In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00306-CR

DELL IVAN GODKIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 16-04-04919-CR

MEMORANDUM OPINION

A jury convicted appellant Dell Ivan Godkin of aggravated sexual assault of a child and assessed punishment at imprisonment for life.[1] In three issues, Godkin contends that (1) trial counsel provided ineffective assistance; (2) the trial court abused its discretion by denying Godkin's motion for new trial, in which he claimed

[1]Godkin was charged in a seven-count indictment. Count one alleged continuous sexual abuse of a child, counts two and three alleged aggravated sexual assault of a child, and counts four through seven alleged sexual assault of a child.

trial counsel was ineffective; and (3) the evidence is legally insufficient to support his conviction because the State failed to prove that the complainant was younger than fourteen years of age when the offense occurred. We affirm the trial court's judgment.

BACKGROUND

Before trial, the State filed a notice of its intent to introduce extraneous offense evidence, including Godkin's alleged sexual abuse of another child victim over a period of several years. During voir dire, defense counsel stated as follows, in pertinent part:

> Now let me talk to you about something else. Extraneous offense -- okay? This could be another crime, a wrong act, evidence regarding Dell Godkin committed other crimes or wrongs or acts against a child who is not the alleged victim in this case. Okay? Another person, another child. Okay?
>
> Now, the burden of proof is proof beyond a reasonable doubt. . . . [H]e is on trial for the most serious offense, continuing sexual abuse of a child. . . . The punishment range . . . starts at 25 years, goes up to life in prison.
>
> The State . . . if they have this kind of evidence, they could offer evidence of an extraneous offense involving another child. . . . Your job as a jury is to take this "beyond a reasonable doubt" standard . . . and applying it to the elements of the offense. And in order for you to be able to sit in judgment of this man, you would have to apply that . . . beyond a reasonable doubt standard[] to not only what he is accused of, but if the State brought you another witness who said that this happened, that would be the extraneous offense, the other offense involving another person. And you would have to be able to apply "beyond a reasonable doubt" to that other child in my hypothetical.

Counsel then asked members of the venire whether they would apply the beyond a reasonable doubt standard of proof to an alleged offense against another complainant. In addition, during his opening statement, defense counsel discussed another victim that counsel expected would testify.

Detective Donna Ripley of the Montgomery County Sheriff's Office testified that she served as lead investigator in the case, and based upon her investigation, she believed the victim was fourteen when the abuse began. During cross-examination, defense counsel asked Ripley whether she had interviewed another person who had filed a report against Godkin in another jurisdiction, and Ripley responded affirmatively. Ripley also agreed during cross-examination that the range of punishment increases exponentially if the victim was younger than fourteen years of age at the time of the offense.

Jamie Ferrell, clinical director of forensic nursing services with Memorial Hermann Health System, testified that the victim's date of birth is July 25, 1997. Ferrell testified that she recalled seeing in the victim's records that on August 9, 2014, the victim reported that she had been sexually abused for the last three years, which she testified means the victim was fourteen years old at the time of the first sexual assault.

The victim's mother and Godkin's wife, M.G., testified that the victim's date of birth is July 25, 1997. M.G. learned that she was pregnant with another child in mid-March 2011, and the child was born on December 7, 2011. The victim outcried to M.G. on July 28, 2014, and M.G. contacted the authorities and left Godkin. According to M.G., the victim "was unclear as to when things started happening." M.G. testified that after talking more with the victim and "looking at timelines[,]" she believed the victim "could have possibly been 13."

When the prosecutor asked M.G. whether she approved of the way Godkin treated another victim, defense counsel asserted that "the State is getting into the extraneous offense. And if we get into the extraneous offense, we are going to request a hearing on that." The trial judge responded, "You can have a hearing. But . . . there isn't a door anymore. It is off the hinges. I think your opening statement and I think all the questions -- you can have a hearing." During the ensuing hearing, the prosecutor agreed to withdraw her question regarding the victim of the extraneous offense. Defense counsel stated that he would like to have a hearing if the State planned to offer evidence regarding the extraneous offense, and the prosecutor indicated that she had not decided whether to do so. The trial then continued.

The victim testified that she was seven years old when her mother married Godkin. The victim explained that she was thirteen years old in March 2011, when she learned that her mother was pregnant with her younger brother, and she testified that Godkin digitally penetrated her vagina, put his mouth on her sexual organ, and asked her to touch his sexual organ at that time. According to the victim, such things also happened before her mother became pregnant, including the months of February, March, April, and May of 2011, when the victim was thirteen years old. The prosecutor specifically asked the victim whether she was sure that Godkin touched her sexual organ with his hand, asked her to put her hand on his sexual organ, and digitally penetrated her sexual organ when she was thirteen years old, and the victim responded affirmatively.

During cross-examination, the victim testified that in August of 2014, when she had just turned seventeen, she told authorities and Safe Harbor that the abuse took place "about" three years ago.[2] According to the victim, Godkin sexually abused her a few times per week every week. The victim explained that before making her outcry to the forensic interviewer, she told a close friend that it was her stepbrother who was sexually abusing her. The victim explained that she was afraid

[2]Forensic interviewer Rachel McConnell testified that the victim told her the abuse started about three years ago.

to tell her friend that Godkin was the perpetrator because her friend and Godkin attended the same church, and she believed her stepbrother would not get into trouble because she could just take back what she said. The victim further explained that after she outcried to her mother, she did not want anyone to know Godkin was the perpetrator because her mother does not work outside the home, and the victim was concerned that if Godkin went to prison, the family would be without financial support.

Among other witnesses, the defense called Children's Memorial Hermann Hospital social worker Vanessa Martinez, who testified that the victim reported that Godkin had sexually assaulted her three times, and that one of those times involved penetration. Martinez testified that she did not go into detail with the victim or explain to the victim what sexual assault and penetration are.

After the jury found Godkin guilty and assessed punishment, Godkin filed a motion for new trial, in which he alleged, among other things, that trial counsel was ineffective because counsel had no reasonable trial strategy in questioning the venire about an extraneous offense or in discussing the extraneous offense during his opening statement. The trial court conducted an evidentiary hearing on the motion for new trial, at which defense counsel testified that he and his co-counsel discussed the issue of the extraneous offense evidence, and their "trial strategy was to deal with

the extraneous offense as soon as possible[]" because they believed the State would offer evidence of the extraneous offense during guilt/innocence. According to defense counsel, he and his co-counsel decided to discuss the extraneous offense during voir dire and opening statement because their "concern was that any traction . . . in the trial would quickly evaporate the minute that the jury heard about this other complainant." Defense counsel explained that he believed that any evidence that questioned the victim's veracity might open the door to evidence of the extraneous offense. According to defense counsel, "the trial strategy was to get out in front of it." Co-counsel testified likewise regarding the defense's trial strategy with respect to the extraneous offense evidence, except he testified that, in hindsight, he had no trial strategy for not having a pre-trial hearing on the admissibility of the extraneous offense evidence.

The prosecutor testified that she had filed a notice that "clearly indicated my intent to use evidence of the extraneous witness . . . in the guilt/innocence portion of the case." The prosecutor further testified that although she intended to call the other victim as a witness, she decided not to do so because the victim "ended up doing remarkably well and I felt my case was strong enough in guilt/innocence without the extraneous [offense evidence]." The prosecutor testified that she was unsure whether

defense counsel requested a hearing to have the trial court determine the admissibility of the extraneous offense.

ISSUE THREE

In issue three, Godkin argues that the evidence is legally insufficient to support his conviction because the State failed to prove that the complainant was younger than fourteen years of age when the offense occurred. Because this issue, if sustained, would result in rendition of a judgment of acquittal, we address it first. *See Price v. State*, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 2016, no pet); *see also* Tex. R. App. P. 47.1.

In evaluating the legal sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 902 n.19 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The jury is the ultimate authority on the credibility of witnesses and the weight to be given to their testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). A reviewing court must give full deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Hooper, 214 S.W.3d at 13. If the record contains conflicting inferences, we must presume that the jury resolved such facts in favor of the verdict and defer to that resolution. *Brooks*, 323 S.W.3d at 899 n.13; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). In addition, we determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Clayton*, 235 S.W.3d at 778. The testimony of a child victim, standing alone and without corroboration, is sufficient to support a conviction for aggravated sexual assault of a child. *See* Tex. Code Crim. Proc. Ann. art. 38.07(a), (b)(1) (providing that a child's testimony alone is sufficient to support a conviction for aggravated sexual assault when the child is under the age of seventeen at the time of the alleged offense); *Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd).

Although the victim sometimes used imprecise language as to her age during the sexual assaults when she outcried to her mother, the forensic interviewer, Ferrell, and Ripley, the victim testified at trial that she was certain that Godkin digitally penetrated her vagina, put his mouth on her sexual organ, and asked her to touch his sexual organ when she was thirteen years old. Viewing the evidence in the light most favorable to the verdict and deferring to the jury's authority regarding the credibility of witnesses and the weight to give their testimony, we conclude that a reasonable

factfinder could have found, beyond a reasonable doubt, that the victim was thirteen years old when the offense occurred. *See* Tex. Code Crim. Proc. Ann. art. 38.07(a), (b)(1); *Brooks*, 323 S.W.3d at 902 n.19; *Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 13; *Penagraph*, 623 S.W.2d at 343; *Tear*, 74 S.W.3d at 560. Accordingly, we overrule issue three.

ISSUES ONE AND TWO

In issue one, Godkin argues that trial counsel provided ineffective assistance, and in issue two, Godkin contends that the trial court erred by denying his motion for new trial, in which he asserted that trial counsel was ineffective. We address issues one and two together.

To establish ineffective assistance, an appellant must satisfy the following two-pronged test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see Perez v. State*, 310 S.W.3d 890, 892-93 (Tex. Crim. App. 2010). An appellant's failure to make either of the required showings of deficient performance or sufficient prejudice defeats a claim

of ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003); *see also Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong."). Allegations of ineffective assistance "must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). An appellant must prove that there was no professional reason for specific acts or omissions of his counsel. *Id*. at 836.

We review a trial court's ruling on a motion for new trial for an abuse of discretion, "reversing only if the trial judge's opinion was clearly erroneous and arbitrary." *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). We view the evidence in the light most favorable to the trial court's ruling, must not substitute our judgment for that of the trial court, and must uphold the ruling if it was within the zone of reasonable disagreement. *Id*.; *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). A trial court abuses its discretion in denying a motion for new trial if no reasonable view of the record could support its ruling. *Riley*, 378 S.W.3d

at 457; *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). "The trial court, as factfinder, is the sole judge of witness credibility at a hearing on a motion for new trial[.]" *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013).

Viewing the record as a whole and assuming without deciding that Godkin could meet the first prong of *Strickland*, Godkin has not demonstrated that, but for counsel's alleged ineffective assistance in bringing up extraneous offense evidence during voir dire and opening statement, the result of his trial would have been different. *See Bone*, 77 S.W.3d at 833. Therefore, the trial court did not err by denying Godkin's motion for new trial. *See Riley*, 378 S.W.3d at 457; *Webb*, 232 S.W.3d at 112. Accordingly, we overrule issues one and two and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on August 9, 2017
Opinion Delivered November 8, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.