Affirmed and Memorandum Opinion filed January 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00290-CR

DAVID RONALD ROLAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 07CR0672

MEMORANDUM OPINION

Appellant David Ronald Roland appeals his conviction for aggravated sexual assault of a child, claiming in a single issue that he was denied effective assistance of counsel by his trial counsel's failure to object to an improper commitment question in voir dire. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by indictment with the offense of aggravated sexual assault of a child, to which he pleaded "not guilty." At voir dire, the trial court spoke with the venire panel about the presumption of appellant's innocence and the State's burden to

prove all of the elements of the charged offense beyond a reasonable doubt. During voir dire, the State proposed a scenario to venire members involving a child-complainant who had been sexually assaulted in which no DNA and no medical injuries were discovered; the State asked venire members if they would be able to convict an accused based only on a child-complainant's testimony of the offense if the venire members believed the child's testimony. One venire member indicated that she expected to see other evidence, such as DNA evidence, if the scenario involved an infant complainant who could not speak. The State responded with the following statement and question of the venire members, of which appellant now complains on appeal:

> So in that situation, I can understand where you would say, I need more. It's not good enough that you just say that this child has been sexually assaulted. She can't even tell us. But what I want to make sure that everyone is clear on is the law says that if one person tells you that it happens and you believe that person, that's what is crucial to the law. If you believe that person and that person can testify to all the facts, you can convict on that one person alone. The key is that you have to believe that person. So if a child gets up there let's say, six, seven, eight, nine, and that child tells you who did it and where it happened, what happened, what it felt like, what he or she did afterwards; and you believe that child the law says that's enough. And I want to know: Can you follow the law? It might not be a law that you agree with, sir or you agree with; but that is the law. Can you follow it?

The State then polled each of the venire members for an answer. In response to one venire member's question, the State indicated that the State could not talk about the particular facts of the case at hand during voir dire. The State referred to the law as the "one-witness rule" and offered another hypothetical scenario in which the venire member was a victim of, and the only witness to, a robbery. When the State asked the first forty-one venire members if they could follow the law, each answered affirmatively. Appellant's trial counsel did not lodge any objection to the State's questions or scenarios.

At the trial on the merits, the complainant's mother testified that her seven-year-old daughter, the complainant, spent several nights at appellant's home. Appellant and his live-in girlfriend were their neighbors. According to the complainant, several times

during the course of her stay in appellant's home, appellant would enter the room in which she was sleeping and would carry her to his bedroom. She testified that on these occasions, appellant put his finger inside her vagina, causing pain. During the following days, the complainant's mother learned of the incident when the complainant complained of pain when using the bathroom. The mother notified authorities after she observed what appeared to be "pieces of skin stripped from the inside" of the complainant's vagina. A sexual assault nurse examiner testified she conducted an examination of the complainant and observed a fresh laceration on the inside vestibule of the complainant's vagina that likely was three to four days old. According to the nurse, the laceration likely had been caused by blunt force, trauma, ripping, tearing, or sheering, such as with a fingernail. The nurse examiner testified that the only way the complainant could have sustained such an injury would have been by penetration.

The jury found appellant guilty as charged. Appellant was sentenced to thirty years' confinement and assessed a fine.

II. ANALYSIS

In a single issue, appellant claims he was denied effective assistance of counsel based on his trial counsel's failure to object to the State's question posed to the venire members, which appellant characterizes as an improper commitment question.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.051 (Vernon 2005). This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient

performance. *Strickland*, 466 U.S. at 688–92. Moreover, appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When, as in this case, there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). If there is no hearing or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. *Stults v. State*, 23 S.W.3d 198, 208–09 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The Court of Criminal Appeals has stated that it should be a rare case in which an appellate court finds ineffective assistance on a record that is silent as to counsel's trial strategy. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). On such a silent record, this court can find ineffective assistance of counsel only if the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting Garcia v. State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). There was no hearing on appellant's motion for new trial.

A commitment question is one that commits a prospective juror to resolve or to refrain from resolving an issue a certain way after learning of a particular fact. *Standefer v. State*, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001). An improper commitment question is one intended to create a bias or prejudice in a venire member before the prospective juror has heard the evidence; however, a voir dire question is proper if it is crafted to uncover a prospective juror's preexisting prejudice or bias on an issue applicable to the case. *See Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App.

2005). To determine whether a question is an improper commitment question, we consider (1) whether the question is a commitment question, and (2) whether that question includes facts—and only those facts—that lead to a valid challenge for cause. *Standefer*, 59 S.W.3d at 182. A question is an improper commitment question and the trial court should not allow the question if the answer to the first query is "yes" and the answer to the second query is "no." *Id.* at 182–83.

In this case, the State asked if the venire members could commit to follow the law and convict an accused based on the testimony of a single witness who has provided all of the facts if the prospective jurors determined that the witness was credible. *See Blackwell v. State*, 193 S.W.3d 1, 20 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (involving a proper commitment question that asked prospective jurors to follow the law that allows a jury to convict on the testimony of one witness that has established the elements of the offense beyond a reasonable doubt). Although the question was a commitment question, it was not improper. *See id.*; *see also Mason v. State*, 116 S.W.3d 248, 254 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (involving proper commitment question that asked venire panel whether they could convict without DNA or medical evidence). In posing the question, the State attempted to discover whether any of the prospective jurors harbored a preexisting bias or prejudice concerning the ability of the jurors to convict in accordance with the "one witness rule." *See Blackwell*, 193 S.W.3d at 20; *see also* TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon 2006) (providing that the State may challenge a juror for cause if that juror has a bias or prejudice against the law upon which the State is entitled to rely for conviction). In asking whether a prospective juror would require the State to produce more evidence beyond the credible testimony of a single complainant, the State sought to identify a prospective juror who would require the State to produce more evidence than what is required by law. A juror who would require the prosecution to prove more than what the law requires is rightfully challengeable for cause. *See Castillo v. State*, 913 S.W.2d 529, 533–34 (Tex. Crim. App. 1995) (holding juror challengeable for cause because juror

would not convict on basis of single witness's testimony even if testimony was sufficient to convince juror of guilt beyond a reasonable doubt); *see also Mason*, 116 S.W.3d at 255–56 (involving proper commitment question that led to identification of venire members who might not be able to follow the law if no DNA or medical evidence were presented). Moreover, the State specifically asserted that it could not talk about the particular facts of the case at hand in voir dire, and the State's hypothetical did not include any extraneous details about the charged offense. *See Blackwell*, 193 S.W.3d at 21. Accordingly, the State could properly ask venire members if they could convict on the testimony of one witness if the prospective jurors believed that witness beyond a reasonable doubt on all elements necessary to establish the offense. *See id.* at 19.

It would not have been an abuse of discretion for the trial court to have overruled any objection that the State's question was an improper commitment question. *See id.* (holding that a voir dire question asking venire members if they could follow the law that allows a jury to convict on the testimony of a single witness who has established all of the elements of the offense beyond a reasonable doubt was a proper voir dire question). We cannot conclude that appellant's trial counsel was deficient for failing to object to the State's question. *See Hawkins v. State*, 278 S.W.3d 396, 402 (Tex. App.—Eastland 2008, not pet.) (concluding that trial counsel's representation was not deficient for failing to lodge an objection to a commitment question). Appellant therefore has not shown by a preponderance of the evidence that his trial counsel provided ineffective assistance. *See id.* The record does not support a conclusion that both prongs of the *Strickland* test for ineffective assistance of counsel have been satisfied. Accordingly, we overrule appellant's sole issue on appeal.

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Yates, Frost, and Brown.

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