Affirmed and Memorandum Opinion filed December 2, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00986-CR

THOMAS VISER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 08CR0861

MEMORANDUM OPINION

A jury convicted Appellant, Thomas Viser, of aggravated sexual assault. The jury then heard evidence of two enhancements and sentenced appellant to ninety-nine years' confinement. Appellant asserts two issues in this appeal. The first is that he received ineffective assistance of counsel because trial counsel failed to object to opinion testimony about the complainant's truthfulness. The second point of error appellant asserts is that one of his enhancements was improperly admitted in the punishment phase. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, complainant W.W. testified that she dated appellant for a period prior to February 5, 2005. They both worked the evening shift at a hospital, which is how they met. On February 5, 2005, appellant was at W.W.'s home when he became angry with her. She repeatedly asked him to leave, but appellant refused and told her that he was going to have sex with her. W.W. testified that there was a period of struggle, but appellant produced a knife and threatened her with it.

W.W. testified that appellant attempted to rape her, but was unable to get an erection. He then penetrated her with his finger, which W.W. claimed caused bleeding on her bed. Appellant then ordered her to get on the floor and perform oral sex on him. W.W. claimed he put the knife to her neck during this period. After this failed to bring appellant to climax, W.W. testified that appellant required her to "masturbate him." Appellant then climaxed and became angry when the ejaculate touched his skin. W.W. wiped off the fluid with a towel.

Eventually, both W.W. and appellant left her house to go to work. They drove separate cars, but appellant drove behind W.W. and warned her not to drive "too fast." W.W. worked the majority of her shift at the hospital and then went to her daughter's home at approximately 11:30 p.m. When W.W. arrived, she told her daughter, M.J., about the assault.

Both women then went to the Dickinson police department to file a report. Later that night, W.W. had a sexual-assault examination performed. Police officers also examined her home.

During M.J.'s direct testimony, the prosecutor asked her if she considered her mother to be a truthful person. M.J. stated that she did. Appellant's trial counsel made no objection to that testimony. Appellant produced no evidence on his own behalf.

After deliberations, the jury found appellant guilty of aggravated sexual assault. In the punishment phase, the prosecution submitted two enhancements. The first was a

conviction in the state of Mississippi for manslaughter. The second was a Texas conviction for involuntary manslaughter. Appellant pled "not true" to both enhancements.

The State introduced the Mississippi conviction through a "pen packet" from the state of Mississippi. Enclosed was a certification of records signed by Gloria Gibbs, a record of appellant's location while in the state of Mississippi's custody, a sentence computation record, photographs of appellant, fingerprints and physical description of appellant, notice of appellant's parole revocation, a record detailing the visitors appellant gave permission to see while imprisoned, appellant's discharge papers and parole conditions, and a record of his admission interview. Sergeant Bell of the Galveston County sheriff's department testified that he had compared the fingerprints taken of appellant that day to the Mississippi records and they matched. (5 RR 18-20)

Appellant objected to the introduction of the Mississippi "pen packet," arguing the certification paragraph did not have a seal and the signature of Gloria Gibbs did not certify that they were true and correct records. The trial court overruled the objections.

Upon deliberation, the jury found the enhancement paragraphs true and sentenced appellant to ninety-nine years of incarceration.

DISCUSSION

In appellant's first point of error, he argues he received ineffective assistance of counsel because trial counsel failed to object to opinion testimony about the complainant's truthfulness.

I. Standard of Review

In reviewing claims of ineffective assistance of counsel, we apply a two-prong test. *See Salinas v. State,* 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). To establish ineffective assistance of counsel, appellant must prove by a preponderance of the evidence that (1) his trial counsel's

representation was deficient to the point it fell below standards of prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would be different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett v. State,* 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

An accused is entitled to reasonably effective assistance of counsel. *King v. State,* 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). When evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of each case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). There is a strong presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *See Salinas*, 163 S.W.3d at 740; *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). To overcome the presumption of reasonably professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson,* 9 S.W.3d at 813. When determining the validity of an ineffective assistance of counsel claim, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingraham v. State,* 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). When the record is silent as to the reasons for counsel's conduct, as in this case, a finding that counsel was ineffective would require impermissible speculation by the appellate court. *Stults,* 23 S.W.3d at 208. Absent specific explanations for counsel's decisions, a record on direct appeal will rarely contain sufficient information to evaluate an ineffective assistance claim. *See Bone v. State,* 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

A. Did Trial Counsel's Inaction Rise to the Level of Ineffective Assistance of Counsel?

Appellant complains of the following passage from the record, elicited from the prosecutor on direct examination of W.W.'s adult daughter, M.J.

Q: [M.J.], do you have any reason to believe your mom would make this up?

A: No. None whatsoever.

Q: Is she a truthful person or not a truthful person?

A: Very, very truthful.

Q: What do you mean by that?

A: She's the type of person who would tell you things and be like too truthful and maybe she shouldn't have said what she just said.

Q: So she doesn't lie to save your feelings?

A: Yes.

Defense counsel never objected to this line of questioning. Nor did he choose to challenge these assertions during his cross-examination of M.J.

A witness' direct opinion about the truthfulness of another witness is inadmissible evidence. *See Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997) (expert testimony about a child's lack of fantasizing was an indication of truthfulness about her assault); *Fisher v. State,* 121 S.W.3d 38 (Tex. App.—San Antonio 2003, pet. ref'd). Testimony of this sort is inadmissible "because it does more than 'assist the trier of fact to understand the evidence or to determine a fact in issue;' it *decides* an issue *for* the jury." *Yount v. State,* 872 S.W.2d 706, 709 (Tex. Crim. App. 1993) (citing *Duckett v. State*, 797 S.W.2d 906, 914-919 (Tex. Crim. App. 1990) (emphasis in original)).

The record, however, contains no explanation of why defense trial counsel did not object at trial. Nor is there any request for a new trial. Thus, any conclusion that counsel was ineffective would be strictly conjecture on the part of this court. *See Ingraham*, 679 S.W.2d at 509. As a result, we are bound to presume defense counsel had a strategic reason not to object to the testimony. *See Thompson,* 9 S.W.3d at 814. Appellant has failed to overcome the strong presumption that his trial counsel was effective. *See*

Salinas, 163 S.W.3d at 740; *Stults,* 23 S.W.3d at 208. Appellant's first point of error is overruled.

II. Was the Enhancement Improperly Admitted in the Punishment Phase?

Appellant argues in his second point of error that the trial court inappropriately admitted a "penitentiary packet," also known as a "pen packet," from Mississippi in the punishment phase of the trial.

A. Standard of Review

To preserve error, a party must (1) make a timely objection (2) state the basis for the objection and (3) obtain a ruling from the trial court. *See* Tex. R. App. P. 33.1; *Valle v. State,* 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). Furthermore, the contention on appeal must conform to the objection made at trial. *Resendiz v. State,* 112 S.W.3d 541, 547 (Tex. Crim. App. 2003); *Prince v. State,* 192 S.W.3d 49, 58 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). The purpose of requiring a trial court objection is "to give the trial court or the opposing party the opportunity to correct the error or remove the basis for the objection." *Martinez v. State,* 22 S.W.3d 504, 507 (Tex. Crim. App. 2000).

B. Did Appellant Preserve Error?

Appellant made two objections to a "pen packet" received from the state of Mississippi. First, he claimed there was no seal of Mississippi affixed to the certification paragraph. Secondly, he argued there were no signatures certifying the "pen packet" was the true and correct records of Mississippi. The trial court heard the objection and overruled it. On appeal, appellant argues that the "pen packet" from Mississippi was invalid because it did not contain a judgment or a sentence from the Mississippi court.

The objections at trial and the issues raised on appeal are different. As a result, appellant has not preserved any error. *See Resendiz v. State,* 112 S.W.3d at 547; *Martinez v. State,* 22 S.W.3d at 507; *Prince v. State,* 192 S.W.3d at 58. Consequently, the appellate

complaint is waived. *See* Tex. R. App. P. 33.1. Appellant's second point of error is overruled.

CONCLUSION

Having overruled each of appellant's points of error, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Brown.

Do Not Publish — TEX. R. APP. P. 47.2(b).