Affirmed and Memorandum Opinion filed January 21, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00864-CR

RAPHAEL MICHAEL VERDUN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1105999

MEMORANDUM OPINION

Appellant Raphael Michael Verdun challenges his conviction for aggravated sexual assault of a child, claiming that he received ineffective assistance of counsel. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by indictment with the felony offense of aggravated sexual assault of a child under the age of fourteen, to which he pleaded "not guilty." At a trial on the merits, the complainant, a thirteen-year-old girl, testified about meeting appellant

through an adult telephone chat line in August 2005. According to the complainant, she told appellant that she was sixteen years old and instructed appellant not to call her home, fearing that her parents would answer. Over the course of several weeks, appellant met the complainant at her home while her parents were working. Appellant would drive with the complainant to a nearby dead-end street, where, on several occasions, appellant kissed the complainant, touched her breasts, and digitally penetrated her sexual organ. The complainant testified that, on another occasion, appellant had sexual intercourse with her in his vehicle. When the complainant's parents learned of her activities with appellant, they notified authorities.

Responding officers created a report based on the information the complainant gave them. Sergeant Brenda Inocencio, an investigator with the Harris County Sherriff's Department, interviewed the complainant. According to Sergeant Inocencio's testimony at trial, she took the complainant's written statement of the events in September 2005.

In January 2006, appellant gave the complainant a ride to her middle school. A neighbor saw the complainant enter appellant's vehicle, jotted down the license plate, and contacted the complainant's parents, who notified authorities. Responding officers created another report with the complainant's oral statements. Sergeant Inocencio again interviewed the complainant following this incident and took the complainant's written statement.

The jury found appellant guilty as charged. Appellant was sentenced to seven years' confinement, probated for ten years, and assessed a fine.

II. ISSUES AND ANALYSIS

In two issues, appellant claims he was denied effective assistance of counsel under the United States and Texas Constitutions because his trial counsel failed to object to the testimony of Sergeant Inocencio. According to appellant, in her testimony Sergant Inocencio improperly vouched for the complainant's credibility, noting that without any

objection by his trial counsel, Sergeant Inocencio testified that the complainant gave consistent statements in the following exchange:

> [PROSECUTOR]: Have you reviewed each of the—each of [the complainant's] statements prior to your testimony today?
> [WITNESS]: I have.
> [PROSECUTOR]: And to recap, she—she made two separate statements orally to deputies with the Sherriff's office; correct?
> [WITNESS]: Correct.
> [PROSECUTOR]: Okay. And how many statements did she make to you?
> [WITNESS]: Two.
> [PROSECUTOR]: Okay. And, obviously, that makes four in all to the Sheriff's office?
> [WITNESS]: Correct.
> [PROSECUTOR]: And have you reviewed all those statements prior to your testimony today?
> [WITNESS]: I have.
> [PROSECUTOR]: Okay. Do you believe—without going into the substance of those statements, do you believe that they are consistent with each other?
> [WITNESS]: They are.
> [PROSECUTOR]: Why is it that you got a second statement from [the complainant] in January of '06?
> [WITNESS]: A second report, when it was made this—on the second time she was actually seen with the alleged suspect and, 'em, she was forthcoming with a little bit more information, as she was very hesitant to give in the first one.
> [PROSECUTOR]: Okay. She was more forthcoming?
> [WITNESS]: Not forthcoming, she just provided me, asking her more information, she just gave more information that she had continued to see him and had been seeing him from the time the first report was taken until the second report.
> [PROSECUTOR]: Okay. But you said those statements were consistent with much [sic] other?
> [WITNESS]: Yes.
> [PROSECUTOR]: Okay. Why do you say they are consistent with much [sic] other but she gave more information later?
> [WITNESS]: She was in—the information, more information she gave later. Meaning she said that she continued to see him, she continued to call him, she—he would pick her up. Consistencies were the way he picked her up, the vehicle and stuff like that.

[PROSECUTOR]: While there was more information in that subsequent statement when she was more forthcoming, did you find any conflicts between that subsequent statement and her first statement?
[WITNESS]: No.
[PROSECUTOR]: Okay. Or any statement that she provided the Sherriff's office?
[WITNESS]: No.

On cross-examination, appellant sought to elicit testimony from Sergeant Inocencio about an alleged inconsistency in the complainant's statements to authorities as to whether appellant attempted to penetrate the complainant's sexual organ or actually achieved penetration by "entering and going up and down." Appellant also complains of Sergeant Inocencio's testimony on the State's redirect examination, pointing to the following exchange:

[PROSECUTOR]: Okay. And the oral statements that [appellant's trial counsel] was cross-examining you on that [the complainant] gave to the officers at the scene, were you there when those statements were made?
[WITNESS]: No.
[PROSECUTOR]: Did you take down [the complainant's] statements when they came out of her mouth?
[WITNESS]: At—the original, at the offense report time, no, I did not.
[PROSECUTOR]: You weren't at the scene?
[WITNESS]: No.
[PROSECUTOR]: You didn't witness what she said?
[WITNESS]: No.
[PROSECUTOR]: You don't know about what came out of her mouth is accurately reflected in the documentation by the deputy, do you?
[WITNESS]: No.
…
[PROSECUTOR]: But you have reviewed these statements and you have an opinion about whether or not they're consistent?
[WITNESS]: I do.
[PROSECUTOR]: Okay. And are they?
[WITNESS]: Yes.
[PROSECUTOR]: Okay. Do you believe—well, as a sex crimes investigator, what do you believe is the best insight into the complainant's story?

> [DEFENSE WITNESS]: Objection, Your Honor. That calls for speculation.
> [TRIAL COURT]: I haven't heard the rest of the question yet. Please.
> [PROSECUTOR]: What do you believe is the best insight into the complainant's story, a written statement that she gives you to—in person or an oral statement that she gives at the scene?
> [WITNESS]: It's, 'em, always use the statements that they give me at the —just the one-on-one statement—.
> [PROSECUTOR]: Okay.
> [WITNESS]: —written statement.
> [PROSECUTOR]: Okay. Why is that?
> [WITNESS]: Their surroundings turn, could be in a public, we're usually in front of their parents, another officer, and it's just—it's just easier to talk in a closed environment just one-on-one.

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 in this case.

Under Texas Rule of Evidence 702, entitled "Testimony by Experts," if a witness possesses scientific, technical, or other specialized knowledge that will assist a fact finder, and if the witness is qualified as an expert by knowledge, skill, experience, training, or education, then that expert may testify with an opinion.[1] TEX. R. EVID. 702; *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). An expert's testimony is admissible when a jury is not qualified "to the best possible degree" to intelligently determine an issue without the testimony. *See Schutz*, 957 S.W.2d at 59. As such, expert testimony is intended to aid, rather than supplant, a jury's decision. *Id.* However, Rule 702 does not permit an expert to give an opinion that a complainant or a class of persons to which the complainant belongs is truthful. *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993). Therefore, expert testimony that offers a direct opinion on the truthfulness of a child complainant's allegations is not admissible under Rule 702. *Id.*

[1] Appellant did not object to Sergeant Inocencio's qualifications as an expert; therefore, we presume, without deciding, that this witness was qualified as an expert. *See Johnson v. State*, 970 S.W.2d 716, 720 (Tex. App.—Beaumont 1998, no pet.).

For appellant to succeed on his claims of ineffective assistance of counsel, he must demonstrate that if his trial counsel had objected, the trial court would have erred in overruling the objection. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). Although appellant characterizes Sergeant Inocencio's testimony as vouching for the complainant's credibility, in her testimony Sergeant Inocencio offered no opinion as to the truthfulness of the complainant's allegations, nor did Sergeant Inocencio express an opinion as to whether appellant committed the conduct alleged. *See Cohn v. State*, 849 S.W.2d 817, 818 (Tex. Crim. App. 1993); *Johnson v. State*, 970 S.W.2d 716, 720 (Tex. App.—Beaumont 1998, no pet.) (addressing argument that expert testimony about conclusions of investigation offered improper conclusion as to the guilt of appellant). Sergeant Inocencio did not recount the substance of the complainant's four statements taken as part of the investigation. *See Head v. State*, 4 S.W.3d 258, 262 (Tex. Crim. App. 1999) (involving hearsay complaint that an officer's testimony that other witnesses' statements were consistent with the complainant's account). In her testimony Sergeant Inocencio did not draw any conclusions regarding the substance of the complainant's statements, and none of those statements were entered into evidence. *See id.* Rather, this testimony revealed only that the complainant recounted the same facts to the investigator about what occurred; the witness did not reveal the substance or the details of what the facts were. *See id.* This testimony did not contain a direct opinion on the complainant's truthfulness or credibility. *See Yount*, 872 S.W.2d at 708 (prohibiting an expert's direct opinion on the truthfulness of a child complainant's allegations).

Moreover, this testimony could assist a trier of fact in determining an issue for which the jury was not qualified to the "best possible degree" in deciding whether the alleged events occurred. *See Johnson*, 970 S.W.2d at 720. Although an expert witness may not directly comment on a complainant's truthfulness, an expert witness may testify to aspects of a complainant's demeanor that may suggest the complainant was subject to manipulation. *See Schutz*, 957 S.W.2d at 69; *Burns v. State*, 122 S.W.3d 434, 437 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (concluding expert testimony as to

psychological test results, suggesting that a child complainant answered questions in an open, nondefensive, and truthful manner, did not constitute an impermissible comment on the child's truthfulness); *see also Darling v. State*, 262 S.W.3d 920, 924 (Tex. App.—Texarkana 2008, pet. ref'd) (providing that an expert's opinion that a child does not exhibit signs of having been coached or manipulated to make a false accusation does not amount to a comment on a child's truthfulness). Expert testimony may provide useful background information to aid a jury in evaluating the testimony of another witness—for example by explaining that children who have been sexually abused sometimes offer conflicting accounts—as a way of assisting a factfinder in determining the impeachment value of a complainant's prior statements. *See Pavlacka v. State*, 892 S.W.2d 897, 903 n.6 (Tex. Crim. App. 1994). In this case, Sergeant Inocencio's testimony indicated only that the complainant consistently offered the same account of appellant's conduct, but in this testimony the witness did not attempt to suggest that the complainant was truthful or that the charges against appellant were true. *See Burns*, 122 S.W.3d at 437. The primary purpose of Sergeant Inocencio's testimony was to provide useful background information regarding her investigation of the case for the jury to consider, and this testimony did not supplant a factfinder's ability to determine witnesses' credibility. *See id.*; *see also Pavlacka*, 892 S.W.2d at 903 n.6 (providing that expert testimony may aid a fact finder by providing information that child complainants sometimes offer conflicting accounts of sexual abuse).

Sergeant Inocencio did not offer a direct comment on the complainant's truthfulness or credibility; therefore, the testimony was not inadmissible for this reason.[2] *See Yount*,

[2] On this basis, appellant's reliance on the following cases is misplaced: *Fuller v. State*, 224 S.W.3d 823, 833–34 (Tex. App.—Texarkana 2007, no pet.) (involving witnesses' direct testimony that a child complainant is a credible and truthful person or that the witness believed the child's allegations); *Sessums v. State*, 129 S.W.3d 242, 247–48 (Tex. App.—Texarkana 2004, pet. ref'd) (involving witnesses who testified to specific factors or methods they used to asses a child's truthfulness and then directly expressed an opinion as to whether the child complainant in that case was truthful by meeting those factors); *Miller v. State*, 757 S.W.2d 880, 883 (Tex. App.—Dallas 1988, pet. ref'd) (involving witnesses' direct testimony that they believed a child was telling the truth); *Garcia v. State*, 712 S.W.2d 249, 252

872 S.W.2d at 708 (prohibiting an expert's direct opinion on the truthfulness of a child complainant's allegations). Trial counsel's failure to object to admissible evidence does not constitute ineffective assistance of counsel. *See McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994). Furthermore, although the record is silent as to trial counsel's strategy, it is plausible that trial counsel chose not to object because she sought to impeach the witness on cross-examination with an alleged inconsistency regarding penetration in the complainant's statements to authorities. *See Alexander v. State*, 282 S.W.3d 701, 709–10 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (providing that reasonable trial strategy for not objecting to evidence includes a decision to impeach a witness on cross-examination). On this basis, appellant has not shown by a preponderance of the evidence that his trial counsel provided ineffective assistance. *See Strickland*, 466 U.S. at 688–92. The record does not support a conclusion that both prongs of the *Strickland* test for ineffective assistance of counsel have been satisfied. Therefore, we overrule appellant's first and second issues on appeal.

(Tex. App.—El Paso 1986, pet.ref'd) (involving testimony that a mother would not manipulate a child to lie about sexual abuse). Likewise, the testimony did not address even the complainant's general capacity of disposition to tell the truth. *See* TEX. R. EVID. 608(a) (involving admissibility of opinion and reputation evidence of a person's character for truthfulness or untruthfulness); *Schutz*, 957 S.W.2d at 69–70 (allowing evidence under Texas Rule of Evidence 608(a) in response to a party's attack on a person's general capacity for truthfulness).

Having overruled appellant's two issues on appeal, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Boyce.
Do Not Publish — TEX. R. APP. P. 47.2(b).