Affirmed and Memorandum Opinion filed March 10, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00134-CR

JOHN LEE BASEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1132602

MEMORANDUM OPINION

Appellant, John Lee Basey, was convicted of aggravated sexual assault of a child and sentenced to life in prison. He raises three points of error: (1) the trial court inappropriately commented on appellant's guilt during voir dire, (2) the trial court was not an impartial judge, and (3) appellant's trial counsel was ineffective. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Offense

Appellant does not appeal based upon the facts of the crime, so we provide a brief recitation. The complainant, C.L., testified that the sexual assault occurred during 1993

when she was twelve years old. She stated she was walking to school when appellant drove behind her, stopped, and engaged her in a conversation about arriving for school on time. C.L. informed the jury appellant wore Houston Independent School District police officer jacket.

C.L. testified she entered appellant's vehicle because he explained he needed to take her to juvenile detention because she was tardy. She stated he then stopped at a pay telephone and told C.L. he was "call[ing] it in." C.L. told the jury that after returning to the car, appellant asked C.L. for a kiss, threatening he would inform the people in juvenile detention she had drugs and a gun in her possession if she refused. C.L. testified that appellant then drove his automobile to a location underneath Interstate 10, stopped his vehicle, and pulled down her pants. She stated appellant required her to perform oral sex on him and then physically forced her to submit to sexual intercourse. C.L. stated that appellant said he would shoot her if she screamed, but she could not remember if she saw a gun.

After appellant completed intercourse, C.L. testified that appellant drove her close to school. C.L. went directly to the school nurse and informed her she had been raped. C.L. eventually gave a statement to the police and went to Texas Children's Hospital, where an evidence kit was performed. That kit apparently remained in the Houston Police Department ("HPD") property room, untested, from 1993 to 2007.[1]

Officer Julie Anderson of HPD testified that in 2007, she was informed that the DNA from C.L.'s evidence kit matched appellant's DNA. Officer Anderson contacted C.L. and performed a photo spread of six individuals, including appellant, with C.L. C.L. identified appellant from the photo spread.

[1] The record does not indicate the reason for the long delay in testing or the reason testing occurred in 2007.

Appellant was later arrested and charged with sexual assault against C.L. The jury convicted appellant of sexually assaulting C.L. *See* Tex. Penal Code § 22.0011 (West 2010).

II. The Punishment Phase of Trial

During the punishment phase of the trial, the State called several witnesses. A woman named L.T. testified appellant raped her when she was 16. Appellant was not tried for this alleged sexual assault.

Appellant also stipulated to three convictions: two counts of impersonating a police officer, and one of sexual assault. He was convicted of the offenses in 2004, and received ten years' deferred adjudication for the crimes.

Officer Gilbert Brillon of the Major Offenders division of HPD investigated the stipulated offenses and testified to the facts of the cases. He stated in both cases of impersonating a police officer, appellant approached prostitutes and negotiated payment for sex. Officer Brillon explained that after the women agreed to exchange money for sex, appellant claimed to be a police officer and threatened the women with incarceration unless they each agreed to perform sexual favors. Appellant held one of the prostitutes, D.L., in his custody for two to three hours while he exposed himself to her. Prostitute T.B. had intercourse with appellant to earn release from his custody. All of Officer Brillon's testimony occurred without objection from defense counsel.

Appellant chose to testify in the punishment phase. He confessed to raping C.L. and L.T. He also testified that after he entered deferred adjudication in 2004, he entered sex offender therapy and became a registered sex offender. Defense counsel asked appellant if he was the same "John Basey as in 1993" or "the same John Basey that committed the acts in 2004." Appellant answered in the negative to both questions.

Defense counsel began his closing argument with the following statement:

> Mr. Basey was a monster. He raped a 12-year-old girl in 1993. And in 2002, you heard from a young lady yesterday that he raped, a young lady of 16. And then he had occasion to rape prostitutes in . . . 2002. He was arrested for those crimes and placed on community supervision, deferred adjudication. He was not convicted, so he's eligible for probation in this case.

Defense counsel then described his personal views on rehabilitation and discussed appellant's actions in his sex offender classes. He also described the family appellant testified he endured as a child. Defense counsel then addressed the "benefit [appellant] would be to the community as a convicted sex offender ministering to other sex offenders to change their ways . . ." and noted a prison sentence would not change the fact that the rapes occurred. Defense counsel argued, "[Appellant] got on the stand and told you what he has done. He told you he was a monster. He lied about it in the past, sure . . . I'm asking you to keep him on community supervision so he can continue to go[] to those classes, he can be monitored by the State, and he can continue to support his children. I'm asking you not to lock him in a cage . . ."

I. Did the Trial Judge's Comment, during Voir Dire, Adversely Affect Appellant's Presumption of Innocence or Affect the Trial Court's Impartiality?

Appellant's first and second issues appeal a statement made by the trial judge during voir dire.

The comment at issue occurred early during voir dire. The trial judge had discussed the trial schedule, requirements for serving as a juror, the purpose of voir dire, and the standard of proof in criminal trials. He then explained that jurors hear objections and the judge responds to the attorneys with either "sustained" or "overruled" and "that allows me to judge what I believe the law is to be." He continued:

> And what will happen then is we have a court reporter taking down every word that is said in this court. That is why jurors are not allowed to take notes. You must decide the case from the sterile environment in this courtroom and nothing else. If something is to be read back to you during

> your deliberations, it will be read back by the court reporter, after you've had ample opportunity to send notes out and tell us what you are in question about. Then I, as the Judge, will decide what goes back to you and what doesn't.
>
> Now, all this is taken down and at the end of the trial it is presented as a record and that record is what is appealed up to the Court of Criminal Appeals or the Courts of Appeals. And the only thing[s] that [are] appealed are mistakes that the Judge makes as to rulings.
>
> Defense counsel made no objection to these remarks by the trial judge.

In his first point of error, appellant contends the trial court's comment "that record is what is appealed up to the Court of Criminal Appeals or the Courts of Appeals" adversely affected appellant's presumption of innocence, creating fundamental error. Appellant's second issue pertains to whether the trial judge's comment prevented appellant from receiving a trial with an impartial judge.

1. Standard of Review

To preserve error, a defendant must generally make a timely and specific objection. Tex. R. App. P. 33.1. Almost every right, constitutional and statutory, may be waived by the failure to object. *Smith v. State,* 721 S.W.2d 844, 855 (Tex.Crim.App.1986). Absent an objection, a defendant waives error unless the error is fundamental—that is, the error creates egregious harm. *Ganther v. State,* 187 S.W.3d 641, 650 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd); *see* Texas R. Evid. 103(d); *Villareal v. State,* 116 S.W.3d 74, 85 (Tex.App.-Houston [14th Dist.] 2001, no pet.). Egregious harm prevents a defendant from receiving a fair and impartial trial. *Ganther,* 187 S.W.3d at 650. Here, appellant failed to make a timely and specific objection , therefore, appellant's issue on appeal survives only if the trial judge's comment constitutes fundamental error.

The United States Supreme Court has determined that when certain constitutional rights are violated, fundamental error occurs. *See Arizona v. Fulminante,* 499 U.S. 279,

309—10, (1991); *Williams v. State,* 194 S.W.3d 568, 579 (Tex.App.-Houston [14th Dist.] 2006), *aff'd,* 252 S.W.3d 353 (Tex.Crim.App. 2008). The Court defined such errors as "structural defects in the constitution of the trial mechanism." *Fulminante,* 499 U.S. at 309. These fundamental constitutional rights include the right to counsel, the right to an impartial judge, the right to not have members of the defendant's race unlawfully excluded from a grand jury, the right to self-representation at trial, and the right to a public trial. *Id.* at 309-10; *Williams,* 194 S.W.3d at 579.

In addition to the fundamental errors established by the United States Supreme Court, a plurality of the Texas Court of Criminal Appeals held another fundamental error of constitutional dimension could exist if a trial judge makes a comment that taints the presumption of innocence. *Blue v. State,* 41 S.W.3d 129, 132 (Tex.Crim.App.2000) (plurality opinion).

2. Analysis

Appellant relies on *Blue v. State* as the primary basis for his argument that the trial judge's comment in this case constitutes fundamental error. Appellant compares the trial judge's statements in this case with the comments made by the trial judge in *Blue.* We disagree with appellant.

In *Blue*, during jury selection, the trial court instructed prospective jurors that (1) a trial delay was due to the defendant prolonging plea bargain negotiations with the State; (2) the trial court would prefer the defendant plead guilty; and (3) there were reasons an innocent defendant might not testify, defense counsel might call "Sister Theresa" to testify even if he knew she was lying because nobody would believe she would lie. *Id.* at 130; *see Ganther,* 187 S.W.3d at 650 (explaining the facts and issues in *Blue*). Although the defendant in *Blue* did not object to the comments at trial, he complained of them on appeal. *Id.* The intermediate court concluded the error was waived because no contemporaneous objection was uttered, but the Court of Criminal Appeals reversed, holding the error was outside the scope of waived error. Tex. Code Crim. Proc. Ann. art. 33.1 (West 2010); *id.*

at 130, 133. The judges voting to reverse, however, did not agree on the rationale. *See id.* at 132, 138. Four judges concluded the trial court's comments tainted the presumption of innocence and were fundamental error of constitutional dimension. *Id.* at 132; *see Saldano v. State,* 70 S.W.3d 873, 889 n. 72 (Tex.Crim.App.2002) (discussinging *Blue*). A fifth judge determined the trial court's comments violated the right to an impartial judge. *Blue,* 41 S.W.3d at 138 (Keasler, J., concurring); *see Saldano,* 70 S.W.3d at 889 n. 72 (explaining *Blue*). Assuming without deciding that *Blue* created another category of fundamental error in Texas, there is no majority opinion in *Blue,* so it is not binding precedent. *Ganther,* 187 S.W.3d at 650; *see Pearson v. State,* 994 S.W.2d 176, 177 n. 3 (Tex.Crim.App.1999).

However, even if we were bound to follow the plurality opinion in *Blue,* the trial judge's comment in this case did not rise to such a level that undermined the presumption of innocence or vitiated the impartiality of the judge. Considering the trial judge's comments as a whole, the intent of the solicitation was to educate the voir dire panel on the purposes and uses of a trial transcript. It was not a statement on either appellant's presumption of innocence or the trial judge's partiality towards the prosecution. *See Ganther,* 187 S.W.3d at 650 (holding the trial judge's comments regarding appellant representing himself were not fundamental error so appellant waived complaint on appeal by failing to object at trial); *Gordon v. State,* 191 S.W.3d 721, 726-27 (Tex.App.-Houston [14th Dist.] 2006, no pet.) (holding the trial judge's statements about how the defendant controls the system did not constitute fundamental error); *Rabago v. State,* 75 S.W.3d 561, 561-63 (Tex.App.-San Antonio 2002, pet. ref'd) (holding the trial judge's pronouncements regarding appellant's prior conviction was not fundamental error).

We overrule appellant's first and second issues.

II. Did Appellant Receive Ineffective Assistance of Counsel from His Trial Attorney?

In his third issue, appellant contends he received ineffective assistance of counsel in violation of the U.S. and Texas Constitution, as well as the Texas Code of Criminal Procedure. *See* U.S. Const. amend. VI; Tex. Const. Art. I, Sec. 10; Tex. Code Crim. Proc. Ann. § 1.051; *Strickland v. Washington,* 466 U.S. 668 (1984). Appellant claims the ineffective assistance is proven because: (1) defense counsel failed to object to the trial judge's comments during voir dire; (2) defense counsel failed to object on the grounds of hearsay and the Confrontation Clause when Officer Brillon testified about the stipulated offenses; and (3) defense counsel referred to appellant as "a monster" in final argument.

A. Standard of Review

When 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 evaluates 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 regarding 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).

B. Analysis

1. Failure to Object to Trial Judge's Comments

Having previously concluded that the trial court's statements were not fundamental error, we now consider whether failure to object to the trial court's statements was ineffective assistance of counsel. Appellant makes the allegations that "no reasonably effective trial attorney would have neglected to have made an objection to the trial court's improper comments" and "there could not be any sound trial strategy for not objecting to [the] comments." Appellant provides no citation or evidence for these statements. Nor does appellant provide any evidence regarding defense counsel's reasons for not objecting to the statement. A strong presumption exists that defense counsel was competent and we defer to the counsel's judgment whenever possible. *Salinas v. State,* 163 S.W.3d at 740; *Ingraham v. State,* 679 S.W.2d at 509. Without further evidence, we must conclude appellant's trial counsel chose not to object as part of a valid trial strategy. *Salinas v. State,* 163 S.W.3d at 740; *Ingraham v. State,* 679 S.W.2d at 509.

2. Failure to Object to Hearsay Regarding Extraneous Offenses

Appellant stipulated to the extraneous offenses introduced in the punishment phase of his trial, but now objects that Officer Brillon's testimony violated both the Confrontation Clause of the U.S. Constitution and the Texas evidence rules regarding hearsay. U.S. CONST. amend. VI.; Tex. R. Evid. 802.

The State had the right to prove these extraneous offenses to the jury for consideration during the punishment deliberations. Tex. Code Crim. Proc. Ann. Art. 37.07, § 3(a)(1). If defense counsel had objected to the testimony of Officer Brillon, the State could have chosen to subpoena appellant's victims. *See* Tex. R. Evid. 801; *Ortiz v. State*, 93 S.W.3d 79, 95 (Tex. Crim. App. 2002). Without evidence regarding trial counsel's strategy, it is possible the trial counsel made a strategic decision not to object to hearsay because trial counsel decided it would be more damaging to appellant's case to require his victims' testimony. Consequently, we must presume trial counsel performed at "a level of prevailing professional norms." *Salinas v. State*, 163 S.W.3d at 740; *Ingraham v. State*, 679 S.W.2d at 509.

3. Reference to Appellant as "A Monster"

During the punishment phase, appellant admitted he committed all of the offenses alleged against him. He also stated that he had participated in sex offender counseling since 2004 and had not re-offended, so he should be given mercy by the jury.

Defense counsel stated "appellant was a monster" during closing arguments. In the same paragraph, however, he noted that appellant was eligible for community supervision. Counsel then went on to catalog the reasons the jury should be lenient on appellant when considering punishment. The second reference to appellant as a monster was:

> [Appellant] got on the stand and told you what he has done. He told you he was a monster. He lied about it in the past, sure . . . I'm asking you to keep him on community supervision so he can continue to go[] to those classes, he can be monitored by the State, and he can continue to support his children. I'm asking you not to lock him in a cage . . ." (6 RR 29)

We presume defense counsel was arguing appellant's previous actions were monstrous, but appellant was a changed man deserving of an opportunity to avoid prison.

Appellant argues that "'Monster' is such a grotesquely abusive term that no reasonably effective attorney would ever consider using it . . ." He cites *Tompkins v. State* as support for that assertion. 774 S.W.2d 195, 218 (Tex. Crim. App. 1987). We conclude the case of *Tompkins* is not compelling precedent. In *Tompkins*, the prosecuting attorney referred to the defendant as "an animal" during argument. *Id.* Nonetheless, the Court of Criminal Appeals declined to overturn the conviction on that basis. *Id.*

In the instant case, defense counsel made the remark, with the possible intent of illustrating appellant, who had just confessed to raping two minors, had become a law abiding citizen. When we look at the record as a whole, we cannot conclude no reasonable attorney would have adopted this strategy. Without additional evidence regarding trial counsel's strategic intent, we must presume that trial counsel was performing as counsel at the level guaranteed by the Sixth Amendment when he decided to pursue this line of defense. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Salinas v. State*, 163 S.W.3d at 740; *Ingraham v. State*, 679 S.W.2d at 509.

We overrule appellant's third point of error.

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, Seymore, and McCally.

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