Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00722-CR

Freddie **DRZYMALLA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 290th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR12439
Honorable Melisa Skinner, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: January 3, 2018

AFFIRMED

A jury convicted appellant Freddie Drzymalla of indecency with a child by sexual contact. The trial court sentenced him to six years' confinement. In his sole point of error, Drzymalla contends his trial counsel was ineffective. We affirm the trial court's judgment.

BACKGROUND

Drzymalla is the father of the complainant, K.D. Because Drzymalla and K.D.'s mother are divorced, K.D., along with her two younger sisters, would spend some nights at Drzymalla's house. According to K.D., one night when she was eight-years-old, Drzymalla "put his private in

[her] bottom" when they were sleeping together in the same bed. The next morning K.D. called her mother and told her what happened. K.D.'s mother immediately picked up all the children and notified the police. Ultimately, Drzymalla was arrested and charged with four counts of indecency with a child.

Drzymalla pled not guilty to all four counts. Thereafter, the State proceeded to trial on only one of the counts charged — specifically, that Drzymalla intentionally and knowingly engaged in sexual contact with a female child by touching her with a part of his genitals with the intent to arouse or gratify the sexual desire of any person. In addition to other testimony, the State produced testimony from Dr. Natalie Kissoon, a child abuse pediatrician who performed a full examination on K.D. a month after her outcry. Dr. Kissoon testified she examined K.D. and made a finding of a "concern for sexual abuse." A jury ultimately found Drzymalla guilty of indecency with a child by sexual contact and sentenced him to six years' confinement. Thereafter, Drzymalla perfected this appeal.

ANALYSIS

In his sole point of error, Drzymalla contends his trial counsel rendered ineffective assistance because he failed to object to a portion of Dr. Kissoon's testimony. According to Drzymalla, Dr. Kissoon's testimony constituted inadmissible opinion testimony with regard to K.D.'s truthfulness, and trial counsel's failure to object on this basis amounted to ineffective assistance because the testimony bolstered K.D.'s credibility. Drzymalla further contends Dr. Kissoon's testimony concerning K.D.'s truthfulness prejudiced his defense to such an extent that but for her testimony, the outcome of the trial would have been different.

Standard of Review and Applicable Law

We review a claim of ineffective assistance of counsel under the well-established standard of review set out in *Strickland v. Washington.* 466 U.S. 668, 687 (1984); *Prine v. State*, No. PD-

1180-16, 2017 WL 4168614, at *2 (Tex. Crim. App. Sep. 20, 2017); *Moran v. State*, 350 S.W.3d 240, 242 (Tex. App.—San Antonio 2011, no pet.). To prevail on an ineffective assistance of counsel claim, the defendant must establish: (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687; *Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 242. To demonstrate deficient performance, the defendant must show by a preponderance of the evidence that trial counsel's conduct fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 242. Our review of trial counsel's performance is "highly deferential," and we will presume that counsel's representation "fell within the wide range of reasonable professional assistance" and counsel's actions constituted sound trial strategy. *Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 242-43. To overcome this presumption, a claim of ineffectiveness must be firmly established in the record and the record must affirmatively demonstrate the ineffectiveness. *Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 243. In general, the record on direct appeal is insufficient to show that trial counsel's performance was deficient. *Prine*, 2017 WL 4168614, at *2. Trial counsel should generally be afforded an opportunity to explain the reasons for his actions before such actions are deemed to be deficient. *Moran*, 350 S.W.3d at 243 (citing *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001), *cert. denied*, 537 U.S. 1195 (2003)). If we are faced with an undeveloped record, then we will determine trial counsel's conduct was deficient only if his "conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 243.

In addition to establishing trial counsel's performance was deficient, a defendant must also establish trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687); *Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 243. In other words, a defendant must establish a reasonable probability that, but for trial counsel's deficient performance, the result

of the proceeding would have been different. *Moran*, 350 S.W.3d at 243. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Application

Here, Drzymalla specifically challenges the portions of Dr. Kissoon's testimony that he contends bolstered K.D.'s testimony as truthful. According to Drzymalla, the State portrayed Dr. Kissoon as an "expert" at trial, and Rule 702 of the Texas Rules of Evidence does not permit an expert to give an opinion that a particular witness is truthful. *See Reyes v. State*, 274 S.W.3d 724, 729 (Tex. App.—San Antonio 2008, pet. ref'd) ("Expert testimony does not assist the jury if it constitutes a 'direct opinion on the truthfulness' of a child victim's allegations.") (citing *Yount v. State*, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993)). The record reflects the State called Dr. Kissoon, a child abuse pediatrician who performed a full examination on K.D. a month after her outcry. When asked about her findings, Dr. Kissoon testified that although she made no physical findings of abuse, K.D.'s "disclosure was concerning for sexual abuse." Dr. Kissoon elaborated, stating that a finding of concern for sexual abuse meant "the information that [K.D.] gave was concerning for being exposed to, at the very least exposed, to inappropriate sexual material, to being — having inappropriate sexual contact with someone." Dr. Kissoon further testified she did not believe K.D. had been "coached" with regard to her description about what Drzymalla did to her. At no point did Drzymalla's trial counsel object on the basis that Dr. Kissoon's testimony was inadmissible, opinion testimony.

According to Drzymalla, Dr. Kissoon's testimony was inadmissible because it amounted to an expert opinion that K.D.'s accusation was true, and there is no circumstance in which a failure to object to such testimony could be considered sound trial strategy. For support, Drzymalla relies on *Fuller v. State*, in which the appellate court held trial counsel rendered ineffective assistance by failing to object to expert testimony that opined on the complainant's truthfulness. 224 S.W.3d

823, 834-36 (Tex. App.—Texarkana 2007, no pet.). The court reasoned that in a case where the credibility of the complainant was the primary issue, there was no circumstance in which it might be considered sound trial strategy not to object. *Id.* at 836. We disagree with Drzymalla's reliance on *Fuller v. State* and his contention that defense counsel's failure to object to Dr. Kissoon's testimony was so outrageous and lacked any possible strategic motive.

We begin our analysis by first noting that although a motion for new trial was filed, no evidentiary hearing was held. Nor did counsel submit an affidavit explaining the basis for his failure to object. As a result, defense counsel was not provided with an opportunity to explain his reasons for the challenged conduct, and our review is limited to the trial record. *See Moran*, 350 S.W.3d at 243.

Our review of the record indicates defense counsel's strategy in not objecting may have been for the purpose of avoiding emphasizing the matter before the jury. *See id.* at 243 (distinguishing *Fuller v. State* by noting examination of trial record reflects trial court's strategy). By shifting attention away from Dr. Kissoon's statements, defense counsel focused on undermining Dr. Kissoon's credibility and framing her as a biased witness during cross-examination. *See id.* at 243-44 (noting that in case where defense counsel failed to object to testimony from police detective and forensic interviewer that complainant was truthful, defense counsel's strategy appeared to be undermining expert's credibility). The record reflects that during cross-examination, defense counsel questioned Dr. Kissoon's examination of K.D., highlighting that she did not make any physical findings of abuse. Defense counsel also questioned Dr. Kissoon about prior cases, pointing out that she has found sixteen of the seventeen children she examined as "concerning for sexual abuse." Furthermore, defense counsel objected to Dr. Kissoon's qualification as an expert, arguing Dr. Kissoon did not rely on proper principles in the field because in almost each of her cases where a child makes an accusation of sexual abuse, she finds it to be

"concerning for sexual abuse" and that sexual abuse occurred. Accordingly, we conclude defense counsel may have been attempting to suggest to the jury that Dr. Kissoon was a biased witnessed who lacked credibility.

Moreover, after reviewing Dr. Kissoon's testimony, we do not agree with Drzymalla that her testimony had any bearing on the truthfulness of K.D.'s accusation. Dr. Kissoon's testimony, much like the results of a physical examination, was merely evidence corroborating the existence of a sexual assault. *See Johnson*, 432 S.W.3d at 557 (holding testimony that expert believes a finding of sexual abuse has occurred was corroborating evidence and did not constitute comment on truthfulness). As stated by our sister court, such evidence "does not point the finger at any particular person. Instead, this type of evidence merely verifies that the child was sexually assaulted." *Id.*

Accordingly, we conclude Drzymalla has not satisfied his burden of proving that trial counsel's failure to object was so "outrageous that no competent attorney would have engaged in it" because a reasonable strategic basis exists for the decision. *See Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 243. We therefore hold Drzymalla failed to show his trial counsel's representation was deficient. *See Strickland*, 466 U.S. at 687; *Prine*, 2017 WL 4168614, at *2; *Moran*, 350 S.W.3d at 242. Because we hold Drzymalla has failed to satisfy the first prong of *Strickland*, we need not address whether Drzymalla was prejudiced under *Strickland's* second prong. *See Lopez v. State*, 343 S.W.3d 137, 144 (Tex. Crim. App. 2011) (holding second *Strickland* prong need not be considered if appellant fails to satisfy first *Strickland* prong).

CONCLUSION

Based on the foregoing, we overrule Drzymalla's sole point of error and affirm the trial court's judgment.

Marialyn Barnard, Justice

Do Not Publish