NO. 12-15-00093-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JOSE IGNACIO LOPEZ-HERNANDEZ, APPELLANT	***§***	***APPEAL FROM THE 420TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION

Jose Ignacio Lopez-Hernandez appeals his conviction for aggravated sexual assault of a child under six years of age, for which he was sentenced to imprisonment for thirty years and a $5,000 fine. In three issues, Appellant contends he received ineffective assistance of counsel at trial. We affirm.

BACKGROUND

Appellant was charged by indictment with aggravated sexual assault of a child under six years of age. He was also charged with the lesser included offense of indecency with a child. The matter proceeded to a jury trial, and the jury found Appellant "guilty" of aggravated sexual assault. After a trial on punishment, the jury assessed Appellant's punishment at imprisonment for thirty years and a $5,000 fine. This appeal followed.

INEFFECTIVE ASSISTANCE OF COUNSEL

In reviewing an ineffective assistance of counsel claim, we apply the United States Supreme Court's two-pronged test established in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ***Hernandez v. State***, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). To prevail on an ineffective assistance of counsel claim, an appellant must show that (1) trial counsel's representation was deficient and that (2) the deficient performance

prejudiced the defense to the extent that there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. An appellant must prove both prongs of ***Strickland*** by a preponderance of the evidence. ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2002). Failure to make the required showing of either deficient performance or sufficient prejudice defeats an appellant's ineffectiveness claim. ***Thompson v. State***, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To establish deficient performance, an appellant must show that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 687-88, 104 S. Ct. at 2064-65. "This requires showing that [trial] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.***, 466 U.S. at 687, 104 S. Ct. at 2064. To establish prejudice, an appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. ***Id.***, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id***. When it is easier for a reviewing court to dispose of an ineffective assistance of counsel on the ground of lack of sufficient prejudice without determining whether counsel's performance was deficient, the court should follow that course. ***Id.***, 466 U.S. at 697, 104 S. Ct. 2052.

Review of trial counsel's representation is highly deferential. *See* ***id.***, 466 U.S. at 689, 104 S. Ct. at 2065. In our review, we indulge a strong presumption that trial counsel's actions fell within a wide range of reasonable and professional assistance. ***Id***. It is the appellant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Id.***; ***Tong***, 25 S.W.3d at 712. Moreover, "[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *See* ***Thompson***, 9 S.W.3d at 813 (citation omitted). When, as here, no record specifically focusing on trial counsel's conduct was developed at a hearing on a motion for new trial, it is extremely difficult to show that counsel's performance was deficient.[1] *See* ***Bone v. State***, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); ***Thompson***, 9

[1] A motion for new trial must be filed no later than thirty days after the date sentence is imposed or suspended in open court. TEX. R. APP. P. 21.4(a). The motion may be amended, without leave of court, within

S.W.3d at 814. Absent an opportunity for trial counsel to explain the conduct in question, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." ***Goodspeed v. State***, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (citation omitted).

MEDICAL RECORDS

In his first issue, Appellant contends he received ineffective assistance of counsel when trial counsel failed to object to the introduction of the victim's and Appellant's medical records. Appellant states that from the beginning of the trial, his trial counsel notified the jury that the evidence would prove touching, if anything, but would not prove penetration. Appellant argues that because the medical records showed that both Appellant and the victim had gonorrhea, the State could argue that the victim contracted the disease from Appellant. This supported the State's contention that Appellant was the perpetrator and that penetration occurred.[2] Without the medical records, Appellant's argument continues, penetration by Appellant could not have been established.

1. ***Victim's medical records***. Appellant argues that trial counsel should have objected to the admission of the victim's medical records (Exhibit 1) because they were not timely served. When counsel is alleged to have been deficient in failing to object to the admission of evidence, the appellant must show, as part of his claim, that the evidence was inadmissible. ***Ortiz v. State***, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002).

In making his argument, Appellant states that the victim's medical records had to be served at least thirty days before trial. But the medical records were authenticated by affidavit. Therefore, the State was required to serve the records and the accompanying affidavit on Appellant's counsel at least fourteen days before trial. *See* TEX. R. EVID. 902(10)(A); ***Adams v. State***, 985 S.W.2d 582, 583-84 (Tex. App.–Eastland 1998, pet. ref'd) (medical records admitted where authenticated by business records affidavit). When the proponent of the records does not

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thirty days of the date sentence was imposed or suspended in open court but before the court overrules any preceding motion for new trial. TEX. R. APP. P. 21.4(b). In this case, sentence was imposed on March 4, 2015, and trial counsel filed a motion for new trial on March 24, 2015. The motion was overruled on the day it was filed.

[2] The State produced evidence that penetration was the most likely way for the victim to contract gonorrhea. According to Appellant, the victim told her mother only that Appellant touched her. The victim described penetration to the sexual assault nurse examiner (SANE) and identified Appellant as the perpetrator. However, the SANE nurse was not permitted to name the perpetrator to the jury.

comply with the service requirement, the trial court may order, "[f]or good cause shown," that a business record be treated as presumptively authentic. TEX. R. EVID. 902(10).

The affidavit authenticating Exhibit 1 was sworn to on February 12, 2015, which was eighteen days prior to the start of evidence. However, the State concedes that the affidavit was never file-stamped with the date of service. Moreover, the prosecutor informed the trial court that he did not give trial counsel a copy of Exhibit 1 prior to trial because "it's of the juvenile child and medical records. And, yeah, I didn't want there to be any HIPAA issues." He stated further that trial counsel had reviewed a copy of the exhibit, and trial counsel agreed. And trial counsel was sufficiently familiar with the exhibit to make objections to it when he saw it again after the prosecutor offered it into evidence.

The record does not reflect that the State complied with the service requirement of Rule 902(10)(A). However, Appellant has not shown that Exhibit 1 was inadmissible under the "[f]or good cause shown" exception to the rule. *See* TEX. R. EVID. 902(10). Therefore, Appellant has failed to show that trial counsel was ineffective for failing to object to the victim's medical records for untimely service. *See* ***Strickland***, 466 U.S. at 687-88, 104 S. Ct. at 2064-65; ***Ortiz***, 93 S.W.3d at 93.

2. ***Appellant's medical records***. Appellant argues further that trial counsel should have objected to the admission of Appellant's medical records (Exhibit 5) on two grounds: (1) they were not timely served, and (2) there is no evidence that Appellant voluntarily consented to the blood test that revealed he had gonorrhea.

The affidavit authenticating Exhibit 5 was sworn to ten days prior to trial. Therefore, Appellant's medical records could not have been served within fourteen days before trial as required by Rule 902(10)(A). We could speculate regarding whether, as it did with Exhibit 1, the State permitted Appellant's counsel to review Exhibit 5 prior to trial. *See* ***Scheanette v. State***, 144 S.W.3d 503, 510 (Tex. 2004) ("A reviewing court can frequently speculate on both sides of an issue. . . ."). But "ineffective assistance claims are not built on retrospective speculation; rather, they must 'be firmly founded in the record.'" ***Id.***; ***Bone***, 77 S.W.3d at 835. Because the record is undeveloped in this case, it does not affirmatively demonstrate that trial counsel was ineffective because he failed to object to Exhibit 5 for untimely service not excused by good cause. *See* ***Thompson***, 9 S.W.3d at 814.

Regarding his consent to the blood test, Appellant acknowledges the testimony from the sheriff's department's investigator that Appellant "agreed" to the drawing of his blood, but also notes that the record does not include a consent form signed by Appellant. He argues that "it was evident from the [recorded] statement Appellant gave, that he could not read in Spanish, much less English, because he had the interpreter read the ***Miranda*** warnings to him. The medical records are in English."[3] Thus, he maintains that the lack of a consent form signed by Appellant, coupled with Appellant's inability to read Spanish or English, proves that he did not consent to the blood test.

The investigator testified that Appellant signed a "medical form" at the jail and was then transported to a local hospital for the testing. The signed form was not offered into evidence. The investigator did not describe the circumstances under which Appellant signed the "medical form," state whether the form included a consent to the blood draw, or specify the language in which the form was printed. This information is critical to any examination of trial counsel's performance. Without it, the record does not affirmatively demonstrate trial counsel's ineffectiveness. *See* ***Thompson***, 9 S.W.3d at 814.

In sum, the reasonableness of trial counsel's decision not to object to Appellant's medical records (Exhibit 5) involves facts that do not appear in the appellate record. Because the record has not been fully developed, Appellant has failed to show that trial counsel was ineffective for failing to object to Exhibit 5. Consequently, Appellant has not shown that trial counsel's performance was so deficient that it fell below objective standards of reasonableness under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 687-88, 104 S. Ct. at 2064-65. Therefore, Appellant has not satisfied the first prong of ***Strickland***.

Appellant's first issue is overruled.

APPELLANT'S RECORDED INTERVIEW

In his second issue, Appellant contends he received ineffective assistance of counsel because his trial counsel did not attempt to suppress Appellant's recorded interview with the

[3] Immediately before Appellant gave his statement, the investigator asked Appellant, on the recording and through an interpreter, whether he could read and write Spanish. Appellant stated that he could. The investigator then proposed that he read the warnings to Appellant in English while Appellant followed along in Spanish. Instead, Appellant asked the interpreter to read the warnings to him. At the conclusion of his statement, Appellant confirmed that he had read each written ***Miranda*** warning before initialing it. The fact that Appellant preferred having the interpreter read the warnings in Spanish does not necessarily contradict his statements that he could read and write in Spanish.

investigator. He first complains that trial counsel did not cross-examine the interpreter and, more specifically, that he should have questioned her about her familiarity with slang. He also complains that counsel did not have Appellant's statement reviewed by an independent interpreter. He urges that the omissions constitute ineffective assistance because the interpreter was employed by the Nacogdoches County Sheriff's Office when she translated his statement.

An individual called to act as an interpreter in a criminal proceeding is not required to have specific qualifications or training. ***Kan v. State***, 4 S.W.3d 38, 41 (Tex. App.—San Antonio 1999, pet. ref'd). What is required is adequate interpreting skills for the particular situation and familiarity with the use of slang. *See* TEX. CODE CRIM. PROC. ANN. art. 38.30(a) (West Supp. 2015). The competency of an individual to act as an interpreter is a question of law for the trial court. ***Kan***, 4 S.W.3d at 41.

Leticia Landeros interpreted and translated Appellant's interview with the investigator. At trial, she was sworn and subject to cross-examination regarding her qualifications. She testified that she is a translator formerly employed by the Nacogdoches County District Attorney's office. Landeros further testified that she is fluent in Spanish because it is her first language. In addition, she stated that she had worked with investigators with both the district attorney's office and the sheriff's department to interview Spanish-only-speaking individuals "a lot of times." She further testified that her translation was accurate and that Appellant never indicated that he was confused or did not understand her. Because Landeros testified that Spanish is her first language, and in light of her extensive experience, trial counsel reasonably could have concluded that he did not need to ask a more specific question regarding her familiarity with slang.

As to trial counsel's failure to have Appellant's statement reviewed by an independent interpreter, we follow ***Strickland***'s instruction and focus on the lack of prejudice. *See* ***Strickland***, 466 U.S. at 697, 104 S. Ct. at 2052. By referring to Landeros's employment with the sheriff's office, Appellant seems to argue that she was biased against Appellant, which affected the accuracy of her translation. However, the record does not contain proof that Landeros's translation contains any inaccuracies or omissions. *See* ***Kan***, 4 S.W.3d at 43 (noting appellant's failure to establish prejudice because no showing of specific inaccuracy or omission, inability to confront witness, or inability to effectively communicate with counsel). Thus, at most,

Appellant has raised an issue of potential harm and, consequently, has failed to satisfy the second prong of ***Strickland***. *See* ***id***.; *see also* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068.

Appellant's second issue is overruled.

PROSECUTION'S STATEMENTS DURING ARGUMENT

In his third issue, Appellant argues that his trial counsel's representation was deficient when he failed to object to the prosecutor's statements during jury argument at the punishment phase.

There are four categories of permissible prosecutorial jury argument: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. ***Allridge v. State***, 762 S.W.2d 146, 155 (Tex. Crim. App. 1988).

1. ***Evidence outside the record.*** Appellant first complains that the prosecutor referred to evidence outside the record when he stated the victim may develop problems related to the incident in the future. Trial counsel stated in his jury argument that the victim did not appear to have any lasting problems as a result of the incident. The prosecutor responded that the victim did not appear to have any lasting problems yet. The prosecutor further stated that the victim may develop problems later in life as she begins to understand what happened to her. A prosecutor may not use closing argument to get evidence before the jury that is outside the record and prejudicial to the accused. ***Borjan v. State***, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990). However, defense argument that goes outside the record will permit prosecutorial argument outside the record. ***Garrison v. State***, 528 S.W.2d 837, 840 (Tex. Crim. App. 1975). But the state may not exceed the limits of the defendant's invitation. ***Id***. at 840-42. The prosecutor's comments did not exceed trial counsel's invitation. Therefore, trial counsel was not ineffective for failing to object.

2. ***Request for leniency.*** Appellant also asserts that trial counsel should have objected to the prosecutor's comments about the request for leniency made by Appellant's brother. Appellant's brother, who is the victim's father, testified for the defense and requested a lenient sentence from the jury. The prosecutor stated, "If that had been my daughter, I'd be sitting where the defendant is sitting right now because I would have killed him. You were supposed to protect your children. You were supposed to come of the defense of your children. . . . And you

know, just boggles the mind, blows my mind that he would come up here saying, show my brother mercy; because if it were me, I'd be sitting where was he was sitting."

These comments are not within one of the four categories of proper jury argument. However, there is no evidence in the record regarding trial counsel's reasons for not objecting. Normally, a silent record cannot defeat the strong presumption against ineffective assistance of counsel. *See* ***Thompson***, 9 S.W.3d at 813-14; *but see* ***Andrews v. State***, 159 S.W.3d 98, 102-03 (Tex. Crim. App. 2005) (reversing a conviction "in a rare case" on the basis of ineffective assistance of counsel when trial counsel did not object to a misstatement of the law by the prosecutor during argument). The unusual circumstances present in ***Andrews*** are not present in the case at hand. Counsel's reasons in ***Andrews***, if any, were unnecessary to resolve the ineffective assistance of counsel claim. *See* ***Andrews***, 159 S.W.3d at 103. But counsel's failing to object to a misstatement of the law that is detrimental to one's client when the harm is so clearly presented by the record on appeal is different from failing to object to improper prosecutorial argument as a matter of trial strategy. ***Adighije v. State***, No. 12-09-00213-CR, 2010 WL 2638149, at *2 (Tex. App.—Tyler June 30, 2010, no pet.) (mem. op., not designated for publication).

But even if we were to assume that counsel's failure to object amounted to ineffective assistance, Appellant must show he was prejudiced by trial counsel's alleged error. ***Strickland***, 466 U.S. at 688, 104 S. Ct. at 2065. The punishment range for this offense was twenty-five years to ninety-nine years or imprisonment for life. TEX. PENAL CODE ANN. §§ 12.32(a) (West 2011), 22.021(e), (f) (West Supp. 2015) (aggravated sexual assault of a child is first degree felony punishable by a minimum sentence of twenty-five years if the victim is under six years of age). The prosecution asked the jury to sentence Appellant to life in prison, and the trial counsel asked for the minimum twenty-five year sentence. The jury assessed punishment at imprisonment for thirty years. Appellant has not shown that but for trial counsel's alleged error, his sentence would have been less than thirty years.

Appellant's third issue is overruled.

DISPOSITION

Having overruled Appellant's first, second, and third issues, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered June 8, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 8, 2016

NO. 12-15-00093-CR

JOSE IGNACIO LOPEZ-HERNANDEZ,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 420th District Court
of Nacogdoches County, Texas (Tr.Ct.No. F1521498)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.