Affirmed and Memorandum Opinion filed December 8, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00835-CR

ANTHONY RAY WILSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1455991

MEMORANDUM OPINION

We consider three claims of ineffective assistance of counsel in this appeal from a conviction for aggravated assault. For each claim, we conclude that appellant failed to meet his heavy burden of proving counsel's ineffectiveness. Accordingly, we overrule each of appellant's issues and affirm the trial court's judgment.

BACKGROUND

Appellant was charged with assaulting the complainant, his wife, by threatening her with a broken glass bottle. At his trial, two versions of the events were presented to the jury.

The State's Case. The complainant testified that, on the night in question, appellant was angry with her because she refused to be intimate with him. At first, appellant was just verbally abusive towards the complainant. He told her several times over the course of the evening that he was going to beat her up or kill her. Then their argument spilled over into the parking lot of a corner store, which was adjacent to their apartment. According to the complainant, appellant became so heated that he took a glass vodka bottle and hit it on the ground, causing it to break in two. Appellant then grabbed the top half of the bottle and chased after the complainant, threatening her with the sharp, broken end of the bottle. He put the bottle down after he realized that the complainant's daughters were watching. The complainant was never physically injured.

The Defense's Case. Appellant testified that he was separated from the complainant and living with his mother. He said that the complainant picked him up on the day in question because she wanted to be intimate with him. At some point, appellant and the complainant started arguing over appellant's ex-girlfriend. Appellant admitted that he had exchanged words with the complainant, but he denied that his words had been threatening.

Appellant testified that the complainant went to the corner store to get him a beer. He claimed that as he was drinking the beer, he accidentally knocked over the glass vodka bottle, which he had placed on a nearby stump. The bottle broke when it hit the pavement, but appellant testified that he never used it to threaten the complainant.

The Verdict. The jury rejected appellant's testimony and convicted him of the charged offense. Appellant then accepted the State's offer of twenty-five years' imprisonment. Appellant did not file a motion for new trial.

INEFFECTIVENESS CLAIMS

Appellant raises three claims of ineffective assistance of counsel. In his first claim, appellant argues that counsel was ineffective because he failed to impeach two witnesses with their prior inconsistent statements. In his second claim, appellant argues that counsel was ineffective because he failed to object to the prosecutor's incorrect characterization of a protective order. In his third claim, appellant argues that counsel was ineffective because he failed to secure recorded phone conversations that appellant made from jail. We examine each of these claims in turn.

The* Strickland *Standard. We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986). Under *Strickland*, the defendant must prove that his trial counsel's representation was deficient, and that the deficient performance was so serious that it deprived him of a fair trial. *See Strickland*, 466 U.S. at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness. *Id.* at 688. A deficient performance will deprive the defendant of a fair trial only if it prejudices the defense. *Id.* at 691–92. To demonstrate prejudice, there must be 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.

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that counsel's actions were reasonably professional and were 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 that the defendant received ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See 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. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In the majority of 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 that counsel's acts or omissions were outside the range of professional competent assistance, the defendant must show

that counsel's errors were so serious that counsel was not functioning as counsel. *See Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

Failure to Impeach Key Witnesses. During the trial, the complainant testified that appellant intentionally broke a glass bottle and that he used one of the broken pieces to threaten her. One of the complainant's daughters testified that she saw appellant threaten the complainant, but she claimed that she did not know how appellant came to possess the broken bottle.

The clerk's record contains a *Brady* disclosure that refutes both of these witnesses. The disclosure reveals that, in the hours after the incident, the complainant and her daughter contacted a caseworker at the District Attorney's Office, and they both reported to the caseworker that the bottle broke when appellant accidentally knocked it over. Citing this disclosure, appellant argues that counsel was ineffective because he did not impeach these witnesses with their prior inconsistent statements.

The record does not affirmatively reveal counsel's reasons for not impeaching the two witnesses; appellant never moved for a new trial and counsel did not otherwise file an affidavit explaining his rationale. Thus, appellant has not rebutted the strong presumption that counsel's inaction was the result of sound trial strategy. *See Jackson*, 877 S.W.2d at 771.

On this silent record, we could only conclude that counsel's performance was deficient if his inaction was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392. That level of unreasonableness cannot be shown here. During her direct examination by the prosecutor, the complainant testified that appellant contacted her when he was in jail and he threatened her in an effort to get her to change her story. Counsel could have reasonably anticipated that, if he were to impeach the complainant or her

daughter with their prior inconsistent statements, he would be playing into the undesirable narrative that these witnesses changed their stories because they had been under threat. We cannot say that counsel's failure to attempt impeachment amounts to deficient performance.

Even if we were to conclude that counsel's performance had been deficient, appellant has not shown that he was prejudiced by counsel's inaction. During her direct examination, the complainant admitted that she gave a different story to the District Attorney's Office. She explained that she wanted to "keep the peace," so she told the District Attorney's Office that appellant did not threaten her and that the bottle had broken by accident. Thus, the jury already knew that the complainant had made a prior inconsistent statement. Although the jury was never made aware that the complainant's daughter had also given a different story, we are not persuaded that there is a reasonable probability that the outcome of the trial would have been different if counsel had impeached the daughter with her prior inconsistent statement.

Failure to Object to an Incorrect Characterization. The complainant testified that appellant called her from jail more than eighteen times before he was finally released on bond. The prosecutor addressed these phone calls when appellant took the stand, and during her cross-examination, the prosecutor created the impression that appellant knowingly made the phone calls in violation of a protective order:

> Q. Okay. So, you called her numerous times while you were in custody, right?
>
> A. She put money on my phone for me to call. So, yes.
>
> Q. You called her, though, right?
>
> A. Yes.
>
> Q. Numerous times, right?

A. Yes.

Q. In violation of the protection order that you say that you knew you had, right?

A. Yes.

Q. Okay. So, you knew you weren't supposed to have contact with her, but you did so anyway.

A. Yes, it's my wife.

Q. Okay. But you knew you weren't supposed to have contact with her, correct?

A. She know she not supposed to have contact with me, either.

Q. Well, isn't it true that the protection order tells you not to have contact with her, not the other way around, right?

A. Uh-huh.

Q. Okay. So, you knew you were not supposed to have contact with her, correct?

A. Correct.

Contrary to the prosecutor's suggestive questioning, the protective order did not contain a categorical "no contact" clause. Instead, the protective order prohibited appellant from communicating with the complainant "in a threatening or harassing manner."

Appellant argues that counsel was ineffective because he did not object to the prosecutor's incorrect characterization of the protective order. We conclude that appellant failed to prove this point. As with his previous claim of ineffectiveness, the record is silent as to the reasons for counsel's inaction, meaning there is nothing to rebut the strong presumption that counsel's performance was the result of sound trial strategy. Moreover, a clear strategy can be imagined for counsel's failure to object: had counsel drawn attention to the precise terms of the protective order, he could reasonably expect the prosecutor to ask more pointed questions about how appellant had threatened the complainant.

Counsel is not ineffective for wanting to avoid drawing attention to evidence that may further damage his client's case. *See Huerta v. State*, 359 S.W.3d 887, 894 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("Counsel may have also decided to withhold objections to avoid drawing unwanted attention to a particular issue . . . .").

Even if we were to conclude that counsel's inaction was objectively unreasonable, appellant has not established that he was prejudiced by counsel's failure to object. The complainant testified that, in one of the phone calls, appellant asked her to change her story. She then explained to the prosecutor that she complied with appellant's request because she was afraid of his retribution:

> Q. Were you afraid something would happen if you didn't tell us it was an accident?
>
> A. Yes, ma'am, because he like to threaten you and if you don't do what Mr. Wilson want, if he don't do something to you, he'll tell you he going to send somebody else.

The evidence supports a finding that appellant violated the protective order by communicating with the complainant in a threatening manner. Accordingly, there is no reasonable probability that the outcome of the trial would have been different had counsel corrected the prosecutor's incorrect characterization of the protective order.

Failure to Secure Jail Calls. Appellant finally claims that counsel was ineffective because he did not secure the phone calls that appellant made to the complainant when appellant was in jail.

Appellant's argument relies on at least three premises that were never actually proved. The first premise is that counsel could have discovered the phone calls. The record is completely silent on this point. There is no indication that the

jail recorded the phone calls or, even if it did, that counsel could have obtained the recordings before they were destroyed pursuant to a routine retention schedule.

The second premise is that counsel actually failed to secure the jail calls. Because the record is underdeveloped, we cannot know whether counsel failed to seek out the jail calls, as appellant asserts in his brief, or whether counsel did obtain the jail calls but then decided not to offer them into evidence at trial because they were harmful or irrelevant.

The third premise, which is somewhat related to the second, is that the jail calls would have benefitted appellant at trial. The jail calls could have been inculpatory, exculpatory, or totally inconsequential. Without knowing the quality of the jail calls, this court has no way of determining what effect they may have had on the outcome of the trial. *See Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) ("A claim for ineffective assistance based on trial counsel's general failure to investigate the facts of the case fails absent a showing of what the investigation would have revealed that reasonably could have changed the result of the case.").

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). The record does not permit a conclusion that counsel was ineffective for failing to secure (or offer) the phone calls as evidence. Appellant has neither rebutted the strong presumption that counsel's performance was reasonably professional, nor demonstrated that the outcome of the trial would have been different but for counsel's performance.

CONCLUSION

The trial court's judgment is affirmed.[1]

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Christopher.
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[1] In a footnote appearing in the "Conclusion" section of his brief, appellant asserts for the first time that counsel was deficient because counsel failed to (1) object to hearsay and irrelevant testimony, (2) obtain funds for an expert, and (3) seek out additional witnesses. Appellant does not explicitly argue that we should reverse the trial court's judgment because of these failures. However, to the extent he has asserted additional claims of ineffective assistance of counsel based on these points, we overrule each claim because the record is silent and nothing rebuts the strong presumption that counsel's decisions were the result of sound trial strategy.