NUMBER 13-19-00292-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MICHAEL ANTHONY IVEY, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 413th District Court
of Johnson County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Longoria

Appellant Michael Anthony Ivey was convicted of one count of continuous sexual abuse of a child, a first-degree felony. *See* TEX. PENAL CODE ANN. § 21.02. By three issues, Ivey argues that (1) the trial court erred by excluding expert testimony; (2) the trial court erred by denying Ivey's request for a fifty-minute recess to allow his expert to return

to court to testify during the punishment phase; and (3) he received ineffective assistance of counsel. We affirm.

I. Background

In June of 2015, Ivey met M.E. using Tinder.[1] After one date together in August of 2015, Ivey moved in with M.E. and her two daughters. M.E.'s oldest daughter, A.A., was ten years' old at the time. In June 2016, Ivey and M.E. got married.

In September of 2018, Ivey was indicted for continuous sexual abuse of a child. *See id.* The indictment alleged that between August of 2016 and May 2018, Ivey sexually abused A.A. on multiple occasions. The allegations of abuse include penetrating A.A.'s sexual organ with Ivey's tongue and fingers (penetration by tongue and finger allegedly occurred approximately thirty times for each); penetrating A.A.'s sexual organ using a pink vibrator and/or tan dildo; and forcing A.A. to perform oral sex on Ivey.

On April 8, 2019, one day before jury trial, Ivey filed a witness disclosure indicating that he intended to call Michael Strain, a psychologist, at trial. The State filed a motion in limine to determine the admissibility of Strain's testimony. Outside the presence of the jury, Strain testified that he had performed a number of psychological evaluations on Ivey. Strain further indicated he would testify that, based on the psychological evaluations he performed, Ivey: "[was] not very prone to manipulate or exploit others"; "[does] not show indications of serious emotional or mental health issues"; "is not a psychopath and does not have psychopathic characteristics"; and "does not show signs of pedophilia or hebephilia, which are a sexual preference for prepubescent children (pedophilia) or a sexual preference for early adolescent children (hebephilia)." The State argued that

[1] To protect the identity of the child complainant, we will refer to her and her mother using aliases. *See* TEX. R. APP. P. 9.8.

Strain's testimony: (1) improperly attempted to show that Ivey was truthful and innocent; (2) invaded the province of the jury; and (3) would only confuse the jury in their deliberations. Thus, the State contended that under Rules 702 and 403 of the Texas Rules of Evidence, Strain's testimony should be excluded during the guilt/innocence phase. *See* TEX. R. EVID. 403, 702. The trial court sustained the State's objections and ruled that Strain's testimony would not be permitted during the guilt/innocence phase.

The jury found Ivey guilty and announced that it was ready to proceed to the punishment phase. Because Strain had already left, Ivey orally moved for a fifty-minute recess so that he could attempt to bring Strain back to the court. The trial court reminded Ivey that Strain had not been excused; the trial court denied Ivey's oral request for continuance.

At the conclusion of the punishment phase, the trial court sentenced Ivey to sixty-six years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

II. EXCLUSION OF EXPERT TESTIMONY

In his first issue, Ivey argues that the trial court erred in excluding Strain's testimony during the guilt/innocence phase of trial.

A. Standard of Review and Applicable Law

"A trial judge's decision to admit expert testimony is reviewed for an abuse of discretion and may not be reversed unless that ruling fell outside the zone of reasonable disagreement." *Blasdell v. State*, 470 S.W.3d 59, 62 (Tex. Crim. App. 2015). The trial court abuses its discretion if it acts unreasonably or arbitrarily or acts without reference to guiding principles. *See Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019).

If we find an abuse of discretion, we must next decide if that error constituted reversible error. *See* TEX. R. APP. P. 44.2; *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017). "[N]onconstitutional error requires reversal only if it affects the substantial rights of the accused." *Proenza v. State*, 555 S.W.3d 389, 398 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.); *see* TEX. R. APP. P. 44.2(b); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010) (holding that the exclusion of expert testimony is a nonconstitutional error). A nonconstitutional error affects the substantial rights of the accused if it had a substantial and injurious effect or influence in determining the verdict. *See Bell v. State*, 566 S.W.3d 398, 408 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

> In assessing the likelihood that the jury's decision was adversely affected by the error, the appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. The reviewing court might also consider the jury instruction given by the trial judge, the State's theory and any defensive theories, closing arguments and even voir dire, if material to appellant's claim.

Morales v. State, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). After considering the above factors, we will only reverse if we have a "grave doubt that the result of the trial was free from the substantial effect of the error." *Proenza*, 555 S.W.3d at 398.

The admissibility of expert testimony is governed by Texas Rule of Evidence 702. *See* TEX. R. EVID. 702. Under Rule 702, a trial court's first task is "to determine whether the testimony is sufficiently reliable and relevant to help the jury in reaching accurate results." *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992); *see* TEX. R. EVID. 702; *Wolfe v. State*, 509 S.W.3d 325, 335 (Tex. Crim. App. 2017). Texas jurisprudence has noted that there is a "fine but essential" line between helpful expert testimony and

impermissible comments on credibility. *Schutz v. State*, 957 S.W.2d 52, 60 (Tex. Crim. App. 1997); *see Yount v. State*, 872 S.W.2d 706, 709 (Tex. Crim. App. 1993). A direct opinion as to the truthfulness crosses the line into impermissible testimony "because it does more than assist the trier of fact to understand the evidence or to determine a fact in issue; it *decides* an issue *for* the jury." *Yount*, 872 S.W.2d at 709 (internal quotations omitted).

If the trial judge finds that the proposed expert testimony meets the requirements of Rule 702, then the judge performs a Rule 403 analysis to determine if the evidence should be presented to the jury. *See Kelly*, 824 S.W.2d at 572*.* Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. A trial court's decision on a Rule 403 objection is "rarely" disturbed and is given "an especially high level of deference." *United States v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007); *see Robisheaux v. State*, 483 S.W.3d 205, 218 (Tex. App.—Austin 2016, pet. ref'd).

B. Analysis

The record indicates that Strain was going to testify about the behavioral traits of people who sexually abuse children and that Ivey did not exhibit those same traits. According to Ivey, Strain was not going to testify as to Ivey's credibility or whether he told the truth by denying the accusations; he was simply going to testify that Ivey did not match the typical psychological profile of a sexual abuser. Thus, Ivey asserts that Strain's testimony was relevant and admissible and would assist the jury without necessarily

replacing it. *See* TEX. R. EVID. 702. However, Ivey completely fails to address Rule 403. *See id.* R. 403.

Even if we assume without deciding that Strain's testimony was relevant and admissible under Rule 702, a trial court must next perform a Rule 403 analysis. *See Kelly*, 824 S.W.2d at 572. And under a Rule 403 analysis, a trial court may even exclude relevant testimony if the evidence's probative value is outweighed by the dangers of misleading the jury or confusing the issues. *See id.* Below, the State expressed concerns that Strain's testimony would confuse and mislead the jury in its evaluation of guilt and innocence; the trial court sustained those objections. Ivey has not demonstrated that the trial court acted arbitrarily or unreasonably or without reference to guiding principles. *See Rhomer*, 569 S.W.3d at 669. In short, given the record below and the briefs on appeal, we cannot conclude that the trial court abused its discretion in excluding Strain's testimony. *See Blasdell*, 470 S.W.3d at 62; *Robisheaux*, 483 S.W.3d at 218.

We overrule Ivey's first issue.

III. REFUSING TO GRANT A RECESS

In his second issue, Ivey argues that the trial court erred by failing to grant a fifty-minute recess so that Strain could return to the court in time for the punishment phase.

A. Standard of Review and Applicable Law

We review a trial court's denial of a mid-trial continuance for an abuse of discretion. *See Vasquez v. State*, 67 S.W.3d 229, 240-41 (Tex. Crim. App. 2002). To preserve this issue for our review, a defendant must file a written motion asking for a continuance. *See Blackshear v. State*, 385 S.W.3d 589, 591 (Tex. Crim. App. 2012) ("[I]f a party makes an

unsworn oral motion for a continuance and the trial judge denies it, the party forfeits the right to complain about the judge's ruling on appeal").

B. Discussion

On appeal, Ivey acknowledges that an oral motion for continuance generally preserves nothing for review. *See id.* Nevertheless, Ivey urges us to find an exception in this case, arguing that "in light of the trial court's ruling on the request for a modest recess, such a request would have been futile." However, we decline to find such an exception. *See Blackshear*, 385 S.W.3d at 591; *Anderson v. State*, 301 S.W.3d 276, 279 (Tex. Crim. App. 2009); *Temple v. State*, 581 S.W.3d 812, 818 (Tex. App.—Texarkana 2019, no pet.).

We overrule Ivey's second issue.

IV. Ineffective Assistance of Counsel

In his third issue, Ivey argues that he received ineffective assistance of counsel. More specifically, he argues that there is no reasonable justification for why counsel failed to object to certain testimony from M.E. and Detective Adam Richards.

A. Applicable Law

For a claim of ineffective assistance of counsel to be sustained, an appellant must satisfy the two-prong test set forth under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, an appellant must show by a preponderance of the evidence that counsel's performance fell below an objective standard of reasonableness and prevailing professional norms. *Id.*; *Chapa v. State*, 407 S.W.3d 428, 431 (Tex. App.—Houston [14th Dist.] 2013, no pet.). To evaluate the effectiveness of counsel's performance, we look at the totality of the representation. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.

Crim. App. 1999). Any claim for ineffectiveness of counsel must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See Thompson*, 9 S.W.3d at 814. If the record is silent on the motivation behind counsel's tactical decisions, then an appellant usually cannot overcome the strong presumption that counsel's representation was reasonable. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). Because "the record is generally underdeveloped," direct appeal is usually an inadequate vehicle for claims of ineffective assistance of counsel. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). Additionally, courts are hesitant to declare a counsel's performance as deficient until counsel has been afforded an opportunity to explain their reasoning behind their performance. *See id*. For that reason, "we commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it." *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005).

Under the second prong, an appellant must show that counsel's performance prejudiced the defense such that there was a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *See Strickland*, 466 U.S. at 687.

B. Analysis

During trial, M.E. testified that she initially did not believe A.A.'s allegations. However, when asked if she believes A.A. "[a]s we sit here today," M.E. responded in the affirmative. Later at trial, Richards testified that he did not "find any evidence in this case that would discredit or cause [him] to bring into question [A.A.'s] statements of events."

Ivey asserts that this was an impermissible foray into truthfulness. *See Schutz*, 957 S.W.2d at 60; *Yount*, 872 S.W.2d at 709. Thus, Ivey asserts that there was no reasonable justification for his trial counsel to not object to such impermissible testimony.

Concerning M.E.'s testimony, the State concedes that it was impermissible. *See Schutz*, 957 S.W.2d at 60. However, the State argues that it was plausibly a strategic choice for counsel to decline to object. For example, the State speculates that because this testimony had so little probative value, perhaps Ivey's trial counsel simply wished to let the State make its point and move on. This way, Ivey could hope that the State would not delve into the additional details about the abuse that M.E. received from the CPS that ultimately led her to change her opinion. Therefore, under the circumstances of this case, we cannot conclude that defense counsel's decision to not object to M.E.'s testimony was so outrageous that no attorney would engage in it. *See Andrews*, 159 S.W.3d at 101.

Concerning Richards's testimony, we cannot conclude that failing to lodge an objection constituted deficient conduct. *See Strickland*, 466 U.S. at 687. Richards did not offer any direct opinions as to truthfulness. *See Schutz*, 957 S.W.2d at 60. Rather, Richards simply offered his testimony that Ivey was the lone suspect in this case. A.A. made the allegations against Ivey and nobody else. According to Richards, nothing else in the case suggested an alternative perpetrator. *See id.* Thus, there was no reason for Ivey's counsel to object to such testimony.

Furthermore, we note that in relatively similar scenarios, other courts have found no harmful error. *See Sandoval v. State,* 409 S.W. 3d 259, 295 (Tex. App.—Austin 2013, no pet.) (concluding that the erroneous admission of a detective's statement that he believed the complainant was ultimately harmless because "[g]iven that he forwarded this

case to the district attorney's office for prosecution after his investigation, one could logically assume that he found [the complainant] credible, her allegations truthful, and believed appellant was guilty of committing this sexual assault"); *Fisher v. State*, 121 S.W.3d 38, 41 (Tex. App.—San Antonio 2003, pet. ref'd.) (holding that a mother's erroneously admitted testimony concerning her son's truthfulness was harmless because "[a] jury would expect a mother to testify that her son was truthful, and would likely view such testimony with natural skepticism").

We overrule Ivey's third issue.

V. Conclusion

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

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

Delivered and filed the
13th day of August, 2020.