



IN THE
TENTH COURT OF APPEALS

No. 10-19-00089-CR

LUIS SALAS-TREVINO,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. D38085-CR

MEMORANDUM OPINION

Luis Salas-Trevino appeals from convictions for two counts of sexual assault of a child. TEX. PENAL CODE ANN. § 22.011. Salas-Trevino complains that the trial court abused its discretion in the admission of a cell phone that had not been properly authenticated, that the State committed prosecutorial misconduct, and that he received ineffective assistance of counsel. Because we find no reversible error, we affirm the judgments of the trial court.

AUTHENTICATION

In his first issue, Salas-Trevino complains that the trial court erred by overruling his objection to the admission of a cell phone because it had not been properly authenticated. The State offered the cell phone into evidence during the testimony of the evidence custodian who had no involvement in the seizure of the cell phone. The State did not ask any predicate questions of the witness to establish the authenticity of the cell phone and Salas-Trevino objected on the basis of authentication. The trial court overruled the objection and admitted the cell phone into evidence. Salas-Trevino argues that he was harmed by the admission of the cell phone because the cell phone was used by the State to show the jury text messages and Facebook messages regarding alleged extraneous bad acts that were found on the phone. The State concedes that the cell phone was not properly authenticated but argues that Salas-Trevino was not harmed by the admission of the cell phone because any error was cured as the phone was properly authenticated by another witness later in the trial, and the evidence was sufficient to find that Salas-Trevino had committed the offenses without the cell phone and its contents.

Rule 901 of the Rules of Evidence provides that evidence must be properly authenticated prior to its admission into evidence. *See* TEX. R. EVID. 901. This did not happen, and the trial court erred by overruling Salas-Trevino's objection to the admission of the cell phone at the time it was offered. However, later in the trial, an officer testified that the phone in question was the same as the phone which was seized that belonged to Salas-Trevino and that was depicted in photographs the officer took the night that a

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search warrant was executed at Salas-Trevino's residence, which would have been sufficient to properly authenticate the phone.

An error in the premature admission of improperly authenticated evidence may be cured by the admission of subsequent evidence of authentication. *See Davis v. State*, 687 S.W.2d 78, 82 (Tex. App.—Dallas 1985, pet. ref'd) (any error in admitting photograph into evidence without proper authentication was "cured" when witness later testified she was present when photograph was taken); *see also Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998). Because the cell phone was adequately authenticated by another witness later in the trial, we find that the error in the premature admission of the cell phone near the beginning of the trial was cured by the later evidence of authentication. *See* TEX. R. APP. P. 44.2(b). We overrule issue one.

PROSECUTORIAL MISCONDUCT

In his second issue, Salas-Trevino complains of multiple instances of prosecutorial misconduct in both the guilt-innocence and punishment phases of the trial. During the guilt-innocence phase, Salas-Trevino complains that the State's use of the contents of a cell phone that had not been properly admitted and arguments made against jury nullification were improper. During the punishment phase, Salas-Trevino complains that evidence presented regarding an extraneous offense through a jailhouse informant, personal opinions of the prosecutors given during closing argument that Salas-Trevino should not receive community supervision, and the contention that Salas-Trevino did not accept responsibility for his actions and therefore should not receive community

supervision during closing argument all constituted misconduct by the State.

Generally, to preserve error regarding alleged prosecutorial misconduct, an appellant must (1) object on specific grounds; (2) request an instruction to disregard any matter improperly placed before the jury; and (3) move for a mistrial. *See Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995). Salas-Trevino acknowledges that he made no objections on the basis of prosecutorial misconduct but argues that “the aggregation of these non-reversible prosecutorial errors” combined to deny him a fair trial such that no objection was required. In support of this contention, Salas-Trevino relies on cases explaining that “serious and continuing prosecutorial misconduct that undermines the reliability of the factfinding process” and results in “deprivation of fundamental fairness and due process of law” may entitle a defendant to a new trial even if “few objections have been perfected.” *See Jimenez v. State*, 298 S.W.3d 203, 214 (Tex. App.—San Antonio 2009, pet. ref’d); *Rogers v. State*, 725 S.W.2d 350, 359-60 (Tex. App.—Houston [1st Dist.] 1987, no pet.).

We have reviewed each allegation of prosecutorial misconduct individually and disagree with Salas-Trevino that the instant case presents an appropriate occasion to conclude prosecutorial misconduct occurred at such a level that Salas-Trevino was not required to preserve the error at trial. Ample evidence supports the convictions, including Salas-Trevino’s own confession, and Salas-Trevino does not challenge the sufficiency of the evidence to support the convictions. We do not find that, despite Salas-Trevino’s failure to object to any alleged prosecutorial misconduct, he is entitled to a new

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trial because the prosecutor's alleged conduct undermined the reliability of the factfinding process or resulted in the deprivation of fundamental fairness or due process of law. We overrule issue two.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his third issue, Salas-Trevino argues that he received ineffective assistance of counsel at trial. Salas-Trevino specifically complains that his trial counsel failed to object to closing argument by the State regarding Facebook and text messages found on the cell phone admitted into evidence during the guilt-innocence phase of the trial, failed to object to the admission of and argument relating to an extraneous offense during the punishment phase, argument by the State regarding Salas-Trevino's exercise of his right to a jury trial, defensive strategy, and personal opinion by the prosecutor that community supervision was inappropriate based on his experience. Salas-Trevino argues that these failures resulted in him receiving ineffective assistance of counsel.

In order to prevail on a claim of ineffective assistance of counsel, an appellant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). First, the appellant must show that counsel was so deficient as to deprive appellant of his Sixth Amendment right to counsel. *Strickland*, 466 U.S. at 687. Second, the appellant must show that the deficient representation was prejudicial and resulted in an unfair trial. *Id.* To satisfy the first prong, appellant must show that his counsel's representation was objectively unreasonable. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). To

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satisfy the second prong, appellant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thompson*, 9 S.W.3d at 812. A reasonable probability exists if it is enough to undermine the adversarial process and thus the outcome of the trial. See *Strickland*, 466 U.S. at 694; *Mallett v. State*, 65 S.W.3d 59, 62-63 (Tex. Crim. App. 2001). The appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. *Thompson*, 9 S.W.3d at 813. Our review is highly deferential. *Mallett*, 65 S.W.3d at 63.

The right to "reasonably effective assistance of counsel" does not guarantee errorless counsel or counsel whose competency is judged by perfect hindsight. *Saylor v. State*, 660 S.W.2d 822, 824 (Tex. Crim. App. 1983). "Isolated instances in the record reflecting errors of commission or omission do not cause counsel to become ineffective, nor can ineffective assistance of counsel be established by isolating or separating out one portion of the trial counsel's performance for examination." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). The appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective, and an allegation of ineffectiveness must be firmly founded in the record. *Thompson*, 9 S.W.3d at 813. An appellant's failure to satisfy one prong of the test negates a court's need to consider the other prong of *Strickland*. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

In his brief to this Court, Salas-Trevino details each of the allegations he contends constituted ineffective assistance of counsel. Salas-Trevino complains of the prosecutor

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reading text and Facebook messages allegedly between him and other females from the phone during closing argument in the guilt-innocence phase without objection which he contends were not admitted into evidence. Salas-Trevino additionally complains that in the punishment phase of the trial, his counsel failed to object to testimony by a jailhouse informant regarding an alleged sexual assault committed by Salas-Trevino that Salas-Trevino allegedly disclosed to the informant while he was incarcerated awaiting trial because he contends that the evidence was not adequately corroborated and should have been excluded. Salas-Trevino further argues his trial counsel failed to object to improper argument by the prosecutor during both guilt-innocence and punishment that the defense was attempting to convince the jury to disregard their oaths, the law, and instructions of the court, commonly known as jury nullification. Salas-Trevino further argues that his trial counsel failed to object to the prosecutor improperly injecting his personal opinion into his argument by contending that, based on his years of experience, this was not a probation case and that Salas-Trevino did not accept responsibility for his actions because he did not plead guilty and avoid a trial.

However, what Salas-Trevino has not shown by a preponderance of the evidence is how there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" as required to prevail under the second prong of *Strickland*. See *Thompson*, 9 S.W.3d at 812. Salas-Trevino admitted to committing the offenses of which he was convicted. His counsel did arguably seek the jury's compassion by not labeling him a sex offender and sending him to prison for many

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years. Salas-Trevino received a sentence of four years, which was on the lower end of the punishment range for one offense and did receive a recommendation for community supervision for the second. Likewise, our review of the entire record does not show that the jury was unduly influenced by any of the alleged errors, or that the result of the proceeding would have been different but for the alleged errors. Because Salas-Trevino has not met the second prong of *Strickland*, we overrule issue three.

CONCLUSION

Having found no reversible error, we affirm the judgments of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill

Affirmed

Opinion delivered and filed August 27, 2020

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