Affirmed and Memorandum Opinion filed March 29, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00167-CR

CARL DION LOVINGS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1419029

M E M O R A N D U M O P I N I O N

A jury found Carl Dion Lovings guilty of aggravated assault of a family member. The offense was enhanced by two felony convictions. The trial court sentenced him to thirty-three years' imprisonment. In two issues, appellant asserts he received ineffective assistance of counsel due to his lawyer's failure to object to (1) testimony regarding the complainant's credibility, and (2) the State's reading of unredacted medical records during closing argument. We affirm.

BACKGROUND

On February 23, 2014, Officer Mark Contreras of the Houston Police Department was dispatched to the home of LaTanya Peterson, the complainant and appellant's wife. Contreras testified that when he arrived at the house, Peterson was "very upset, crying, [and] frazzled." She immediately said to him, "He beat me. He beat me. He hit me like a dog. I thought he was going to kill me." "He" referred to appellant. She was very upset and feared appellant might still be in the area.

Peterson told Contreras she and appellant had been arguing when appellant slapped her and punched her in the face. She retreated to the master bedroom and tried to close the door as appellant continued to assault her. Unable to close the door, she went into the closet. In response, appellant grabbed an aluminum baseball bat and began striking her. She ran out of the closet, but that enabled appellant to, in Contreras' words, "land a few good blows with the baseball bat." Peterson went back into the closet because appellant could not hit her as hard with the bat when she was in the closet. She tried to block herself from the strikes to her head. Peterson said appellant had bitten her at some point.

Blood was all over the closet floor. Contreras considered that relevant because it supported complainant's account of the assault. He observed many injuries on Peterson that also were consistent with her account. She was bleeding from her lip and the side of her head. Bruises were forming on her arms and legs. She had cuts above her eye and on some of her fingers. She had what looked like a bite mark or deep bruise on her back.

Peterson was treated in a hospital after the assault. Sandra Sanchez, R.N., examined her. Medical records from that treatment were admitted into evidence. One page of the medical records showed drawings of the front and back of a

female human body. Sanchez drew marks on the figures to indicate the location of Peterson's injuries and annotated each mark with information about the size, appearance, and nature of the injury. Peterson denied strangulation but said, "He grabbed my neck," and demonstrated how he twisted her head. Sanchez noted Peterson's bloody, red scleras and difficulty breathing.

Eleven photographs of Peterson taken at the hospital were admitted into evidence. Contreras confirmed the photos accurately depicted the injuries he saw on her. He pointed out a straight-line injury to Peterson's arm and said it was consistent with being hit with a baseball bat. When shown a picture of Peterson's finger in which her fingernail was torn, he said he considered that injury a defensive wound she suffered while using her hands to try to shield her head from appellant's blows with the baseball bat.

The State rested its case after Contreras testified. Appellant did not testify, call witnesses, or offer evidence. Peterson did not attend the trial.

The jury found appellant guilty. At appellant's election, the trial court assessed punishment. Appellant timely appealed.

ANALYSIS

I. Legal standards for ineffective assistance of counsel

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). Under *Strickland*, the defendant must prove (1) his trial counsel's representation was deficient, and (2) the deficient performance was so serious that it deprived him of a fair trial. *Id.* at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness. *Id.* at 688. A deficient performance deprives the defendant of a fair trial only if it prejudices the defense. *Id.* at 691–92. To show prejudice,

appellant must demonstrate there was 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 counsel's actions were reasonably professional and motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When the record is silent as to counsel's strategy, we will not conclude the defendant 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); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In many cases, the defendant 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. *See 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). Isolated 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 counsel's performance for examination. *See*

Ex parte Welborn, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Moreover, it is not sufficient that the defendant show, with the benefit of hindsight, that counsel's actions or omissions during trial were merely of questionable competence. *See Mata*, 226 S.W.3d at 430. Rather, to establish counsel's acts or omissions were outside the range of professionally competent assistance, the defendant must demonstrate counsel's errors were so serious that he was not functioning as counsel. *See Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

II. Failure to Object to Testimony About Credibility

In his first issue, appellant asserts his lawyer's failure to object to Contreras' testimony about Peterson's credibility was ineffective assistance of counsel.

The following exchange occurred early in the testimony:

The State:	Is it a part of your job to or your duties to determine credibility of witnesses?
Contreras:	Yes, ma'am, it is.
The State:	Why is that?
Contreras:	You never want to file a charge against someone if they're being accused of the crime if you don't believe that the person or persons that are witness against them are telling the truth.
Appellant's counsel:	Judge, I object. That invades the province of the fact finder as to the credibility of witnesses.
Court:	Let's move on.

Later, the State asked Contreras about Peterson specifically:

The State:	Did you find LaTanya Peterson to be credible that night?

Contreras:	I did.
The State:	I may have already asked this, but why? Why did you find her credible that night?
Appellant's counsel:	That's been asked and answered.
The Court:	Sustained.

Appellant argues Contreras' testimony that Peterson was credible was objectionable because it invaded the province of the jury to determine credibility. He relies on *Schutz v. State*, 957 S.W.2d 52 (Tex. Crim. App. 1997), in which the Court of Criminal Appeals decided that certain expert testimony about the truth of the allegations made by a child complainant in a sexual assault case was inadmissible. A question about a witness' truthfulness "'is designed to elicit testimony in the form of one witness' opinion as to the credibility or veracity of another witness, a determination which lies solely within the province of the jury.'" *Id.* at 67–68 (quoting *State v. Walden*, 69 Wash. App. 183, 847 P.2d 956, 959 (1993)). Appellant also cites *Yount v. State*, 872 S.W.2d 706, 709 (Tex. Crim. App. 1993), *Ayala v. State*, 352 S.W.2d 955, 956 (Tex. Crim. App. 1962), and *Fuller v. State*, 224 S.W.3d 823, 833 (Tex. App.—Texarkana 2007, no pet.).

The record is silent on counsel's strategy regarding an objection, so appellant must establish his lawyer's not objecting to the testimony was "so outrageous that no competent attorney" would not have objected. *Goodspeed*, 187 S.W.3d at 392; *see also Moran v. State*, 350 S.W.3d 240, 244 (Tex. App.—San Antonio 2011, no pet.) (rejecting argument and authority implicitly supporting argument that allowing witness to opine on victim's credibility constitutes deficient performance in all circumstances).

Appellant's lawyer lodged several objections in the early part of Contreras' testimony, each of which the trial court sustained. Later, as quoted above, he

objected to Contreras' testimony about why he considers the credibility of a complainant generally. The trial court said, "Let's move on." Based on that instruction, appellant's lawyer could reasonably have inferred the trial court would overrule an objection to testimony about Peterson's credibility, and therefore may have strategized not to object again. Despite the reasonableness of that inference and strategy, counsel **did** object to the State's asking Contreras about Peterson's credibility. He did not object to the first question ("Did you find LaTanya Peterson to be credible that night?"), but he objected to the second—and final—question ("I may have already asked this, but why? Why did you find her credible that night?"). The trial court sustained that objection. Through that objection, appellant's counsel prevented the jury from hearing why Contreras found Peterson credible.

Because appellant has not met his burden to establish deficient performance by his lawyer, we do not reach the question of whether appellant has shown he was prejudiced. *See Strickland*, 466 U.S. at 697. We overrule appellant's first issue.

III. Failure to Object to Medical Records

Appellant's second issue concerns Peterson's medical records. The medical records were admitted into evidence without objection as business records. Appellant argues certain statements in the quoted records are inadmissible hearsay and asserts he was harmed by his lawyer's failure to seek redaction of those "incredibly damaging" statements, which the State read during closing argument.

Hearsay is an out-of-court statement by a non-testifying declarant offered to prove the truth of the matter asserted. *See* Tex. R. Evid. 801(d); *West v. State*, 406 S.W.3d 748, 764 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Hearsay is inadmissible unless the statement falls under an exception. *See* Tex. R. Evid. 802.

One such exception is "[a] statement that (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history;

past or present symptoms or sensations; their inception; or their general cause." Tex. R. Evid. 803(4). The medical treatment exception assumes the patient understands the importance of being truthful with health-care providers so as to receive an accurate diagnosis and treatment. *Burns v. State*, 122 S.W.3d 434, 438 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

Another hearsay exception is business records. Business records are those made and kept in the regular course of business that concern and are made at or near the time of an act, condition, opinion, or diagnosis. *See* Tex. R. Evid. 803(6). It is undisputed that Peterson's medical records are admissible as business records.

However, a business record may contain hearsay statements, known as "hearsay within hearsay." The proponent of the document must esablish those hearsay statements are independently admissible. *See* Tex. R. Evid. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."); *Sanchez v. State*, 354 S.W.3d 476, 485–86 (Tex. Crim. App. 2011) ("When hearsay contains hearsay, the Rules of Evidence require that each part of the combined statements be within an exception to the hearsay rule.").

The State read Peterson's description of the assault, as written by Sanchez. The statements appellant asserts are inadmissible hearsay are in bold:

> Pt states, **"today, I came home from church a little after 2:00. I was checking Facebook to see if my husband was still my friend and on his page, I see 'this ho of a wife of mine, bitches and ho's. Bitch you ain't shit.' All kinds of names. I told him if he don't want me just leave. He said he wouldn't leave until he gets the papers, divorce papers. He came back to the room where I was watching television. I told him he couldn't watch my TV and to go to his aunt's house. He said 'bitch, I ain't going to leave until you give me the papers.' I got up to walk out of the room.** He pushed me so hard, he pushed me to the wall across the room. **I said 'I don't**

> **want to fight.' I went to the closet.** He pulled my hair off. It was glued to my head. The first time he hit me here (points to left forehead). **He called his mom and put it on speaker phone and said he was going to the penitentiary because 'I'm going to kill this bitch.'** He pushed me in the closet. I fell on my knees. He put me on the floor. He was on my back and he grabbed my neck. **'Bitch, I'll break your fucking neck.'** He got a baseball bat and hit me. I ran to the bathroom and he hit me again. He bit me (points to back of right shoulder). I said 'why are you hitting me?' I got back in the closet because it was harder for him to swing the bat in the closet. He went to the other side of the bed. I ran to the bathroom to get out the window, but I don't fit through the window. He knocked the door off the hinges. I believe his mom was telling him to just leave because he just left and left his stuff there.

Appellant argues the bolded statements do not fall under the medical-diagnosis-or-treatment hearsay exception because they were not pertinent to Peterson's diagnosis or treatment. The Court of Criminal Appeals reached the same conclusion under similar fact patterns. *Taylor v. State*, 268 S.W.3d 571, 590–91 (Tex. Crim. App. 2008) (victim's statement to therapist identifying appellant as her rapist was not pertinent to medical diagnosis or treatment); *Hassell v. State*, 607 S.W.2d 529, 531 (Tex. Crim. App. [Panel Op.] 1980) (child's statement to doctor that her mother hit her with a broom was not pertinent to treatment of her injuries). *Accord Mbugua v. State*, 312 S.W.3d 647, 670–71 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("While the fact that appellant was cut was clearly pertinent to his treatment, the fact that he was injured 'while fighting' and 'following an altercation' was not."). In his reply, appellant also argues the statements emanate from someone "outside the business" and are inadmissible. *Garcia v. State*, 126 S.W.3d 921, 926–27 (Tex. Crim. App. 2004).

Assuming the statements were inadmissible hearsay under either theory, we nonetheless conclude appellant has not satisfied his burden to show his lawyer's performance was deficient. The challenged conduct is not "so outrageous that no

competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392; *Garcia*, 57 S.W.3d at 440. Thus, an evidentiary record as to strategy is necessary:

> We ordinarily need to hear from counsel whether there was a legitimate trial strategy for a certain act or omission. Frequently, we can conceive potential reasonable trial strategies that counsel could have been pursuing. When that is the case, we simply cannot conclude the counsel has performed deficiently.

Andrews v. State, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005).

Appellant did not file a motion for new trial, so there was no hearing at which a record as to the lawyer's strategy could be developed. *Aldaba v. State*, 382 S.W.3d 424, 431 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Without a record, an affidavit from counsel is almost vital to the success of a claim of ineffective assistance. *Id.* No such affidavit is in the record. We cannot conclude on this silent record that counsel's performance was deficient. We overrule appellant's second issue.

CONCLUSION

We affirm the judgment of the trial court.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, McCally, and Busby.
Do Not Publish — Tex. R. App. P. 47.2(b).