Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00668-CR

Deon Latre **NICKENS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the County Court at Law No. 13, Bexar County, Texas
Trial Court No. 560303
Honorable Rosie S. Gonzalez, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: December 2, 2020

AFFIRMED

A jury convicted appellant Deon Latre Nickens of assault causing bodily injury to a family or household member, and the trial court sentenced Nickens to one year in jail, probated, and assessed a $2,500 fine. In two issues, Nickens argues he received ineffective assistance of counsel and the trial court erred in admitting a 9-1-1 recording. We affirm.

BACKGROUND

San Antonio police officers Jonathan Haley and Timothy Farrow responded to a 9-1-1 call from Maria Munguia, who claimed her boyfriend, Nickens, had hit her. When the officers arrived

at the home, they spoke to Munguia, who was visibly upset and had a swollen bottom lip. The officers also spoke to Nickens, who told them that he and Munguia had an argument and when he tried to leave, Munguia blocked the door and he pushed her out of the way. The State charged Nickens with assault causing bodily injury to a family or household member. At trial, the jury heard the recording of Munguia's 9-1-1 call as well as testimony from both officers and the San Antonio Police Department's custodian of records. After hearing the evidence, the jury found Nickens guilty. Nickens filed a motion for new trial, which was overruled by operation of law. Nickens now appeals his conviction.

ANALYSIS

Ineffective Assistance of Counsel

In his first argument on appeal, Nickens contends he received ineffective assistance of counsel. For support, he points to an affidavit attached to his motion for new trial in which his counsel lists four ways her performance was deficient. In addition, Nickens argues his counsel's performance was deficient because she failed to make certain objections and cite the record during trial. The State counters that counsel's performance was not deficient and each of Nickens's claims are meritless.

Standard of Review and Applicable Law

To prevail on a claim of ineffective assistance of counsel, an appellant must prove that counsel's performance was deficient and that deficiency prejudiced the defense. *Prine v. State*, 537 S.W.3d 113, 116 (Tex. Crim. App. 2017) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish deficient performance, an appellant must prove by a preponderance of the evidence that counsel's representation fell below an objective standard of reasonableness. *Id.* at 116–17. In making our determination, we apply a highly deferential scrutiny to trial counsel's performance. *Mata v. State*, 226 S.W.3d 425, 428 (Tex. Crim. App. 2007). The range of

reasonable assistance is wide and carries a presumption that counsel rendered adequate assistance and exercised reasonable professional competence. *Prine*, 537 S.W. 3d at 117.

To overcome this presumption, an appellant must establish that counsel's ineffectiveness is "firmly founded in the record." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). The record in a direct appeal is often insufficient to present an ineffective assistance claim because it is usually undeveloped and does not provide counsel's reasons for her actions. *Id.* Trial counsel should be afforded an opportunity to explain her actions before they are denounced as ineffective. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). A reviewing court should not find deficient performance unless trial counsel has had an opportunity to explain her actions or counsel's challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392. We may not find trial counsel's performance deficient "if any reasonably sound strategic motivation can be imagined." *Lopez v. State*, 343 S.W.3d 137, 142–43 (Tex. Crim. App. 2011). "[A] silent record on the reasoning behind counsel's actions is sufficient to deny relief." *Badillo v. State*, 255 S.W.3d 125, 129 (Tex. App—San Antonio 2008, no pet.).

Application

We begin with Nickens's claims listed in his counsel's affidavit attached to the motion for new trial. In the affidavit, counsel admits, without explanation, that she failed: (1) to object under *Crawford v. Washington* when Officer Haley testified that Munguia told him Nickens hit her; (2) to request a *Daubert/Kelly* hearing to determine if Officer Haley qualified as an expert; (3) to move to strike Officer Haley's testimony regarding Nickens's recklessness; and (4) to investigate the facts of the case by failing to interview Officer Haley before cross-examining him. According to Nickens, these claims are "well-grounded in the record" since his counsel listed them in her affidavit. However, an affidavit attached to a motion for new trial is not evidence in and of itself

and must be introduced at a hearing on the motion to be considered. *Stephenson v. State*, 494 S.W.2d 900, 909–10 (Tex. Crim. App. 1973). In this case, the trial court did not hold a hearing on the motion for new trial, and the affidavit is not evidence. *See id.* Accordingly, the record is silent as to counsel's reasons for failing to take the actions outlined above. *See Lopez*, 343 S.W.3d at 143–44.

Because the record is silent, to prevail on his claims of ineffective assistance, Nickens must show the challenged conduct was so outrageous that no competent attorney would have engaged in it. *See Goodspeed*, 187 S.W.3d at 392. We will address his claims separately.

First, Nickens claims that his counsel was ineffective for failing to object to Officer Haley's testimony about Munguia's statement that Nickens hit her because the statement was testimonial under *Crawford*. An appellant who claims ineffective assistance based on a failure to object "must demonstrate that if trial counsel had objected, the trial court would have committed error by overruling the objection." *Gauna v. State*, 534 S.W.3d 7, 12 (Tex. App.—San Antonio 2017, no pet.). Nickens has not demonstrated this in either his motion for new trial or appellate brief. Additionally, statements made during a police interrogation in situations that objectively indicate the primary purpose of the interrogation is to assist with an ongoing emergency are nontestimonial. *Davis v. Washington*, 547 U.S. 813, 813–14 (2006). Here, Munguia's statement was made to assist with an ongoing emergency and was nontestimonial. *See id*. Therefore, if counsel had objected under *Crawford*, the trial court would not have committed error by overruling the objection. *See Gauna*, 534 S.W.3d at 12. Accordingly, Nickens has not shown that his counsel's conduct was so outrageous that no competent attorney would have engaged in it. *See Goodspeed*, 187 S.W.3d at 392.

In his next two issues, Nickens claims his counsel should have requested a *Daubert/Kelly* hearing to determine whether Officer Haley qualified as an expert who could testify that Nickens

acted recklessly. He argues his counsel should have also moved to strike this testimony. A police officer may give a lay opinion if such testimony is based on his own personal observations and experiences as a police officer. *See Atkinson v. State*, 564 S.W.3d 907, 913 (Tex. App.—Texarkana 2018, no pet.). At trial, Officer Haley testified that based on his training and experience, he believed he had probable cause to arrest Nickens since he believed Nickens's conduct was reckless. Because this lay opinion testimony was admissible, counsel did not act below an objective standard of reasonableness when she failed to request a *Daubert/Kelly* hearing or move to strike the testimony. *See id*. (holding counsel's failure to request a Rule 705 hearing and object to officer's testimony was not deficient).

Nickens also argues his counsel's performance was deficient because she failed to interview Officer Haley before cross-examining him. An appellant claiming ineffective assistance based on failure to investigate must show how her representation would have improved from further investigation. *See Cooks v. State*, 240 S.W.3d 906, 912 (Tex. Crim. App. 2007); *Paez v. State*, 995 S.W.2d 163, 171 (Tex. App.—San Antonio 1999, pet ref'd). Nickens does not argue in either his motion for new trial or his appellate brief that his counsel's performance would have improved had she interviewed Officer Haley before cross-examining him. Accordingly, Nickens has not demonstrated that his counsel's failure to interview Officer Haley constituted outrageous conduct or deficient performance. *See Cooks*, 240 S.W.3d at 912; *Paez*, 995 S.W.2d at 171.

Next, Nickens argues his counsel was ineffective because she failed to object to the 9-1-1 recording on authentication grounds since the State did not identify the caller in the recording. Texas Rule of Evidence 901(a) provides that an item is authenticated when there is sufficient proof "to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). A proponent may authenticate evidence multiple ways, including by direct testimony from a witness with personal knowledge. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). To

authenticate an audio recording, the witness is not required to identify every speaker on the recording. *Jones v. State*, 80 S.W.3d 686, 688–89 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Here, the State introduced testimony from the police department's custodian of records, who testified how the department makes and keeps 9-1-1 recordings. The custodian testified it was her job to provide these recordings to attorneys working on cases related to the calls, and she recognized this recording because when she made it, she initialed and dated it. Contrary to Nickens's assertion, this testimony properly authenticated the 9-1-1 recording. *See Tienda*, 358 S.W.3d at 638; *Montoya v. State*, 43 S.W.3d 568, 571 (Tex. App.—Waco 2001, no pet.) (holding State properly authenticated 9-1-1 recording when officer testified she was custodian of 9-1-1 tapes who had listened to the recording and testified it was made in the ordinary course of business). As a result, counsel's performance was not deficient.

Nickens further argues his counsel failed to properly object when Officer Haley referred to Munguia as a "victim" and referred to a "standardized checklist" and "risk assessment form." Nickens has not presented any argument in his brief about whether the trial court would have erred by overruling these objections, and with a silent record, we cannot speculate as to counsel's reasoning or strategy. *See Lopez*, 343 S.W.3d at 143. Additionally, Texas courts have concluded use of words like "victim" at trial are relatively nonprejudicial and do not constitute reversible error. *See Cueva v. State*, 339 S.W.3d 839, 864 (Tex. App.—Corpus Christi 2011, pet. ref'd) (holding counsel's performance did not amount to ineffective assistance when counsel failed to object to term "victim"). And, the record shows that when Officer Haley referred to the "standardized checklist" and "risk assessment form," counsel objected on the basis of relevancy, and the trial court sustained the objections each time. Accordingly, Nickens has not demonstrated that counsel's performance constituted deficient performance.

Finally, Nickens contends his counsel failed to adequately respond to an objection the State made during closing argument. During closing argument, Nickens's counsel argued that Officer Farrow believed Nickens did not hit Munguia, and the State objected that this statement was not supported by the record. According to Nickens, his counsel should have pointed out that the statement *was* in the record—here, the jury heard Officer Farrow's testimony that he believed Nickens. But because the jury heard that evidence, when considering this silent record, we cannot conclude counsel's conduct fell outside the range of reasonable assistance. We therefore overrule Nickens's first issue.

Admissibility of the 9-1-1 Recording

In his second issue, Nickens argues the trial court erred in admitting the recording of Munguia's 9-1-1 call because it contained testimonial statements and violated his Sixth Amendment right to confrontation. The State contends the trial court properly admitted the recording because it consisted of nontestimonial statements made to the police.

Standard of Review and Applicable Law

"Whether a statement is testimonial is a question of law that we review de novo." *Crawford v. State*, 595 S.W.3d 792, 803 (Tex. App.—San Antonio 2019, no pet.) (citing *De La Paz v. State*, 273 S.W.3d. 671, 680 (Tex. Crim. App. 2008)). The Confrontation Clause of the Sixth Amendment bars the "admission of testimonial statements of a witness who does not appear at trial unless [the witness is] unavailable to testify and the defendant ha[s] had a prior opportunity for cross-examination." *Id*. at 802 (quoting *Davis*, 547 U.S. at 821). A statement is testimonial if it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 803 (quoting *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013)). In cases like the one before us, the United States Supreme Court has defined statements "made in the course of police interrogation under

circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" as nontestimonial. *Davis*, 547 U.S. at 822. Consistent with that holding, Texas courts have followed that "[s]tatements made to police during contact initiated by a witness at the beginning of an investigation are generally not considered testimonial." *Cook v. State*, 199 S.W.3d 495, 497–98 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Specifically, our sister courts have held that statements made during 9-1-1 calls are non-testimonial. *Id*. at 498 (citing *Ruth v. State*, 167 S.W.3d 560, 569 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).

Application

At trial, the State offered the audio tape recording of Munguia's 9-1-1 call, and Munguia did not appear as a witness. Nickens objected that the recording was "testimonial" and "would amount to hearsay." The trial court overruled Nickens's objection reasoning the recording was admissible under the public-record exception to hearsay.

Nickens contends, however, that the recording was inadmissible since it contained testimonial statements.[1] We disagree. Here, Munguia initiated contact with the police by calling 9-1-1 to report that Nickens had hit her. *See id.* at 497–98. The statements made during this phone call were made at the beginning of the investigation. *See id.* Such statements were nontestimonial and did not violate Nickens's Sixth Amendment right to confrontation. *See Crawford*, 595 S.W.3d at 803; *Lee v. State*, 418 S.W.3d 892, 895 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (providing that the threshold inquiry in determining whether a Confrontation Clause violation is

[1] To the extent the State argues Nickens's objection that the tape was "testimonial" did not preserve the Confrontation Clause issue, the Texas Court of Criminal Appeals has held that "[w]hen a defendant's objection encompasses complaints under both the Texas Rules of Evidence and the Confrontation Clause, the objection is not sufficiently specific to preserve error." *Reyna v. State*, 168 S.W.3d 173 (Tex. Crim. App. 2005). Nevertheless, assuming error is preserved, Nickens's objection fails because the statements are nontestimonial. *See Lee v. State*, 418 S.W.3d 892, 898 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (holding that even if appellant preserved Confrontation Clause objection, it fails because the objected to photographs are not testimonial statements).

whether the statement is testimonial). We therefore hold the trial court did not err in admitting the recording and overrule Nickens's final issue.

CONCLUSION

Based on the foregoing, we overrule Nickens's issues on appeal and affirm the trial court's judgment.

Beth Watkins, Justice

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