had come to expect it. According to Anastasia, Y.W. specifically remembered that it happened once on Valentine's Day and one other day that Anastasia could not recall. Y.W.

informed Anastasia that when Y.W's mother was not there, Longoria would make Y.W. come into his room, lie down, and kiss him. Y.W. also told Anastasia that, when they were getting ready for a parade, Longoria made her take a shower with him, during which neither of them was clothed.

According to Anastasia's testimony, she told Y.W.'s father Bret what Y.W. had told her. They called an outcry hotline at Child Protective Services and reported what Y.W. had said. Anastasia also testified that she had known Y.W. for four years and she did not think Y.W. was a liar (Y.W. had lied only about minor things like not brushing her teeth).

Bret, Y.W.'s father, testified that on the night of Anastasia's conversation with Y.W., Y.W. was pale, quiet, and crying; she normally talked a lot. He testified that, in 2014, he witnessed Longoria kiss Y.W. on the lips, and he had a conversation with Y.W. explaining that it was inappropriate.

Y.W.'s mother, Rau, testified that she divorced Longoria after the summer of 2014 and that Y.W. rarely lies. Rau averred that she believed Y.W. She explained that Longoria would watch Y.W. when she was at work. She remembered that Longoria took a shower with Y.W. on "Frontier Day," but she had not asked him to take a shower with her and he did not need to take a shower with her. She also testified that although Longoria asserted that Y.W. knew "what his private parts looked like" because he got fire ants on him one day so he took off his clothes, Rau

never saw fire ant bites on him. Rau confirmed that Longoria is uncircumcised and "a hairy person down there."

Finally, Shana Sullivan, an investigator with the Child Advocacy Center of Big Bend, testified that she interviewed Y.W. and found her story to be consistent. Similarly, Darell Lasoya, Captain of the Alpine Police Department and Assistant Chief of Police, testified that he witnessed Sullivan's interview with Y.W. at the Child Advocacy Center. He described the interview as "graphic" and stated that certain details Y.W. gave indicated to him that the offenses had occurred.

The jury convicted Longoria of three counts of aggravated sexual assault of a child (Counts 1-3) and two counts of acts of indecency with a child (Counts 4-5). The jury assessed punishment at 30 years' imprisonment on Count One; 40 years' imprisonment on Count Two; 50 years' imprisonment on Count Three; and 20 years' imprisonment on Counts Four and Five. The Judge ran the sentences on Counts One and Two concurrently and the sentences on Counts Three, Four, and Five consecutively. Longoria appealed.

Discussion

Longoria argues that (1) his counsel's assistance was ineffective and (2) the evidence against him was insufficient. We reject both contentions and affirm the trial court's judgment.

A. Ineffective Assistance of Counsel

In his first point of error, Longoria asserts that his trial counsel was ineffective.

1. Standard of Review and Applicable Law

We evaluate claims of ineffective assistance of counsel under the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 770 n.3 (Tex. Crim. App. 1999); *Goody v. State*, 433 S.W.3d 74, 78 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). To show ineffective assistance, an appellant must establish that (1) counsel's performance was deficient (meaning it fell below the objective standard of reasonableness) and (2) the deficiency prejudiced the defendant (meaning that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different). *Ex parte Bryant*, 448 S.W.3d 29, 39–40 (Tex. Crim. App. 2014); *Hernandez*, 988 S.W.2d at 770 n.3; *Goody*, 433 S.W.3d at 78. A reasonable probability is a probability sufficient to undermine confidence

in the outcome; counsel's errors must be so serious as to deprive appellant of a fair trial. *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009).

Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions were within the wide range of reasonable and professional assistance. *See Bell v. State*, 90 S.W.3d 301, 307 (Tex. Crim. App. 2002). An appellant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; 104 S. Ct. at 2065; *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Further, the record must affirmatively demonstrate the alleged ineffectiveness. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *Thompson*, 9 S.W.3d at 813.

"When the record is silent on the motivations underlying counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that counsel's conduct was reasonable." *Mallett*, 65 S.W.3d at 63 (citing *Thompson*, 9 S.W.3d at 813–14). "In the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions." *Id*. (citing *Thompson*, 9 S.W.3d at 813–14).

2. Analysis

Longoria argues that his lawyer provided ineffective assistance in (1) failing to call witnesses during the guilt-innocence phase of trial, (2) failing to adequately

investigate the State's witnesses, and (3) opening the door to the admission of improper opinion testimony. We address each of Longoria's points in turn.

a. Failure to call witnesses

Longoria first asserts that his counsel was ineffective because he did not call defense witnesses during the trial's guilt-innocence phase. Specifically, Longoria argues that his trial counsel should have called in the guilt-innocence phase the four witnesses—Longoria's mother, his former neighbor, and his aunts—who testified on Longoria's behalf in the punishment phase.

But "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)); *Rodd v. State*, 886 S.W.2d 381, 384 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) ("The decision to call a witness is generally a matter of trial strategy.") (citations omitted). That principle applies readily here.

Longoria cannot show that his lawyer's witness decisions were anything other than trial strategy. The record is silent on defense counsel's strategy,[1] and we do not engage in speculation to find ineffective assistance. *See Easily v. State*, 248 S.W.3d

[1] In his motion for new trial, Longoria made a general allegation of ineffective assistance, but he failed to explain how his counsel was ineffective. He also attached no evidence to his motion and the record does not reflect any hearing on the motion. Thus, the record contains no explanation of counsel's trial strategy.

272, 279 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) ("[W]e normally will not speculate to find trial counsel ineffective when the record is silent on his reasoning or strategy."); *Henderson v. State*, 29 S.W.3d 616, 624 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (refusing to speculate regarding trial counsel's strategy where record was silent regarding counsel's decision-making). Longoria's counsel may have investigated these witnesses and decided strategically not to include their testimony during the guilt-innocence phase. He may have determined that the risk of harm from the witnesses' testimony outweighed any possible benefit.[2] Longoria has not overcome the strong presumption that his counsel's representation fell within the wide range of reasonable and professional assistance. *See Rodd*, 886 S.W.2d at 384 (counsel's failure to call character witnesses during guilt-innocence phase did not amount to ineffective assistance); *see also Strickland*, 466 U.S. at 687–88.

b. Failure to investigate State's witnesses

Longoria also asserts that his trial counsel failed to properly investigate the case by not interviewing State witnesses before trial. Again, Longoria cannot make the necessary showing.

To render effective assistance, a criminal defense lawyer must have a firm command of the facts of the case and governing law. *Ex Parte Ybarra*, 629 S.W.2d

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[2] Notably, during the punishment phase, one such witness asked the jury to "forgive" Longoria. Another testified that, given Longoria's conviction, she would not leave her grandchildren alone with him.

943, 946 (Tex. Crim. App. 1982); *Ex Parte Duffy*, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980), *overruled on other grounds by Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). Along those lines, counsel should make an independent investigation of the facts. *Duffy*, 607 S.W.2d at 517.

Longoria does not show that his counsel made a deficient investigation such that he provided ineffective assistance. Longoria cites to portions of the trial record where his counsel confirmed with Y.W., Rau, Sullivan, and Jason Scates that they had not previously met. Longoria also cites portions of the record where his counsel introduced himself to Anastasia, Bret, and Chief Lasoya, and where his counsel clarified Kewanee Cain-Richard's last name.[3] Longoria argues that these exchanges show that counsel had not met these witnesses before trial. But there is no evidence that Longoria's counsel did not have an investigator interview these witnesses before trial or that he did not otherwise investigate them.

To the contrary, the record makes clear that Longoria's counsel was aware of information about these witnesses—including specific information that he could not have learned during trial because it had not previously been mentioned at trial—that he used to impeach them. Longoria's counsel must have become aware of these facts during a pretrial investigation.

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[3] Cain-Richard is a CPS worker who testified at trial that she spoke with Longoria after receiving the report of abuse.

Moreover, a claim for ineffective assistance based on trial counsel's failure to interview a witness cannot succeed absent a showing that what the interview would have revealed reasonably could have changed the result of the case. *See Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Longoria does not show that further investigation by his counsel could have changed the result. *See id.* (appellant failed to establish what investigation or interviews would have revealed that reasonably could have changed outcome of case).

Longoria does not show that counsel's performance was deficient and prejudiced his defense. *See Strickland*, 466 U.S. at 687–88.

c. Examination Strategy

Longoria further asserts that, during his counsel's cross-examination of the State's witnesses, his counsel opened the door to improper opinion testimony by two of State witnesses—Captain Lasoya and Rau—regarding Y.W.'s credibility. Specifically, Longoria complains that his counsel allowed Captain Lasoya to state that he believed that the offense had occurred. Longoria also argues that his counsel elicited harmful and improper opinion testimony as a result of the following exchange between Longoria's counsel and Rau, as well as the ensuing redirect examination by the State:

Longoria's counsel asked Rau:

> Q. Now, when you're talking with police around the time of this incident, do you remember telling them that you believe Rocky was a very good man?
> A. Yes.
> Q. And that you trust him with all your heart?
> A. Yeah.
> Q. And whenever you heard this allegation [of his sexual abuse of Y.W.] you did not believe it, correct?
> A. No.

Immediately following, on redirect, the State's counsel asked Rau:

> Q. Do you believe it now?
> A. Yes.

But a defendant's counsel's decision to elicit opinion testimony through cross-examination of a hostile witness in order to discredit the witness is presumed to be a strategic choice. *See Humphrey v. State*, 501 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) ("Counsel's decision to elicit testimony through cross-examination is presumed to be a strategic choice."). "Unless a defendant overcomes the presumption that counsel's actions were based in sound trial strategy, counsel will generally not be found ineffective." *Id.* (quoting *Ex Parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012)). Proper trial strategy includes cross-examination with intent to discredit witnesses by pointing out inconsistencies. *Id; see also Josey v. State*, 97 S.W.3d 687, 696 (Tex. App.—Texarkana 2003, no pet.) (cross-examination strategy that opened door to testimony about additional incidents of assault was not ineffective assistance; "[w]e cannot say attempting to discredit one or both of the State's primary witnesses is improper trial

strategy or otherwise falls below the level of an objectively reasonable standard of conduct").

Here, Longoria's trial counsel attempted to (1) expose Rau's doubts regarding Y.W.'s allegations of abuse, and (2) question Captain Lasoya about what he actually knew about the abuse allegations. Longoria has not overcome the presumption that his trial counsel's actions were sound trial strategy. *See Humphrey*, 501 S.W.3d at 661; *see also Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990) (noting that it would be inappropriate for the court to "use hindsight to second guess a tactical decision made by trial counsel which does not fall below the objective standard of reasonableness").

We overrule Longoria's first issue.

B. Sufficiency of the Evidence

In his second issue, Longoria asserts that insufficient evidence supported his conviction. Notably, Longoria does not challenge the sufficiency of the evidence regarding a specific count, but rather challenges Y.W.'s credibility and the jury's reliance on Anastasia's testimony.

1. Standard of Review

We review the sufficiency of the evidence in the light most favorable to the verdict and then determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Acosta v. State*, 429 S.W.

3d 621, 624–25 (Tex. Crim. App. 2014). This standard of review allows a jury to resolve fact issues and to draw reasonable inferences from the evidence. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). The jury is the sole judge of witness credibility and weight to be attached to witness testimony, and when the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict and we defer to that determination. *Id*.

In a sufficiency inquiry, direct and circumstantial evidence are equally probative. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016) (citing *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013)). Not every fact presented must directly indicate the defendant is guilty, so long as the cumulative force of the evidence is sufficient to support a finding of guilt. *Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015) (citing *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987)).

2. Applicable Law

A person commits the offense of indecency with a child if the person engages in sexual contact with a child younger than 17 years old or causes the child to engage in sexual contact. TEX. PENAL CODE § 21.11(a)(1). "Sexual contact" includes "any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person" if committed with the intent to arouse or gratify the sexual desire of any person. TEX. PENAL CODE § 21.11(c)(2).

The uncorroborated testimony of either the child or an outcry witness suffices to support a conviction of indecency with a child. *Jones v. State*, 428 S.W. 3d 163, 169 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Courts afford wide latitude to testimony provided by child victims of sexual abuse. *Id.* (citing *Gonzales Soto v. State*, 267 S.W.3d 327, 332 (Tex. App.—Corpus Christi 2008, no pet.)). We liberally construe this testimony, and, as long as the child communicates to the jury that the touching occurred on a part of the body within the definition of the statute, the evidence will be sufficient. *See id.*; *Lee v. State*, 176 S.W.3d 452, 456 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006); *see also Gonzales Soto*, 267 S.W.3d at 332 ("The victim's description of what happened to her need not be precise, and she is not expected to express herself at the same level of sophistication as an adult.").

A person commits aggravated sexual assault of a child if, among other things, he intentionally or knowingly causes the penetration of the mouth of a child by the sexual organ of the actor. TEX. PENAL CODE § 22.021(a)(1)(B)(ii). Texas Code of Criminal Procedure 38.072, the outcry statute, provides that a child-abuse victim's statement to another is not inadmissible hearsay if the statement describes the alleged offense and the person to whom the statement is made is the first person who is at least 18 years old to whom the child made a statement about the offense. TEX. CODE CRIM. PROC. art. 38.072; *Garcia v. State*, 792 S.W.2d 88, 90–91 (Tex. Crim. App.

1990); *Carty v. State*, 178 S.W.3d 297, 305 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). In general, the proper outcry witness is the first adult to whom the alleged victim relates the "how, when, and where" the abuse took place. *See Reyes v. State*, 274 S.W.3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref'd). Uncorroborated outcry testimony regarding the child's disclosure of the sexual assault suffices to support a conviction. *Eubanks v. State*, 326 S.W.3d 231, 241 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

3. Analysis

Longoria argues that Anastasia's testimony was insufficient to support his conviction because Anastasia was not present when the alleged offense occurred and her testimony was hearsay. But Anastasia was properly designated as the outcry witness because she was the first adult to whom Y.W. made a statement about the abuse. Thus, her testimony was admissible hearsay under the exception provided for by the outcry statute, and the jury was entitled to rely on it. *See* TEX. CODE CRIM. PROC. art. 38.072; *Garcia*, 792 S.W.2d at 91; *Carty*, 178 S.W.3d at 305.

Longoria next challenges Y.W.'s credibility, arguing that the evidence was insufficient to support his conviction because, in addition to her allegations of sexual abuse, Y.W. stated that (1) she was unhappy her mother and father were not together, (2) she was unhappy Longoria and her mother had a new baby, (3) she had allegedly

witnessed a kidnapping, and (4) she had seen her mother and Longoria together without any clothes on.

This argument is unavailing. The jury, as the trier of fact, was the sole judge of the credibility of the witnesses and was free to accept or reject all or part of the witnesses' testimony. *See Diaz v. State*, 125 S.W.3d 739, 743–44 (Tex. App.—Houston [1st Dist.] 2003 pet. ref'd).

Ample evidence supported the conviction. Among other evidence, the State offered the following consistent testimony regarding the allegations of abuse:

- Y.W. testified that Longoria made her suck on his penis, and Anastasia testified that Y.W. told her that Longoria made her kiss and suck on his penis and that it had happened on multiple occasions.
- Anastasia testified that Y.W. told her about two specific instances.
- Y.W. also testified regarding a specific incident when she touched Longoria's privates in the shower. Y.W. demonstrated how he made her touch him and testified that she was not sure how many times she had touched him.
- Rau specifically recalled the incident when Longoria showered with Y.W. on "Frontier Day," and she testified that she had not asked him to do so nor was it necessary.

- Y.W. described Longoria's private area, as longer than a girl's, "with skin all over it" that could be "pulled up," "two balls," "oval shaped," and had "a lot of hair around it."
- The State also submitted Y.W's drawing of Longoria's private parts, which depicted an image resembling male genitalia.
- Consistent with Y.W.'s description, Rau confirmed that Longoria was "a hairy person down there" and that he was uncircumcised.
- Rau also testified that Longoria stayed home with Y.W. when Rau was at work.

Yes, Y.W. did testify that she initially wanted her parents to get back together when they broke up, that she was initially jealous of her baby sister, that she had allegedly witnessed a kidnapping, and that she once saw Longoria and her mother naked. She stated that sometimes it was hard for her to tell the difference between a truth and a lie. But she testified that she had no doubt that what she said about Longoria actually happened and she understood how serious it was.

Based on the evidence presented and viewing the evidence in the light most favorable to the jury's verdict, as we must, a rational jury could have found beyond a reasonable doubt that Longoria committed the offenses with which he was charged.

We overrule Longoria's second issue.

Conclusion

We affirm the judgment of the trial court.

Jennifer Caughey
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Caughey.

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