Affirmed and Opinion filed January 27, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00243-CR

———————————

CALVIN WEAVER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 764,065

O P I N I O N

Calvin Weaver appeals his conviction by jury for the offense of aggravated sexual assault of a child pursuant to TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 1999). The jury assessed punishment at confinement for life and a $10,000 fine. In four points of error, appellant contends (1) the trial court erred in admitting the complainant's testimony regarding evidence of extraneous offenses of appellant under TEX. R. EVID. 404(b), (2) the trial court erred by allowing state to introduce extraneous evidence in its case-in-chief after failing to provide proper notice, (3) the trial court erred by commenting on the weight of the evidence,

and (4) appellant was denied effective assistance of counsel. We disagree and affirm the judgment of the trial court.

BACKGROUND

Appellant is the grandfather of the complainant, Marie Ramirez. She would frequently visit her grandparents, and, at one point, lived with them. She was at appellant's house on November 1, 1993, when he asked Marie to go to the garage with him. When she entered the garage, Marie saw appellant standing on a pool table, apparently looking through a window to see if anyone was coming home. Marie testified that appellant unzipped his pants and made her touch his penis. He then made her perform oral sex. Marie was twelve years old on the date of the sexual assault alleged in the indictment. She finally reported the incident to her mother on June 6, 1997. These activities formed the basis for the charged offense. Marie also testified, over appellant's objection, to multiple extraneous incidents of sexual molestation occurring over a span of several years.

POINT OF ERROR ONE

In his first point of error, appellant claims that the trial court erred in admitting complainant's testimony regarding evidence of extraneous offenses of appellant under Texas Rule of Evidence 404(b) and the relevant case law. The trial court admitted the extraneous evidence based on its reading of *Self v. State*, 860 S.W.2d 261 (Tex. App.–Fort Worth 1993, pet. ref'd). We follow the abuse of discretion standard of review. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). Because the controlling issues regarding admissibility of extraneous offenses were functionally identical to *Self*, we hold that the trial court did not abuse its discretion by admitting complainant's testimony.

Self stands for the proposition that when one accused of sexually assaulting a child challenges the credibility of the complainant, proof of similar acts may be admissible, under Texas Rule of Evidence 404(b), to rebut the challenge if the evidence logically serves that purpose. *See Self*, 860 S.W.2d at 263. The appellant in *Self* attacked complainant's credibility

indirectly by theorizing that a family member coaxed complainant into telling the story. *See id.* Because this amounted to a claim that family members, rather than the complainant, fabricated the offense, the Court of Appeals concluded that complainant's testimony of other extraneous offenses would tend to rebut appellant's theory. *See id.*

The case before us is similar in these aspects to *Self*. When cross-examining the complainant, defense counsel asked, "[a]nd the reason you felt compelled to come forward was not because you had become – not because you had been sexually molested, but because your mother told you to say that you had been sexually molested, isn't that correct?" Further, during the cross-examination of Elvera Zamora, Marie's mother, defense counsel attempted to develop testimony showing that Zamora disliked appellant. The questioning strongly implied that Zamora had influenced Marie into making the statement. This defense strategy challenged complainant's credibility indirectly by theorizing that her mother somehow influenced her testimony. Marie was then recalled to the stand to offer the evidence of which appellant now complains. We thus believe that extraneous evidence was relevant to rebut the defensive assertion that placed in issue whether complainant's testimony was the product of improper influence or motive. *See id.*; *see also Easter v. State*, 867 S.W.2d 929 (Tex. App.–Waco 1993, pet ref'd).

The State also argues that the extraneous evidence would be admissible under article 38.37 of the Code of Criminal Procedure. We need not reach the merits of this argument because we find the evidence to be admissible under Texas Rule of Evidence 404(b) as applied in *Self*. Appellant's point of error one is overruled.

POINT OF ERROR TWO

In his second point of error, appellant claims that the trial court erred by allowing the State to introduce extraneous evidence in its case-in-chief without first giving proper notice. Trial courts' rulings on the admissibility of evidence are reviewed for abuse of discretion. *See Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998). Upon a timely request by the

accused in a criminal case, the State must give reasonable notice in advance of trial of intent to introduce extraneous evidence in its case-in-chief. TEX. R. EVID. 404(b). Appellant filed two motions for notice of State's intent to use extraneous offenses, one under Texas Rule of Evidence 404(b), and the other under Texas Code of Criminal Procedure article 38.37. The trial court granted these motions in its discovery order. Having secured a ruling on his discovery motions, appellant fulfilled the prerequisites for triggering the notice requirements of Rule 404(b) and article 38.37. *See Simpson v. State*, 991 S.W.2d 798 (Tex. Crim. App. 1998); *Espinosa v. State*, 685 S.W.2d 36 (Tex. Crim. App. 1993).

The State provided written notice only to the extent that it would use extraneous offenses for impeachment and punishment purposes. During a hearing on appellant's motion in limine, the State claimed it had given appellant oral notice of its intent to introduce extraneous offenses during its case-in-chief. Appellant's counsel at first stated that no such notice was given. After being questioned further by the judge, appellant's counsel professed that he could not remember whether or not oral notice had been given. The trial court granted appellant's motion in limine, but did not rule as to whether the evidence would be admissible or whether notice was proper. After appellant raised the issue of fabrication, the State sought to recall Marie Ramirez in order to elicit evidence of extraneous offenses. The record reflects that appellant objected on two grounds. Appellant based the first objection on the notice requirement of article 38.37. Appellant based the second objection on Rule 404(b), claiming that the evidence was "not admissible as other crimes, wrong acts."

Appellant's trial objections pose a problem with respect to preserving his point of error concerning lack of notice. A timely and specific objection is all that is required to preserve error under Rule 404(b). *See Buchanan v. State*, 911 S.W.2d 11, 14-15 (Tex. Crim. App. 1995). As discussed above under point of error one, we find the evidence to be relevant under Rule 404(b). *See Self*, 860 S.W.2d 261. Thus, appellant's second objection concerning relevancy under Rule 404(b) is without merit. The only objection made on the record as to notice was based on article 38.37, not on Rule 404(b). Although appellant's brief raises the notice

requirement of Rule 404(b), an objection at trial supporting one theory will not support a different theory on appeal. *See Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990). If an error raised on appeal does not comport with the objection made at trial, the error, if any, is waived. *See Webb v. State*, 995 S.W.2d 295 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

The State had two means of introducing evidence of extraneous offenses. One avenue was under Rule 404(b) as evidence of other crimes, wrongs, or acts. The other way was article 38.37 as evidence of extraneous offenses or acts. Because the evidence was relevant under Rule 404(b), and because appellant's objection under 404(b) was not specific as to notice, we find that appellant waived error as to notice. *See* TEX. R. APP. P. 33.1(a). We need not rule on the merits of appellant's article 38.37 objection because we have already found the evidence to be admissible under Rule 404(b). We overrule point of error two.

POINT OF ERROR THREE

In his third point of error, appellant contends that the trial court erred by commenting on the weight of the evidence. During voir dire, the trial judge explained to the venire the wide range of punishment available for the charged offense. In order to clarify why the punishment range is so broad, the judge provided the venire with two hypothetical fact patterns. The fact patterns involved individuals with different degrees of culpability. Neither hypothetical instructed the jury to commit to a certain punishment range, and neither disclosed the details of the actual case. In fact, the judge admonished the jury on several occasions that they must keep an open mind to the full range of punishment for the charged offense. Appellant did not object to the trial judge's comments.

Appellant contends, however, that the hypothetical fact pattern relating to the upper range of punishment correlated to the facts of the case at bar. According to appellant this prejudiced his cause in the eyes of the jury. The relevant portion of the judge's statement is as follows:

> You contrast that to a situation where a 35-year-old man who works in a hospital where there are little children in the hospital, goes into the room of a six-year-old girl, fondles her, and inserts his finger into her vagina and maybe on another occasion a 10-year-old girl and makes her perform oral sex on him and has this done over a number of years in a situation in the hospital, that may be a situation where the jury may want to consider on the upper range of the scale, 99 years or life in the Texas Department of Criminal Justice institutional division.

A timely proper objection is necessary to preserve error concerning a trial judge's comment on the weight of the evidence. *Sharp v. State,* 707 S.W.2d 611, 619 (Tex. Crim. App. 1986); *Sharpe v. State,* 648 S.W.2d 705, 706 (Tex. Crim. App. 1983); *Minor v. State,* 469 S.W.2d 579, 580 (Tex. Crim. App. 1971); *Lee v. State,* 454 S.W.2d 207, 208-09 (Tex. Crim. App. 1970); *Rosales v. State,* 932 S.W.2d 530, 537 (Tex. App.–Tyler 1995, no pet.); *Lookingbill v. State,* 855 S.W.2d 66, 77 (Tex. App.–Corpus Christi 1993, pet. ref'd). In the absence of fundamental error, the defendant has waived this point on appeal. *See Cade v. State,* 795 S.W.2d 43, 45 (Tex. App.–Houston [1st Dist.] 1990, pet. ref'd).

Fundamental error is error that is so egregious and creates such harm that the defendant has not had a fair and impartial trial. *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1984); *McIntosh v. State,* 855 S.W.2d 753, 760 (Tex. App.–Dallas 1993, pet. ref'd). Egregious harm "is presented when the reviewing court finds that the case for conviction or punishment was actually made clearly and significantly more persuasive by the error." *Skidmore v. State,* 838 S.W.2d 748, 755 (Tex. App.–Texarkana 1992, pet. ref'd) (*citing Saunders v. State,* 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)).

Even conceding for the sake of argument that the judge's comments constituted error, none were so egregious that they could not have been cured by instruction. Before stating the fact patterns, the judge instructed the jury not to prejudge the case until the facts of the case were heard. The hypothetical fact patterns correlated to the facts of the case at bar only to a slight degree. Appellant was fifty-two-years-old, not thirty-five. He worked as a truck driver, not in a hospital. The evidence presented pertained to the sexual assault of one child, not two as in the judge's hypothetical. Only a strained interpretation of the judge's remarks would lead

to a conclusion that the trial court was commenting on the weight of the evidence, much less that the comment amounted to egregious error.[1]

We do acknowledge that in some circumstances a judge's choice of words during voir dire may prejudice the jury, especially if the given hypothetical comports closely with the facts of the case. This is not so in the case before us. Still, we believe that the practice of providing hypothetical fact patterns that are similar to the facts of the case at bar can be confusing to the jury and should not be encouraged.

Point three is waived.

POINT OF ERROR FOUR

In his fourth point of error, appellant states that he received ineffective assistance of counsel because his counsel allowed unfairly prejudicial information to be introduced before the jury without objection.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See id.*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992). A reasonable probability is defined as

---

[1] We note that there exists a line of cases standing for the proposition that a proper objection to a trial judge's comments is necessary even in the case of egregious error. *Moore v. State*, 907 S.W.2d 918, 921-23 (Tex. App.–Houston [1st Dist.] 1995, pet. ref'd); *Lookingbill v. State*, 855 S.W.2d 66, 77 (Tex. App.–Corpus Christi 1993, pet. ref'd); *Martinez v. State*, 822 S.W.2d 276, 282 (Tex. App.–Corpus Christi 1991, no pet.).

probability sufficient to undermine confidence in the outcome. *See Miniel v. State,* 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland,* 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *See McFarland v. State,* 845 S.W.2d 824, 843 (Tex. Crim. App. 1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *See Strickland,* 466 U.S. at 670. The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *See Cannon v. State,* 668 S.W.2d 401, 403 (Tex. Crim. App. 1984).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App.1994) (en banc). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *See id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *See id.* In *Jackson,* the Court of Criminal Appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *See id.* at 772; *see also Jackson v. State,* 973 S.W.2d 954, 956-957 (Tex. Crim. App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

Appellant mentions the following three grounds as evidence of ineffective assistance of counsel: 1) counsel was ineffective in his failure to object throughout the trial to repeated attacks on illegal character evidence, 2) counsel neglected to object to the unfairly prejudicial testimony of Robbie McCoy, and 3) counsel failed to object to inappropriate jury instruction during voir dire.

Appellant has not provided any record from which we may discern trial counsel's strategy. Although appellant filed a motion for new trial, he did not address any of the alleged deficiencies that he urges now on appeal. Thus, the record before us is inadequate to effectively evaluate appellant's claim. Further, isolated failures to object to improper evidence or argument do not constitute ineffective assistance of counsel. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984); *Ewing v. State*, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977). An appellate court will not use hindsight to second guess a tactical decision made by trial counsel which does not fall below the objective standard of reasonableness. *See Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990). First, we have already discussed trial counsel's objection to extraneous evidence in point of error one. Appellant's brief does not point to any further specific instances when trial counsel should have objected to character evidence. Second, appellant's brief also fails to state why the testimony of Robbie McCoy was unfairly prejudicial. Finally, in the absence of a record revealing trial counsel's strategy, we cannot speculate why counsel did not make an objection to the court's jury instruction. *See Jackson*, 877 S.W.2d at 771. Thus, appellant has not overcome the strong presumption that his counsel's strategy was reasonable. We conclude that appellant has not met his burden under *Strickland*. We overrule appellant's fourth point of error and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed January 27, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).