Affirmed and Memorandum Opinion filed April 14, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00881-CR

ARTHUR LEE ALEXANDER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1198020

MEMORANDUM OPINION

A jury convicted appellant Arthur Lee Alexander of aggravated assault of a family member, and the trial court sentenced appellant to seventy-five years' imprisonment. *See* TEX. PENAL CODE ANN. § 22.02(b)(1) (West Supp. 2009). In a single issue, appellant argues that his trial counsel rendered ineffective assistance. We affirm.

BACKGROUND

Appellant was in a dating relationship with Bree Nelms for about five years. Late one night in January 2009, Nelms was awakened by her son after he heard knocking at the front door. Nelms opened the door and found appellant. After an argument, appellant

pointed a pistol at Nelms's face and said, "Bitch, if I can't have you, nobody can." Appellant then shot Nelms in the face, torso, and arm.

Nelms survived the shooting and testified at trial. Immediately before appellant's counsel was to begin his cross examination of Nelms, he approached the bench and advised the court that appellant had given him "a list of questions that he wants asked exactly like he has them." Appellant's counsel expressed concern that the questions involved "some very dangerous areas." The court instructed appellant's counsel that he was not required to follow appellant's instructions,[1] and the court recessed so counsel could advise appellant. When proceedings resumed outside the presence of the jury, appellant requested and received permission to make the following statement to the court:

> I'm telling my counsel that I need him to ask certain questions. He steadily telling me what questions he's going to talk. I don't need you to do what you are going to do. I need you to do what I ask you to do. Other than that, you ain't helping me. You ain't fit counsel. I need to do what I asked you to do, not what you want to do.
>
> My life's on the line right here. He's steadily telling me about what she's saying on the stand. That ain't helping me. I need you to ask these questions which are going to prove she's lying. You want to ask what you want to ask. I don't want you to ask what you want to ask. I want you to ask what I got wrote down right here. That's what I need you to ask. Anything else is irrelevant.
>
> I'm saying what he's talking about. Because you-all don't know what he's over there telling me. He's over there talking to me like I'm a two-year-old, like I ain't got common sense. I'm steadily telling him that she's lying about what she said, that we wasn't together. And I'm telling him that we was together the first day I got out and I can prove it by—because she rented the room. I was at her house and everything else. He's steadily telling me he ain't going to ask these questions. I need you to ask these questions because it's going to prove that she's lying.

[1] The court explained, "The only decisions [appellant] gets to make is whether he pleads guilty or not guilty, whether he testifies, and who assesses punishment. The rest is up to you. You don't have to follow—he doesn't dictate—I understand your quandary; but if you don't want to ask the questions, you don't have to."

The court asked appellant if these questions would prove that Nelms was lying about appellant shooting her. Appellant answered,

> Yes, sir. It's proving that she's a proven liar. He's steadily saying that these questions that I'm asking is going to open up everything that happened between the relationship. That's what I want, everything that happened to come out because it's going to prove that she's lied and lied and lied again on me. That's exactly what I want. That's exactly why I want these questions asked.

Following this statement, the court inquired of appellant's legal training and suggested appellant was a "fool" for not following the advice of counsel. After appellant told the court that a prior charge against him for assault of a family member was dismissed, the following exchange took place:

> The Court: Do you want to open that door?
>
> Appellant: I don't have no choice. I have to. I don't have no choice. My life's on the line.
>
> The Court: All right. Do you understand if you open the door to your prior criminal history, you're opening the door—you may kick that thing wide open, including assault on a peace officer, pen time for another assault? Any violent act you've ever committed, whether—whether you were arrested for, convicted of, any violent act, you may open the door to that. Do you understand that?
>
> Appellant: Yes, sir.
>
> The Court: Do you want the jury to hear about every time you got violent with somebody? I'm asking you a legitimate question. Do you want the jury to hear that?
>
> Appellant: If I don't—
>
> The Court: You're about to kick the door wide open.
>
> Appellant: But if I don't, then they're only going to hear what she's saying and then I ain't—I sure enough ain't got no win then. I sure enough ain't got no win.

. . . .

> The Court: . . . I want it on the record that you, in fact, are requesting him—not only requesting him, but demanding that he ask these open-ended questions that you don't know the answers so that when it opens up this can of worms, you can't come back on a writ and say, "He was ineffective because he opened up this can of worms that buried me."

Then, appellant's counsel asked appellant to state, on the record, that even though the eleven questions at issue could open up matters that counsel did not know the answers to and could open doors to inadmissible evidence, appellant was demanding counsel ask all or some of the questions. Appellant responded, "I'm going to take my chance with the questions. I'm going to take my chance." The court asked appellant, "So, are you demanding that your lawyer, Mr. Hayes, ask all 11 questions?" Appellant responded, "Yes. Yes. Yes, sir."

After once again explaining the consequences of the course of action appellant was insisting upon, the court asked, "So, you are saying you are not going to follow the advice of your counsel and demand of him to go into the questions—and actually not go into, but specifically ask these specific questions you have written down for him during the complaining witness' direct examination?" Appellant responded, "Yes, sir."

Finally, the court explained to appellant that he would be waiving error on a writ based upon those eleven questions: "[A]re you waiving any collateral attack based on these 11 questions?" Appellant responded, "Yeah, based on them 11 questions. Yes, sir."

Appellant's counsel asked Nelms the questions during cross examination, thereby eliciting information concerning appellant's criminal history and prior bad acts. The State conducted a redirect examination, eliciting further detail on the matters raised during cross. Appellant's counsel did not object to those matters.

INEFFECTIVE ASSISTANCE OF COUNSEL

In a single issue, appellant claims his trial counsel was ineffective during the guilt/innocence phase by (1) eliciting testimony regarding otherwise inadmissible prior felony convictions and extraneous bad acts during cross examination of the complainant and (2) failing to object to the prosecutor's redirect examination on those subjects.

To prevail on an ineffective assistance claim, an appellant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness and (2) counsel's deficiency caused the appellant prejudice—that counsel's errors were so serious as to deprive the appellant of a fair trial, and there is a probability sufficient to undermine confidence in the outcome that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Perez v. State*, 310 S.W.3d 892, 892–93 (Tex. Crim. App. 2010). An appellant must satisfy both prongs by a preponderance of the evidence; failure to demonstrate either deficient performance or prejudice will defeat a claim of ineffectiveness. *Perez*, 310 S.W.3d at 893.

Here, appellant cannot satisfy the first prong of the *Strickland* test. If a defendant, upon full advice of the consequences, demands that counsel follow a flawed strategy, a subsequent claim of ineffective assistance will not lie. *McFarland v. State*, 845 S.W.2d 824, 848 (Tex. Crim. App. 1992) ("When a defendant preempts his attorney's strategy by insisting that . . . certain evidence be put on or kept out, no claim of ineffectiveness can be sustained."), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994); *see Porter v. State*, No. 74095, 2003 WL 1845082, at *4 (Tex. Crim. App. Apr. 9, 2003) (not designated for publication) (holding counsel's performance not deficient when the client insisted on not striking a juror who favored the death penalty because "counsel advised their client of their professional position, advised the court of the situation, preserved the record, and did not breach the Rules of Professional Conduct"); *Duncan v. State*, 717 S. W. 2d 345, 348 (Tex. Crim. App. 1986) ("[W]hen a

defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."); *see also United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990) ("Cutting through the smoke, it is apparent that we are being asked to permit a defendant to avoid conviction on the ground that his lawyer did exactly what he asked him to do. That argument answers itself."), *quoted in McFarland*, 845 S.W.2d at 848.

In part, this is because the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691, *quoted in McFarland*, 845 S.W.2d at 848.

In this case, counsel's performance was not deficient. Counsel and the court repeatedly implored appellant not to follow a potentially disastrous course of action, but appellant could not be dissuaded. Appellant demonstrated his desire to pursue his own course in the trial and his knowledge of the ramifications. Appellant acknowledged the risks of asking these questions and made a strategic decision. He explained, "That's what I want, everything that happened to come out because it's going to prove that [Nelms] lied and lied and lied again on me. That's exactly what I want. That's exactly why I want these questions asked."

Further, we note that the Texas Disciplinary Rules of Professional Conduct provide that an attorney must "abide by a client's decisions" unless the course of action would be criminal, fraudulent, or otherwise prohibited by the rules or law. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X, § 9). Appellant does not argue on appeal that the questions he demanded to be asked constituted a criminal, fraudulent, or otherwise prohibited act. Thus, counsel's legal assistance to appellant did not fall

below an objective standard of reasonableness when he asked the questions as directed. *See McFarland*, 845 S.W.2d at 848; *Porter*, 2003 WL 1845082, at *4.[2]

Additionally, appellant's counsel did not render deficient performance by his failure to object to the State's questions on redirect examination after counsel opened the door during cross examination. Even if the redirect examination revealed otherwise inadmissible testimony, a defendant's questioning can open the door to its admission. *See Green v. State*, 934 S.W.2d 92, 101–02 (Tex. Crim. App. 1996). And counsel's failure to object to admissible evidence cannot be considered deficient performance. *McFarland*, 845 S.W.2d at 846; *see Gosch v. State*, 829 S.W.2d 775, 784 (Tex. Crim. App. 1991).

[2] Appellant suggests that the decision of how to cross examine a witness is one belonging to counsel alone, and thus, appellant's trial counsel should have ignored appellant's insistence that particular questions be asked; and the failure to ignore appellant's demands constituted deficient performance. Perhaps appellant is correct that counsel was not *required* to ask Nelms the questions as directed by appellant. *See Phillips v. State*, 604 S.W.2d 904, 907 (Tex. Crim. App. [Panel Op.] 1979) ("[W]hen a defendant is represented by counsel, he does not have the right to propound his own questions to witnesses . . . .") (citing *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976)); *see also Brookhart v. Janis*, 384 U.S. 1, 8 (1966) (Harlan, J., dissenting in part) ("I believe a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval. The decision, for example, whether or not to cross-examine a specific witness is, I think, very clearly one for counsel alone."); *Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985) ("We have recognized the very practical consideration that the criminal defense lawyer controls the progress of a case while the client confronts only three personal decisions: his plea to the charge, whether to be tried by a jury, and whether to testify on his own behalf." (emphasis omitted)), *vacated on other grounds by Texas v. Jackson*, 475 U.S. 1114 (1986); *Landers v. State*, 550 S.W.2d 272, 280 (Tex. Crim. App. 1977) (op. on reh'g) (same); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 4-5.2 (3d ed. 1993) (listing five decisions that belong to the criminal defendant; explaining that "[s]trategic and tactical decisions should be made by defense counsel after consultation with the client," which includes "whether and how to conduct cross-examination"); *cf. Schindley v. State*, 326 S.W.3d 227, 230 (Tex. App.—Texarkana 2010, pet. ref'd) (op. on reh'g) (concluding that Rule 1.02 does not require counsel to present particular issues on appeal upon the client's request).

But in its discretion, a trial court may allow for hybrid representation so that a criminal defendant may actively participate in decisions involving trial strategy, as the court apparently did here. *See Phillips*, 604 S.W.2d at 907–08. And although the trial court was not required to do so, *see Clark v. State*, 717 S.W.2d 910, 918 (Tex. Crim. App. 1986), it repeatedly cautioned appellant against his desired course of action. Appellant acknowledged the potential dangers and decided to take the risk; he said, "I'm going to take my chance with the questions."

Accordingly, appellant has failed to satisfy the first prong of the *Strickland* test, and we need not determine whether he was prejudiced. *See My Thi Tieu v. State*, 299 S.W.3d 216, 225 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *Strickland*, 465 U.S. at 697).[3]

We overrule appellant's sole issue and affirm the trial court's judgment.

/s/ Sharon McCally
Justice

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

[3] We note, however, that appellant urges this harm analysis only in the most conclusory manner, urging solely that "it is reasonable to conclude . . . Appellant's trial could very well have been different."