Affirmed and Memorandum Opinion filed September 20, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00666-CR
NO. 14-10-00667-CR

DAVID WAYNE CLARK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause Nos. 1262899 & 1262901

MEMORANDUM OPINION

A jury convicted appellant David Wayne Clark of aggravated sexual assault of a child and indecency with a child. Punishment was assessed at eighty years' imprisonment on the first charge, and twenty years' imprisonment on the second. On appeal, appellant contends (1) that the evidence is legally insufficient to support his convictions, (2) that the trial court erred by overruling his motion for new trial, and (3) that he received ineffective assistance of counsel. We affirm.

BACKGROUND

Appellant is the great uncle to the complainant, who, at the time of the offense, was just an eight-year-old boy. During the spring of 2009, the complainant, his mother, and three siblings lived with appellant at appellant's home in Channelview. One day at school, the complainant was instructed that he would need to ride the bus home rather than go to his grandfather's house. The complainant grew visibly upset, panicked, and refused to take the bus. The school principal contacted Children's Protective Services following the incident, suspecting that the child may be suffering from abuse at home.

After a series of interviews, the complainant finally revealed to authorities that he was sexually abused when he was forced to put his mouth on appellant's penis. The complainant reported that the incident happened in appellant's backyard, during the day, when no one was around. The complainant also indicated that on a different occasion, appellant touched him inappropriately and made him watch a pornographic movie.

Two psychiatrists testified that the complainant was a deeply troubled child who exhibited many signs of fear, post-traumatic stress, and sexual abuse. Upon their recommendation, the trial court allowed the complainant to testify at trial through closed-circuit television. During his examination, the complainant acknowledged that he used to live with "Uncle David," but the complainant refused to speak of him by name, referring to appellant only as "pervert" instead. When describing the backyard incident, the complainant testified that appellant used his hands to push the complainant's head up and down while the complainant's mouth was touching appellant's penis.

The complainant also testified that on a later occasion, he was sitting in appellant's living room watching television with this older sister when appellant placed his hand under the complainant's pajamas and touched his private parts. The complainant then described an event where appellant showed him and his sister "a bad thing" on television where people were using their bodies to touch each other without wearing any clothes.

SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction for aggravated sexual assault of a child. In his second issue, he argues that the evidence is legally insufficient to support his conviction for indecency with a child. Appellant contends his convictions cannot be sustained because (a) the complainant never made an outcry statement in his initial interviews with the authorities; (b) the two child psychiatrists never made specific findings of sexual abuse; (c) the complainant's fear of taking the stand may have been caused by any number of factors, such as past disciplinary action on the part of appellant, rather than sexual abuse; (d) the complainant's testimony was "apparently coached"; and (e) the complainant's sister did not testify during the guilt-innocence phase of the trial, and thus, there is no evidence to corroborate the complainant's testimony.

When reviewing the legal sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion); *Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence and substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.*

To support a conviction for aggravated sexual assault, the State was required to prove that appellant intentionally or knowingly penetrated the mouth of a child with his sexual organ. *See* Tex. Penal Code Ann. § 22.021 (West 2010). To support a conviction for indecency with a child, the State was required to prove that appellant engaged in sexual contact with a child or caused a child to engage in sexual contact. *See id.* § 21.11(a). "Sexual contact" means "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child," if the touching is intended to arouse or gratify the sexual desire of any person. *Id.* § 21.11(c)(1).

A conviction for aggravated sexual assault of a child or indecency with a child is supportable on the uncorroborated testimony of the victim if the victim was younger than seventeen years of age at the time of the offense. Tex. Code Crim. Proc. Ann. art. 38.07 (West 2010). In this case, the complainant testified that when he was eight years old, appellant touched him inappropriately and made him perform oral sex. Viewing the evidence in the light most favorable to the verdict, we conclude that a rational juror could have found every essential element of the offenses beyond a reasonable doubt. Appellant's first two issues are overruled.

MOTION FOR NEW TRIAL

In his third issue, appellant contends "[t]he trial court erred in overruling appellant's first amended motion for new trial." He specifically argues that the complainant never identified him in open court as the person who committed the sexual assault. Appellant also argues that the evidence is insufficient to prove identity because the complainant's sister never produced corroborating evidence that appellant committed the offense of indecency with a child. The State observes that the trial court never actually entered a ruling on appellant's motion for new trial, and that it was overruled instead by operation of law. The State then contends that, although appellant timely filed his motion for new trial, appellant waived this point of error because he failed to properly present his motion to the trial court.

Under Rule 21.6 of the Texas Rules of Appellate Procedure, a defendant must "present" a motion for new trial within ten days of its filing, unless the court in its discretion permits more time. *See* Tex. R. App. P. 21.6. To satisfy the presentment requirement, the defendant must place the trial judge on actual notice that he desires the judge to rule, conduct a hearing, or take some other action on his motion. *Gardner v. State*, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009). The mere filing of a motion for new trial is insufficient to show presentment. *Stokes v. State*, 277 S.W.3d 20, 21 (Tex. Crim. App. 2009). Presentment must be apparent from the record, and it may be shown by such proof as the judge's signature or notation on the motion, or an entry on the docket sheet showing presentment or the scheduling of a hearing. *Gardner*, 306 S.W.3d at 305. Without any showing that the trial judge actually saw appellant's motion for new trial, the judge cannot be faulted for failing to rule or conduct a hearing on the motion. *Id.*; *Longoria v. State*, 154 S.W.3d 747, 762–63 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("A trial court cannot abuse its discretion by denying a motion for new trial by operation of law when the motion was not timely presented.")

The record in this case contains no affirmative proof of presentment. There is no ruling on the motion for new trial, no proposed order containing the judge's signature or notation, and no notation on the docket sheet showing that a hearing had been set on the motion. *See Carranza v. State*, 960 S.W.2d 76, 79–80 (Tex. Crim. App. 1998) (providing a non-exclusive list in which a defendant may satisfy the presentment requirement). The only suggestion of presentment is an unsigned "Certificate of Presentation" in the body of the motion stating that counsel "presented this motion to the trial court on _____, with [sic] the 10 days after filing it." An unsigned certificate will not suffice under established precedent. *See Rozell v. State*, 176 S.W.3d 228, 231 (Tex. Crim. App. 2005); *Longoria*, 154 S.W.3d at 762.

Even assuming the motion had been properly presented, the trial court would not have abused its discretion by denying appellant's request for a new trial. The State carries

the burden of proving that the accused is the person who committed the charged offense. *See Phillips v. State*, 297 S.W.2d 134, 135 (Tex. Crim. App. 1957). Identity may be proven by direct or circumstantial evidence. *See Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *Martin v. State*, 246 S.W.3d 246, 261 (Tex. App.—Houston [14th Dist.] 2007, no pet.). An in-court identification is not necessary where other evidence is presented establishing the culpability of the accused. *See Conyers v. State*, 864 S.W.2d 739, 740 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). The failure to make an in-court identification is merely a factor for the jury to consider when assessing the weight and credibility of the witness's testimony. *Meeks v. State*, 897 S.W.2d 950, 955 (Tex. App.—Fort Worth 1995, no pet.).

In this case, the complainant testified through closed-circuit television. He referenced acts of abuse committed by "Uncle David," without specifically identifying appellant as his abuser. Even though the complainant did not identify appellant in open court, one such identification was made by Michael Burr, who was the complainant's guardian at the time of trial. Burr testified that appellant is a distant relation of his, and that he knew the complainant to be living with appellant at the time of the offense. Burr's testimony was sufficiently probative of appellant's identity, as circumstantial evidence is subject to no higher standard of proof than direct evidence. *See McGee v. State*, 774 S.W.2d 229, 238 (Tex. Crim. App. 1989); *see also* Tex. Code Crim. Proc. Ann. art. 38.07 (stating that corroboration evidence is not required where a child victim testifies to a charged offense for sexual assault or indecency with a child). Appellant's third issue is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his fourth issue, appellant argues he received ineffective assistance of counsel because counsel did not produce any mitigation evidence during the punishment phase of trial. Appellant argues that he should have been called as a witness so that he could have testified that he did not commit the offenses, notwithstanding the jury's findings of guilt.

Appellant also argues that counsel should have called certain family members to testify about appellant's background and character.

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, appellant must prove (1) that his trial counsel's representation was deficient, and (2) that the deficient performance was so serious that it deprived appellant of a fair trial. *Id.* at 687. To establish the first prong, appellant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688. Regarding the second prong, appellant must demonstrate that counsel's deficient performance prejudiced his defense. *Id.* at 691–92. To demonstrate prejudice, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffectiveness. *Id.* at 697. This test is applied to claims arising under both the United States and Texas Constitutions. *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986).

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that the attorney's actions were reasonably professional and were motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When the record is silent as to trial counsel's strategy, we will not conclude that appellant received ineffective assistance unless 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). Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In the majority of cases, the appellant is unable to meet the first prong of the *Strickland* test because the record on direct appeal is underdeveloped and does not adequately reflect the

alleged failings of trial counsel. *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). "[I]solated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination." *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994). Moreover, "[i]t is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata*, 226 S.W.3d at 430. Rather, to establish that the attorney's acts or omissions were outside the range of professionally competent assistance, appellant must show that counsel's errors were so serious that he was not functioning as counsel. *Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

Appellant first argues that counsel was ineffective because he did not call appellant to the stand during the punishment stage of trial. The defendant has the ultimate right to testify in his own defense, but counsel shoulders the primary responsibility of informing him of that right, including advising him of the advantages and disadvantages of doing so. *See Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005); *Sapata v. State*, 574 S.W.2d 770, 771 (Tex. Crim. App. 1978). Because counsel carries the burden of imparting such information to the defendant, *Strickland* provides the appropriate framework for addressing a claim that counsel should have called the defendant to testify. *See Johnson*, 169 S.W.3d at 235.

The record contains no evidence explaining why counsel did not call appellant to the stand. Appellant never indicated that he wished to testify, and appellant does not

contend that he received deficient information which led him to believe he was not allowed to testify. *Cf. Salinas v. State*, 163 S.W.3d 734, 740–41 (Tex. Crim. App. 2005) (counsel not ineffective where record does not reflect that defendant asserted his right to testify and counsel failed to protect it). Ordinarily, defense counsel should be afforded an opportunity to explain his trial strategy before being denounced as ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). No part of this record, however, sheds any light on the reasons why counsel did not call appellant to testify. Accordingly, appellant has failed to overcome the presumption that counsel acted within the wide range of professional norms by not calling appellant to the stand.

Appellant also argues that counsel was ineffective because he did not call other witnesses on appellant's behalf. In his briefing, appellant indicates that counsel could have called his brother, stepson, ex-wife, or mother, each of whom possessed "extensive knowledge as to the background and character of Appellant."

The decision to call a witness is a matter of trial strategy and a prerogative of trial counsel. *Weisinger v. State*, 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). To obtain relief on an ineffective assistance of counsel claim based on an uncalled witness, appellant must show that the witness would have been available to testify and that his or her testimony would have had some benefit to the defense. *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004); *see Nwosoucha v. State*, 325 S.W.3d 816, 830 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Counsel's decision not to call particular witnesses at the punishment stage of trial may be strategically sound when based on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant. *See Shanklin v. State*, 190 S.W.3d 154, 164 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd); *Weisinger*, 775 S.W.2d at 427. "However, a failure to uncover and present mitigating evidence cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the defendant's background." *Shanklin*, 190 S.W.3d at 164.

Appellant filed two motions for new trial, and in neither did he allege that he received ineffective assistance of counsel. The record does not indicate that any of the witnesses cited in appellant's brief was available to testify, or that the witness's testimony would have been beneficial to appellant's defense. Similarly, there is nothing in the record to suggest that counsel failed to conduct a thorough investigation prior to trial. Accordingly, the record contains no evidence to rebut the presumption that counsel's decision not to present witnesses was sound trial strategy. Appellant's fourth issue is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Anderson, Brown, and Christopher.
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