Affirmed and Memorandum Opinion filed July 21, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00288-CR

RUDY LEE GONZALEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1511413

MEMORANDUM OPINION

A jury convicted Rudy Lee Gonzalez of continuous sexual abuse of a child under the age of fourteen, and the trial court sentenced him fifty-five years in prison. On appeal, appellant raises one issue to challenge his conviction, arguing his trial counsel rendered ineffective assistance by failing to adequately utilize *Brady* disclosures. We affirm.

I. BACKGROUND[1]

In August 2016, appellant was indicted in Harris County, Texas, for the offense of continuous sexual abuse of a child under fourteen years of age committed against Jenna[2] on or about March 10, 2014 through March 10, 2016. *See* Tex. Penal Code § 21.02. Appellant entered a plea of not guilty and proceeded to trial by jury in March 2019. Jenna is the great granddaughter of Angela, appellant's wife. Jenna testified that in 2014, when she was eight years old, appellant began sexually abusing Jenna. Jenna testified the abuse occurred continuously for two years until she made an outcry to Kaitlyn Samford, a family friend, in 2016. On March 28, 2019, the jury found appellant guilty as charged. On that same day, the trial court sentenced appellant to fifty-five years confinement. Appellant filed a timely notice of appeal.

II. ANALYSIS

In his sole issue, appellant contends he received ineffective assistance of trial counsel because his attorney failed "to adequately pursue and utilize information provided to him by the State in a *Brady* notice concerning the witness Angela []." Specifically, appellant contends that his trial counsel failed to adequately utilize the testimony of Angela, Jenna's great grandmother/appellant's wife, to either establish a motive for the complainant to fabricate this allegation of abuse or to substantially undermine the complainant's credibility.

A. Standard of review and applicable law

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. Const.

[1] Appellant's issues do not necessitate a full discussion of the facts of the offense. *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

[2] To protect the privacy of the minor complainant in this case, we identify her by a pseudonym—*i.e.*, Jenna.

amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). To prove a claim of ineffective assistance, an appellant must establish, by a preponderance of the evidence, that (1) his counsel's representation fell below the objective standard of reasonableness, and (2) there is a reasonable probability that but for counsel's deficiency the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *see Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In considering an ineffective-assistance claim, we indulge a strong presumption that counsel's actions fell within the wide range of reasonable professional behavior and was motivated by sound trial strategy. *Strickland*, 466 U.S. at 689; *Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Thompson*, 9 S.W.3d at 814. In most cases, direct appeal is an inadequate vehicle for raising such a claim because the record is generally undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson*, 9 S.W.3d at 813–14. When the record is silent regarding trial counsel's strategy, as here, 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).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). "Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination."

Id. at 483 (quoting *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992) (en banc)). Counsel's performance is judged by "the totality of the representation," and "judicial scrutiny of counsel's performance must be highly deferential" with every effort made to eliminate the distorting effects of hindsight. *Id*.; *accord Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). The *Strickland* court cautioned us to avoid an intrusive post-trial inquiry into attorney performance because such an inquiry would encourage the proliferation of ineffectiveness challenges. *Robertson*, 187 S.W.3d at 483 (citing *Strickland*, 466 U.S. at 690).

To that end, we are instructed that, for an appellate court to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record. *Lopez*, 343 S.W.3d at 142. The Texas Court of Criminal Appeals further advises, "[w]hen such direct evidence is not available, we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." *Id*. at 143.

B. Counsel's performance was not deficient

Appellant's issue in this case is his trial counsel's failure to use information discussed in a telephone conversation in January 2018, between the great grandmother and Assistant District Attorney Denise Nichols. The State disclosed what the great grandmother told Nichols in a *Brady* notice:

> A friend named Cheyenne had told [Jenna] that if she didn't like someone and wanted to get rid of them she should tell the police that the person touched them inappropriately.

As discussed below, the record does not support appellant's contention that his trial counsel's performance was deficient.

At trial, defense counsel cross-examined Kaitlyn, who denied that Jenna had talked to her about a friend named Cheyenne and testified that she did not know the name. During cross-examination of Jenna, defense counsel twice asked Jenna if she

had or ever had a friend named Cheyenne. Jenna answered, "No." Defense counsel drew objections from the State (which were sustained) when he next asked, "Have you ever had a friend tell you . . . that if you didn't like your mom's boyfriend, that you could tell somebody that he touched you inappropriately?"

Although two witnesses declined knowing a person named Cheyenne, defense counsel put Jenna's credibility in question by eliciting testimony from Angela, Jenna's great-grandmother, "She will lie to you." Her great grandmother further testified, "I don't trust everything [Jenna] says." Defense counsel also questioned Jenna's great-aunt, who testified, "I know she lied to me on numerous occasions." Defense counsel even elicited testimony from Jenna that she "sometimes t[old] stories to get out of trouble[.]" In his closing argument, defense counsel told jurors that "[e]verything hinges on [Jenna]. And the people in her family got up here and told you, they know this child is not beyond lying. She told you that she makes stuff up . . . . She wants her grandma back, she wants her mom and dad back. There's issues."

Moreover, defense counsel elicited testimony that demonstrates Jenna may have had a motive to lie in this case. Jenna did not like appellant and, according to her great-grandmother, "believe[d] that [appellant] was going to take [her great grandmother] away from her." Jenna further admitted that her grandmother, who raised her, "didn't like" appellant and said that appellant was "using" her great-grandmother. The record evidence demonstrates that defense counsel, even without success in eliciting testimony about advice from an alleged friend named Cheyenne, discredited Jenna's credibility, and motive in making an outcry against appellant.

C. Silent record as to attorney's trial strategy

Additionally, the record is silent as to his attorney's trial strategy. Appellant did not file a motion for new trial; no hearing was conducted to explore defense counsel's reasoning and trial strategy. Appellant's claims of ineffective assistance

of counsel are inherently matters of trial strategy. The record before us does not demonstrate that trial counsel's representation fell below an objective standard of reasonableness because there has been no inquiry into trial counsel's trial strategy. *See Thompson*, 9 S.W.3d at 812–13.

To know defense counsel's reasoning concerning the aforementioned matters would require us to speculate, which we cannot do. *Jackson*, 877 S.W.2d at 771. Without affirmative evidence in the record to overcome the presumption of reasonable assistance, we are not persuaded by appellant's claim of ineffective assistance of counsel. Under these circumstances, appellant has failed to show his trial counsel's conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392. Because appellant has failed to satisfy the first prong of the *Strickland* test, we overrule his sole issue on appeal.

III. CONCLUSION

The trial court's judgment is affirmed.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant.
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