NUMBER 13-16-00002-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

OSCEAS CANTU A/K/A
OSEAS CANTU A/K/A
OSEAS CANTU JR. A/K/A
OSEAS SANTILLAN CANTU, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 197th District Court of
Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

By one issue, appellant Osceas Cantu a/k/a Oseas Cantu a/k/a Oseas Cantu Jr. a/k/a Oseas Santillan Cantu challenges his conviction for continuous sexual assault of a

child. *See* TEX. PENAL CODE ANN. § 21.02 (West, Westlaw through Ch. 34 2017 R.S.). Cantu argues his defense counsel provided ineffective assistance of counsel. We affirm.

I. BACKGROUND

On February 29, 2015, M.H.[1] told her grandmother, M.C., that Cantu had "raped" her in response to M.C. asking if Cantu had ever "done anything to her [M.H.]". M.C. testified that she did not know why she asked M.H. about Cantu, but just did. M.H. told M.C. the abuse started when she was six years old and in first grade, and it continued until around the third grade. M.C. said she did not press M.H. for more details.

M.C. told her daughter K.G., M.H.'s mother, about M.H.'s allegations when she arrived home from work the following morning. K.G. and M.C. contacted the Brownsville police.

At trial, M.C. testified that M.H. was a quiet, reserved child who spent most of her time in her bedroom. M.C. also spoke of the change in M.H. since her outcry, stating that she is more free and interactive with the family.

On cross examination by Cantu, M.C. stated that she does not believe the outcry is related to a divorce proceeding between Cantu and K.G.

M.H., who was 13 years old at the time of trial, testified next. She stated Cantu molested her for three years. M.H. recounted that Cantu would come into her room at night or in the early morning, perform oral sex on her, and then have sexual intercourse with her. M.H. stated she would try to push Cantu off, but he would just pull her back. Following intercourse, he would go into the bathroom and clean her genital area. M.H. also explained that when previously asked if anyone had hurt her, she said "no" because

[1] In order to protect the complainant's identity, we will use her initials and her family member's initials throughout this memorandum opinion. *See generally* TEX. R. APP. P. 9.8.

she was too nervous to tell anyone. M.H. made the outcry to M.C. after hearing a church sermon and said she felt the pressure lifted from her. M.H. also stated that no one had asked her to make up any allegations against Cantu.

K.G. testified after her daughter. She related that M.H. was around six years old when she met Cantu. M.H. had been a "normal little girl," then changed and became quiet and withdrawn, and even failed the second grade. K.G. remembered catching Cantu in M.H.'s bedroom a couple of times with the lights off. When she would question Cantu about being in M.H.'s bedroom, he would give explanations that did not make sense. K.G. stated she felt uneasy by what she had seen. She also explained she questioned M.H. on different occasions following the outcry to verify M.H.'s allegation.

Following K.G., her oldest son, A.G., testified. A.G. relayed that he had noticed Cantu look at M.H. in an inappropriate manner. He also witnessed M.H. and Cantu playing, and he saw Cantu's face near M.H.'s genital region. A.G. agreed that he had never heard anyone tell M.H. to fabricate allegations against Cantu.

L.H., M.H.'s paternal grandmother, also testified for the State. L.H. recalled an incident when L.H. noticed that M.H. appeared to be in pain. L.H. stated that she noticed that anytime six-year old M.H. sat down, she would say "ouch." When L.H. asked M.H. about it, M.H. stated, "No, no, it's nothing. It's okay. M.H. is okay, Grandma." Years later, when M.H. told her biological father, V.H., and L.H. about the abuse, M.H. told her grandmother the pain L.H. questioned her about was from Cantu's abuse. L.H. also clarified that K.G. never accused V.H. of abuse previously, an allegation Cantu had made.

Joanna Frausto, the forensic interviewer who met with M.H., also testified. She explained she worked for Monica's House, a non-profit children's advocacy center. Brownsville Police Department Detective Veronica Garcia scheduled an interview for M.H. and Frausto conducted the interview. Frausto stated that M.H. identified Cantu as her abuser and spoke of the painful sexual intercourse. On cross examination, Frausto stated it is not her job to believe or disbelieve a child's statements, but to get information from the complainant.

Detective Garcia was the lead officer on the case. She stated she is assigned the case after an initial report is taken. She then set up interviews with adult witnesses, arranged for M.H. to go to Monica's House, and arranged for a sexual assault exam to be conducted. Detective Garcia talked about how delayed outcries are not uncommon in sexual assault cases and that K.G. told her about the divorce proceedings from Cantu during their interview. On cross-examination, Detective Garcia stated her reason for filing charges against Cantu was based on M.H.'s statements and the evidence shown by the sexual assault exam, and the timing of M.H.'s outcry did not factor into her decision. Detective Garcia stated although false allegations can be made, she did not feel that happened in M.H.'s case.

Laura Dominguez testified as the State's final witness. Dominguez, a sexual assault nurse examiner (SANE) at Valley Baptist Medical Center, explained the exam procedures and how there could be scarring on the female genital area of smaller children. Dominguez testified that there were two scars found during M.H.'s SANE exam in her genital region, although the abuse allegedly happened many years prior. She opined that the injuries had been significant enough in size that they likely were the result

of some type of penetration. Dominguez also believed the injuries were consistent with continuous sexual abuse.

Cantu called several character witnesses in his defense who testified that they never witnessed any inappropriate behavior between Cantu and the complainant. The testimony generally was that M.H. seemed happy and unafraid of Cantu.

Following the presentation of the evidence, the jury found Cantu guilty of continuous sexual abuse of a child. *See id*. The jury assessed punishment at 75 years' imprisonment in the Texas Department of Criminal Justice–Institutional Division. This appeal followed.

II. COUNSEL WAS NOT INEFFECTIVE

By his sole issue, Cantu argues his trial counsel was ineffective for failing to object to various instances of testimony by lay witnesses throughout the trial.

A. Standard of Review and Applicable Case Law

To prevail on a claim of ineffective assistance of counsel, the defendant must meet the heavy burden of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must show by a preponderance of the evidence that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the proceeding would have been different but for the attorney's deficient performance. *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (en banc) (citing *Strickland*, 466 U.S. at 694); *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi 2006, no pet). A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Allegations of ineffectiveness must be "firmly founded in the record." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A "convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. We look 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. If the appellant fails to prove one prong of the test, we need not reach the other prong. *See Strickland*, 466 U.S. at 697; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

In evaluating the first prong of *Strickland*, counsel's competence is presumed and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action could not have been based on sound strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). "A vague inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent." *Bone*, 77 S.W.3d at 836. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id*.

B. Discussion

Cantu alleges his trial counsel was deficient in eight categories:

(1) failure to object to improper evidence of witness opinion as to the truthfulness of the complainant;

(2) failure to object to improper evidence as to the behavior of the complainant to corroborate truthfulness;

(3) failure to object to improper evidence of character or reputation evidence of the complainant regarding truthfulness;

(4) failure to object to improper designation of outcry witness under article 38.072;

(5) failure to object to improper hearsay evidence of complainant's outcry;

(6) failure to object to improper evidence of other prior crimes, wrongs, or bad acts;

(7) failure to object to improper hearsay outcry admitted through the SANE nurse's testimony; and

(8) failure to object to witness comments on Cantu's right to remain silent.

1. Truthfulness of Complainant

In addressing Cantu's areas of complaint, we will address the first three categories together regarding "bolstering" of the complainant. Under rule 608 of the Texas Rules of Evidence, "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." TEX. R. EVID. 608(a)(2). Cantu alleges the State attempted to "bolster" M.H.'s testimony by asking each witness about their observations of the complainant and that counsel was ineffective by failing to object.

The State did improperly bolster testimony through M.C., the first witness who testified. M.H.'s reputation had not been attacked by Cantu at this time, yet the following occurred:

State: And how would you–Is M.H. a truthful child?

Defense: Objection, Your Honor. That's an improper question.

Court: Overruled.

State: You can answer.

M.C. A truthful child? Sometimes. She's a teenager. But truthful? She wouldn't lie about big things like this, but she didn't really open up to me either.

. . . .

State: And since that time to now, has she ever told you that she lied about what she said?

M.C. No. I always asked her, I asked her, and I asked her. It's because I just want–You know, I want the truth. I want it to be known. I keep on asking her. And now I believe–

At first, I asked her several times, but now I do believe her more so than ever. I believed her from the very beginning because she doesn't have no reason to make this lie up, no reason at all. She didn't know what was going on. But now it's like God has spoken to me and I know it's true.

. . . .

State: Okay. Is there any way that K.G. or anybody else might be making M.H. say these things?

M.C.: No. M.H. wouldn't lie about this. I know she wouldn't lie about this.

"Direct opinion testimony about the truthfulness of another witness, without prior impeachment, is inadmissible as it does more than 'assist the trier of fact to understand the evidence or to determine a fact issue.'" *Lopez v. State*, 343 S.W.3d 137, 140–41 (Tex. Crim. App. 2011). It was improper for the State to attempt to bolster M.H.'s statements through M.C. without an attack on M.H.'s truthfulness. However, Cantu objected to this testimony, so his trial counsel was not ineffective relating to M.H.'s testimony.

Cantu also claims that the State bolstered M.H.'s testimony by asking questions of K.G., A.G., L.H., Villarreal, Frausto, Detective Garcia, and Dominguez. However, these witnesses mainly testified about their personal observations of M.H. and her demeanor, which are permissible areas of testimony by a witness. Defense counsel's failure to object to their testimony was also not ineffective.

2. Outcry Witness Testimony

Cantu's next two complaints allege that trial counsel failed to object to the State's outcry witnesses and their hearsay testimony regarding M.H.'s statements to them. "Article 38.072 allows the admission of a hearsay statement made to an outcry witness by certain abuse victims, including child victims of a sexual offense." *Id.* at 140; *see* TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2 (West, Westlaw through Chap. 49, 2017 R.S.). An outcry witness is the first person over the age of eighteen to whom the child spoke about the offense. *Lopez*, 343 S.W.3d at 140.

"The statement must be 'more than words which give a general allusion that something in the area of child abuse is going on;' it must be made in some discernable manner and is event-specific rather than person-specific." *Id*. (quoting *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990)). "Hearsay testimony from more than one outcry witness may be admissible under article 38.072 only if the witnesses testify about different events." *Id*.

"In order to invoke the statutory exception, the party intending to offer the statement must notify the adverse party of the names of the outcry witnesses and a summary of their testimonies, the trial court must conduct a reliability hearing of the witnesses outside the presence of the jury, and the child victim must testify or be available

to testify at the proceeding." *Id*.

The State in its pre-trial notice regarding outcry witnesses identified M.C. and Frausto as M.H.'s outcry witnesses. M.C. testified generally during trial regarding the initial outcry from M.H. Prior to Frausto's testimony, the trial court held a hearing and determined Frausto would be allowed to testify as an outcry witness. During her trial testimony, Frausto related significantly more details acquired during the forensic interview with M.H. and, therefore, could testify about event-specific incidents of abuse. *See id*.

Cantu additionally complains that the remainder of the State witnesses were able to testify about learning of the outcry M.H. made. However, none of the witnesses testified regarding specific details of the outcry. Mainly, the witnesses were able to speak regarding M.H.'s demeanor both before and after the alleged abuse. Cantu agreed that Dominguez could testify regarding some details of the abuse, but those parts of her testimony constitute a hearsay exception because M.H. made statements for the purpose of medical diagnosis. *See* TEX. R. EVID. 803(4).

Defense counsel did not fail to object to the outcry witnesses, as the trial court had ruled they fit under the designation of article 38.072. *See* TEX. CODE. CRIM. PROC. ANN. art. 38.072. The State's other witnesses were not testifying to specific details of the conduct alleged, and therefore, were not outcry witnesses.

3. Other Crimes, Acts, or Wrongdoing

Cantu next complains that the State repeatedly introduced instances of prior bad acts in violation of Rule 404(b) and that his trial counsel did not object. *See* TEX. R. EVID. 404(b). Trial counsel filed a pre-trial motion regarding notice of extraneous offenses and evidence, and the State submitted its notice of intent to use evidence of prior extraneous

offenses prior to trial. However, the offenses listed by the State on its notice were not introduced at trial.

Cantu alleges that remarks about his temper or observations of him and the complainant constituted evidence of prior bad acts. The testimony elicited from the State's witnesses that Cantu had a bad temper, Cantu would throw things, or would stare at the complainant's behind were general observations, not specific bad acts. Although Cantu's trial counsel did not object, these statements would not fall under the requirement of Rule 404(b) notice. *See id*. Therefore, trial counsel was not deficient for not objecting to each statement.

4. Testimony of SANE Nurse

The fourth area Cantu complains of is the hearsay testimony of Dominguez. Hearsay is a statement, other than one made by the declarant while testifying at trial or a hearing, offered into evidence to prove the truth of the matter asserted. *See id*. 801(d). However, several exceptions to the rule against hearsay are provided by Rule 803. *See id*. R. 803. Among these exceptions is a statement that is made for—and is reasonably pertinent to—medical diagnosis or treatment that describes the medical history, past or present symptoms or sensations, their inceptions, or their general cause. *See id*. R. 803(4). Dominguez testified that M.H. told her when the abuse started, how Cantu abused her, and when it happened. This testimony, while hearsay, fell under the Rule 803(4) exception because the statements were made during the course of a sexual assault examination. *See id*.; *see also Bradley v. State*, No. 13-15-00153-CR, 2016 WL 4576046, at 2 (Tex. App.—Corpus Christi 2016, no pet.) (mem. op., not designated for publication). Thus, even if Cantu's trial counsel had objected to Dominguez's testimony,

such objection would have likely been overruled pursuant to Rule 803(4). *See id*. R. 803(4). In addition, the State submitted Dominguez's records into evidence, which contained her observations, under the business records exception, so the records were available for the jury to examine in full. *See* TEX. R. EVID. 902(10). Trial counsel was not ineffective for not objecting to Dominguez's testimony.

5. Comment on Cantu's Silence

Cantu's final complaint concerns testimony from a defense witness. Cantu's trial counsel elicited testimony from Detective Sam Lucio regarding a phone conversation with Cantu's divorce attorney. The following exchange occurred:

> Defense: Obviously, though, Brownsville PD is investigating this case?
>
> Lucio: And that's why we offered the defendant a chance to give a statement. And when Mr. Armstrong said—Mr. Armstrong wasn't there. He might have been tied up, busy, whatever, he couldn't come in, but we did offer Mr. Armstrong to come in with his client and provide any information he had for us.

Cantu cites cases in his brief regarding when the State elicits information that seems to comment on the defendant's right to remain silent. Here, the information discussed came when Cantu's own attorney questioned his witness, and Detective Lucio clarified the exchange between the attorney and the police department. There was no implied comment on Cantu's right to remain silent and no ineffective assistance of counsel because there was no objection necessary.

6. No Motion for New Trial so Defense Counsel Has Had No Opportunity to Defend Himself

Additionally, we note that "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*, 77 S.W.3d at 833. "Under normal

circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional." *Id*. Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation [being rendered ineffective]. *Id*.

"Under *Strickland*, the defendant must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission." *Id*. at 836. "From this trial record, one could conclude that there were legitimate and professionally sound reasons for counsel's conduct or one could speculate that there were not." *Id*. "Under our system of justice, the criminal defendant is entitled to an opportunity to explain himself and present evidence on his behalf. His counsel should ordinarily be accorded an opportunity to explain her actions before being condemned as unprofessional and incompetent." *Id*.

Cantu's appellate counsel did not file a motion for new trial with the trial court so these allegations could be defended against. Without more information, we are unable to determine any decision alleged by Cantu was not sound trial strategy. *See id*.

7. Summary

Accordingly, we conclude the Cantu failed to rebut the presumption that his trial counsel's failure to object was reasonable under prevailing professional norms and that it was based on sound trial strategy. *See Kimmelman*, 477 U.S. at 384. Because Cantu has failed to prove the first prong of the *Strickland* test, we need not reach the other prong. *See Strickland*, 466 U.S. at 697; *Garcia*, 57 S.W.3d at 440. We overrule Cantu's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
13th day of July, 2017.