Opinion issued February 13, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00171-CR

ABEL MARK GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Case No. 1491255

MEMORANDUM OPINION

A jury convicted Abel Mark Garcia of assault on a family member, second offense, and the trial court assessed his punishment at confinement for 25 years.[1] In two issues, appellant contends that (1) his trial counsel rendered ineffective

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1 *See* TEX. PENAL CODE § 22.01(b)(2)(A).

assistance by failing to object to testimony regarding the complainant's credibility, and (2) the trial court erred in exempting the State's domestic violence expert from the witness sequestration rule.

We affirm.

Background

On the night of November 25, 2015, the complainant, R.P., who was six months pregnant, placed a call to emergency services to report an incident of domestic violence by appellant, her boyfriend from whom she was separated. This case arises out of that incident. We describe the trial evidence below.

At trial, a recording of complainant's 911 call was admitted into evidence and played for the jury. When the dispatcher asked whether she was injured, the complainant stated that she had been hit on her face.

Officer V. Gonzalez of the Pasadena Police Department testified that, shortly after the emergency call, he arrived at the complainant's apartment. Gonzalez testified that the complainant "appeared to have been crying," and "seemed a little frightened, a little shaken up." She told Gonzalez that her boyfriend, appellant, had arrived intoxicated at her apartment that evening to retrieve some belongings. She stated that earlier, she had discovered "some different women were contacting him through Facebook claiming that he fathered their children," and that when she confronted appellant about this that night, he

denied it. The complainant told Gonzalez that she and the appellant then "engaged in a verbal altercation," at which point appellant "grabbed her by her face, her jaw, and slapped her one time across the right side of her face."

Photographs taken by Officer Gonzalez to document the complainant's injuries were admitted into evidence and published to the jury. Gonzalez testified that although the photographs did not show redness on the right side of the complainant's face, he had seen it in person. He also averred that the complainant told him that she was in pain where appellant had hit her face. The photographs showed scratches on the lower part of the complainant's right arm.

Officer Gonzalez testified that when asked whether she would like to press charges against appellant, the complainant answered that she would, and she then "inquired as to how she could get a restraining order placed against [appellant]." He also recounted that the complainant told him that she would not be staying at her apartment that night, "out of fear that [appellant] would return." Gonzalez stated that he found the complainant to be credible when he spoke to her at the scene that night.

Detective P. Sinitiere also testified at trial. As he explained, he worked in the Family Violence Unit of the Pasadena Police Department and was assigned to investigate the case. Just over a week after the incident, Sinitiere spoke with the complainant on the telephone. He found the complainant credible—both because

of her consistency in recounting the incident and because of the "emotion" he observed in her.[2]

The complainant testified at trial as well—but to a different version of these events. Specifically, the complainant testified that appellant *did not* hit her, and that she lied to the emergency services dispatcher because she was angry. She stated that she is "emotionally unstable sometimes" and acts "irrationally" when, as was the case that night, she does not take her medication. She also testified that her pregnancy had made her "emotional," and that she was "raging" the day of November 25, because "one of [appellant's] exes kept interfering in [their] relationship." She stated that appellant's ex-girlfriend had been "stalking" her, by "contacting [her] through Facebook, through [her] phone, through e-mail, harassing [her] on a daily basis," and having "her friends calling [], texting[] as well, harassing [her]."

In describing the evening of the incident, she averred that when she confronted appellant about his ex-girlfriend, they "started arguing." The complainant became upset and asked appellant to leave. He at first refused, "[b]ut whenever I threatened to call the police and he s[aw] me grab my phone, he left."

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[2] After this phone call and a conversation with appellant later that day, Sinitiere presented the case to the district attorney for criminal charges.

She further asserted that she did not tell Detective Sinitiere the truth when she spoke with him a week after the incident because she was afraid of being "put in jail for a false report." She also stated that she did not tell Officer Gonzalez that she was in pain or that she was afraid and wanted a restraining order.

She testified that appellant had never been abusive to her, that the "marks" on her arm were scars from punching a window several years ago, and that the "only explanation" for any redness visible on her face the night of the incident was that she had been asleep "on [her] arms."

In addition, the complainant testified that after appellant was arrested, she contacted the district attorney's office several times to report that appellant had not in fact hit her, but no one listened to her. She stated that, as of the time of trial, she was living with appellant, they were "common law married," and she was pregnant with his second child.

Kapriva Hutchinson, a social worker for the Family Criminal Law Division of the Harris County District Attorney's Office, served as the State's domestic violence expert. Although the witness sequestration rule had been invoked, the State asked that Hutchinson be allowed to observe the complainant's testimony to consider it in forming her expert testimony. The trial court, over appellant's objection, exempted Hutchinson from the rule and permitted her to remain in the courtroom while the complainant testified.

Hutchinson testified that, based on her meeting with the complainant three weeks after the incident as well as her observation of the complainant's trial testimony, the complainant displayed characteristics of a "battered woman." In both instances, Hutchinson explained, the complainant offered inconsistent statements and "blamed others." Hutchinson explained that domestic violence victims may minimize, normalize, or deny the violence in order to cope with it. She further stated that it is common for victims of domestic violence—out of fear, embarrassment, or shame—to be hesitant to report the violence, and they may recant such reports "[f]or many reasons. Sometimes fear—that's the most dangerous time for a woman, when she tries to leave an abusive relationship—could be love—they love that person, they just want the violence to stop—family, spiritual reasons, financial reasons." On cross-examination, Hutchinson agreed that it was possible the complainant recanted because she lied when she reported the assault.

Ultimately, the jury found appellant guilty of assault of a family member, second offense. This appeal followed.

Ineffective Assistance of Counsel

In his first issue, appellant argues that his trial counsel rendered ineffective assistance because he did not object to Officer Gonzalez's or Detective Sinitiere's

testimony that they found the complainant to be credible when she reported the alleged assault.

A. Applicable Law

To prevail on a claim of ineffective assistance of counsel, appellant must show that (1) her trial counsel's performance fell below an objective standard of reasonableness, and (2) 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); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004). Absent contrary evidence, we will not second-guess counsel's strategy through hindsight. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) ("[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined. . . .") (internal quotation omitted)); *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979).

The appellant must provide a record that affirmatively demonstrates that counsel's performance was not based on sound trial strategy. *Mallett v. State*, 65

S.W.3d 59, 63 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). In the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (citing *Thompson*, 9 S.W.3d at 813–14). This is because the reasonableness of trial counsel's choices often involves facts that do not appear in the appellate record; thus, trial counsel should ordinarily be given an opportunity to explain his actions before a court reviews the record and determines that counsel was ineffective. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003).

If trial counsel is not given an opportunity to explain his actions, "then the appellate court should not find deficient performance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed*, 187 S.W.3d at 392).

To show ineffective assistance, appellant must also prove that he was prejudiced by counsel's actions. *Thompson*, 9 S.W.3d at 812. This requires appellant to demonstrate a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

B. Failure to Object to Testimony Concerning Credibility of Complainant

Appellant argues that his counsel was ineffective because he failed to object to the testimony of two State witnesses concerning the credibility of the complainant. On this record, we disagree.

We note from the outset that appellant did not raise this issue below. The record is silent as to counsel's motivation or strategy.

Appellant's argument is centered on the following testimony:

> Officer Gonzalez:
>
> [State]: As an officer, do you have to essentially judge different statements and witness' credibility on the scene?
>
> [Officer Gonzalez]: Yes, ma'am.
>
> [State]: And did you find this complainant credible—
>
> [Officer Gonzalez]: I did.
>
> [State]: —when you spoke to her?
>
> [Officer Gonzalez]: I did.
>
> . . .
>
> Detective Sinitiere:
>
> [State]: Did you find, from your conversations with the complainant, her to be credible?
>
> [Detective Sinitiere]: I did.

[State]: Why is that?

> [Detective Sinitiere]: Well, the—I had three different versions: I had some information from the 911 call; I had the information she provided to the original officer, as well as the information she provided me, which was all consistent; and the 911 call, as well as the original report, was documented. There was emotion involved; and she appeared upset and, you know, nervous and scared.

Appellant asserts that the above-quoted testimony constituted a direct opinion as to the truthfulness of the complainant regarding the allegations. He argues that such testimony is inadmissible under Texas Rule of Evidence 608, which provides that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." TEX. R. EVID. 608(a). He contends that there was no plausible strategic reason to for counsel to have forgone a Rule 608 objection as "appellant's entire defense was based upon the credibility of the complainant's testimony that she lied about the assault taking place."

In response, the State emphasizes the record's silence as to counsel's motivations, arguing that appellant has not shown ineffective assistance. The State further contends that appellant's counsel was not ineffective for failing to object under Rule 608 because evidence of truthful character is admissible when "the witness's character for truthfulness has been attacked." The State contends that appellant's trial counsel attacked the complainant's credibility in his cross examination of her. In particular, on cross-examination, the complainant testified that she lied to the emergency assistance operator, Officer Gonzalez, and Detective

Sinitiere. After that testimony, the State argues, Rule 608 allowed rebuttal evidence that the complainant appeared truthful at the time she spoke with the officers. The State contends that counsel was not ineffective for failing to object to admissible evidence. *See, e.g.*, *Webb v. State*, 991 S.W.2d 408, 419 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) ("The failure to object to admissible evidence does not constitute ineffective assistance of counsel.").

The record's silence here is significant, and we agree with the State that appellant has not met his burden under *Strickland's* first prong. In *Lopez v. State*, the Court of Criminal Appeals reversed a holding that counsel was ineffective, concluding that because the record was silent as to why trial counsel did not lodge an objection to opinion testimony about a complainant's credibility, the defendant had not met his burden under *Strickland*. 343 S.W.3d at 143–44; *see also Macias v. State*, No. 01-16-00664-CR, 2017 WL 5150315, at *5 (Tex. App.—Houston [1st Dist.] Nov. 7, 2017, pet. filed).

Here, too, the silent record does not affirmatively demonstrate a deficiency. *See Lopez*, 343 S.W.3d at 142 ("[C]ounsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation"); *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2001) ("Ineffective assistance of counsel claims are not built on retrospective speculation; they must be firmly founded in the record.") (internal quotation

omitted)). Appellant has failed to overcome the strong presumption that counsel's conduct fell within the wide range of reasonable, professional assistance. *See Lopez*, 343 S.W.3d at 142; *see also Macias*, 2017 WL 5150315, at *5 ("In the absence of evidence concerning trial counsel's reasons for failing to object to this opinion testimony [that complainant was truthful], we conclude that appellant has failed to meet his burden under *Strickland* to show, by a preponderance of the evidence, that his trial counsel rendered deficient performance."); *Amaya v. State*, No. 14-10-00670-CR, 2011 WL 2536164, at *3–4 (Tex. App.—Houston [14th Dist.] June 28, 2011, pet. ref'd) (mem. op., not designated for publication) (On silent record, failure to object to child abuse investigator's opinion testimony that complainant's outcry was "very credible" did not meet burden under first prong of *Strickland*); *Menefield*, 363 S.W.3d at 592 ("An ineffective-assistance claim must be firmly founded in the record and the record must affirmatively demonstrate the meritorious nature of the claim.") (internal quotation omitted)).

Moreover, on this record and in light of the fact that the complained-of testimony came in after the complainant averred that she had lied in her conversations with the police, we cannot conclude that counsel's decision not to object was "so outrageous that no competent attorney would have engaged in it." *Menefield*, 363 S.W.3d at 593 (quoting *Goodspeed*, 187 S.W.3d at 392).

We overrule appellant's first issue.

The Witness Sequestration Rule

Appellant argues in his second issue that the trial court erred in allowing Kapriva Hutchinson, the State's domestic violence expert, to remain in the courtroom after the witness sequestration rule had been invoked. *See* TEX. R. EVID. 614. He asserts that the State "failed to show why" Hutchinson should have been exempt from the Rule.

Texas Rule of Evidence 614 codifies the witness sequestration rule. When invoked by either party or the trial court, the rule mandates the exclusion of witnesses from the courtroom during trial, so they cannot hear the testimony of other witnesses. This rule prevents the testimony of one witness from influencing the testimony of another. *Russell v. State*, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005); *Martinez v. State*, 186 S.W.3d 59, 65 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

Relevant here, the rule expressly "does not authorize" the exclusion of four types of individuals.[3] One such category of exempted individuals is "a person

[3] Texas Rule of Evidence 614 "does not authorize excluding" the following four categories of witnesses:
(1) a party who is a natural person or in civil cases the spouse of such natural person;
(2) after being designated as the party's representative, an officer or employee of a party in a civil case, or a defendant that is not a natural person in a criminal case;
(3) a person whose presence is shown by a party to be essential to the presentation of the party's claim or defense; or
(4) the victim in a criminal case, unless the victim is to testify and the victim's testimony would be materially affected by hearing other testimony at the trial.

whose presence a party shows to be essential to presenting the party's claim or defense." *Id.* The party seeking to exempt a witness from the rule has the burden of showing that the claimed exemption applies. *Russell*, 155 S.W.3d at 180.

Enforcement of the rule and its exemptions lies within the sound discretion of the trial court. *Caron v. State*, 162 S.W.3d 614, 618 (Tex. App.—Houston [14th Dist.] 2005, no pet.). A trial judge abuses his discretion if he acts arbitrarily or unreasonably without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990).

Here, the State requested that Hutchinson be exempt from the rule, stating as follows:

> Your Honor, the State's here to put on the record that we would like to have our expert witness, Kapriva Hutchinson, present during the complainant's testimony. She is testifying as an expert in domestic violence, and we just ask that she be able to be present to listen to the testimony so that it can—**she can take that into consideration when she puts forth her expert testimony**.

Appellant argues that the State's explanation was insufficient to satisfy the State's burden because "the State only generically stated that their expert should be able to consider the Complainant's testimony and never specifically explained why their expert's presence was essential." Thus, he contends, the court abused its discretion in allowing Hutchison to stay. We disagree.

"The trial court is vested with discretion and may permit expert witnesses to be exempt from the rule in order that they may hear other witnesses testify and

then base their opinion on such testimony." *Martinez v. State*, 867 S.W.2d 30, 40 (Tex. Crim. App. 1993) (quoting *Lewis v. State*, 486 S.W.2d 104, 106 (Tex. Crim. App. 1972)). Put differently, a trial court has discretion to conclude that an expert's presence in the courtroom is essential—and thus falls under Rule 614's exemptions—where, as here, the expert plans to base her opinion on evidence offered at trial. *See id.* (Court did not abuse its discretion in allowing prosecution's expert to remain in courtroom during testimony of defendant's siblings because court may permit expert witnesses to be exempt from the rule to hear other witnesses testify and then base their opinions on such testimony); *see also, e.g.*, *Lewis*, 486 S.W.2d at 106 ("The trial court is vested with discretion and may permit expert witnesses to be exempt from the rule in order that they may hear other witnesses testify and then base their opinion on such testimony."); *Castillo v. State*, No. 10-12-00391-CR, 2014 WL 1778421, at *7 (Tex. App.—Waco May 1, 2014, no pet.) (mem. op., not designated for publication) ("A trial court may . . . permit expert witnesses to be exempt from the rule so they may hear other witnesses testify and then base their opinions on such testimony.").

In line with these cases, we find no abuse of discretion here. The purpose articulated by the State—allowing a domestic violence expert to take the complainant's testimony into account when offering her opinion—fell under the exemptions provided for in the rule. *See, e.g.*, *Martinez*, 867 S.W.2d at 39-40;

Gonzales v. State, Nos. 03-13-00333-CR, 03-13-00334-CR, 2015 WL 3691180, at *2 (Tex. App.—Austin June 11, 2015, no pet.) (mem. op., not designated for publication) ("We believe the purpose articulated by the State—providing expert testimony based upon observations of the children's testimony to explain exhibited behaviors not readily understood by those not familiar with the dynamics of child sexual abuse—is consistent with the exception provided for in the Rule."); *Hullaby v. State*, 911 S.W.2d 921, 929 (Tex. App.—Fort Worth 1995, pet. ref'd) ("[T]he trial judge did not abuse his discretion in (presumably) determining that the State's expert witness fit the exception"; "it seems clear that the State was seeking the presence of the witness to hear and interpret the meaning of 'gang' slang and symbolism . . . . This fact situation is one of the scenarios that part (3) of the rule contemplates. . . .").

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Jennifer Caughey
Justice

Panel consists of Justices Jennings, Massengale, and Caughey.

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