Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00412-CR

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GERALD WAYNE PHILLIPS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 773,314

O P I N I O N

Appellant, Gerald Wayne Phillips (Phillips), was convicted of aggravated assault by a jury and was sentenced to 20 years in the Texas Department of Criminal Justice, Institutional Division by the trial judge. He appeals his conviction in three points of error. First, Phillips argues he was denied effective assistance of counsel because his trial counsel failed to strike previous testimony after the complainant refused to testify. In his second and third points of error, Phillips alleges the evidence was legally and factually insufficient to support the jury's finding that a knife was used during the offense. We affirm.

I.
Factual Background

The record in this case demonstrates Phillips and his longtime girlfriend, Alicia Warner, had an argument which resulted in Warner leaping from Phillips' van as it traveled approximately 70 miles an hour along I-45. After she was taken by ambulance to the hospital, Warner told Officer Garner, a Harris County Sheriff, that Phillips had sexually assaulted her, threatened her with a knife and a gun, and forced her to get in his van and ride with him to Lake Conroe. The officer further testified she believed Phillips would kill her, so she decided to "take her chances by getting run over" and leaped from the van. Warner repeated the sexual assault allegation to the emergency room doctor and to the nurse who conducted the sexual assault examination. Warner refused to testify against Phillips in the guilt/innocence phase of the trial, invoking her Fifth Amendment[1] right to remain silent at trial. The prosecution was able to get Warner's statements to the police and medical personnel into evidence based on the "excited utterance" and "statements made for purposes of medical treatment" hearsay exceptions. In his first issue on appeal, Phillips argues his counsel was ineffective for failing to move to strike the testimony of the officer, the doctor, and the nurse from the record after Warner refused to testify.

II.
Ineffective Assistance of Counsel

Appellant's first point of error contends he received ineffective assistance of counsel at the guilt/innocence stage of the trial. In order to challenge the trial court's judgment based on an ineffective assistance of counsel claim, Phillips must satisfy the two-prong *Strictland* test. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984).

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[1] Warner asserted her Fifth Amendment right against self-incrimination presumably because she testified at the Grand Jury hearing that Phillips had not assaulted her and was concerned about perjury prosecution. However, she did testify at the punishment phase of Phillips' trial and confirmed much of what she told the officer and the medical personnel, except that she denied that Phillips sexually assaulted her. Because the sexual assault allegations have no bearing on our decision, we are not concerned with this later testimony.

First, Phillips must demonstrate that his trial counsel's performance was so deficient it fell below an objective standard of reasonableness. Second, Phillips must demonstrate that the deficient performance caused prejudice such that his trial counsel's errors deprived him of a fair trial. *See id.* at 687, 104 S. Ct. at 2064. There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. *See id.* at 689, 104 S.Ct. at 2065. Trial counsel's performance must be judged on the totality of the representation. *See id.* at 670, 104 S.Ct. at 2056. Furthermore, an ineffectiveness claim cannot be established by isolating one portion of trial counsel's representation. *See Hammond v. State*, 942 S.W.2d 703, 710 (Tex .App.—Houston [14th Dist.] 1997, no pet.).

We do not reach the second prong of the *Strictland* test because we do not agree that Phillips' trial counsel's performance was deficient. *See Strictland*, 466 U.S. at 687, 104 S.Ct at 2064. Phillips asserts his trial counsel was deficient because he did not move to strike the testimony of the police officer, the doctor and the nurse after it was determined Warner would not testify. Phillips bases this argument on two cases which are completely distinguishable.

First, Phillips relies on *Keller v. State*, 662 S.W.2d 362 (Tex. Crim. App. 1984) to illustrate his argument that Sixth Amendment confrontation rights are undermined when a witness asserts the Fifth Amendment on cross-examination. However, *Keller* involved a defense witness asserting the Fifth Amendment following his direct testimony. *See id.* The *Keller* case is factually distinguishable from this case. Here, the witnesses who testified to Warner's statements on the day of the offense never asserted the Fifth Amendment. The defense and the prosecution were free to question them repeatedly, which they did, concerning their recollections of that day. Warner, who did not testify at all, asserted her Fifth Amendment right before either side questioned her. So there was no issue in this case, as there was in *Keller*, of the jury hearing only half of the story because a witness refused to allow cross-examination following direct testimony.

Second, Phillips also relies on *Villegas v. State*, 791 S.W.2d 226 (Tex.App.—Corpus Christi 1990, pet. ref'd) to support his argument that the proper remedy when a prosecution

witness invokes the Fifth Amendment is to strike the testimony. However, this case is also inapposite because there a witness testified for the prosecution and invoked the Fifth Amendment when the defense attempted cross-examination. The distinction here is that Warner never testified for either side; therefore, no confrontation rights were undermined nor is striking the testimony of the prosecution's witnesses a proper remedy.

Phillips concedes that the testimony of Officer Garner, as well as that of the doctor and the nurse who examined Warner was admissible evidence under the "excited utterance" and "statements made for the purposes of medical treatment" hearsay exceptions. *See* TEX. R. EVID. 803(2) and 803(4). The United States Supreme Court and the Texas Court of Criminal Appeals have held that the constitutional right to confrontation does not require that hearsay evidence can never be introduced. *See Dutton v. Evans*, 400 U.S. 74, 80, 91 S.Ct. 210, 215, 27 L.Ed.2d 213, 222 (1970); *see also Tucker v. State*, 771 S.W.2d 523, 535 (Tex.Crim.App. 1988). Hearsay and confrontation are not necessarily coextensive. *See Tucker*, 771 S.W.2d at 535. Hearsay evidence can be inadmissible or admissible as an exception to the hearsay exclusion rule contained in Rule 802. The testimony of the officer and the physician was admissible as an exception to Rule 802 by specific subdivisions of Rule 803. Because the testimony was admissible hearsay, it would have been futile for Phillips' trial counsel to move to strike it. Counsel is not required to present the court with futile motions. *See Mooney v. State*, 817 S.W.2d 693, 98 (Tex. Crim. App. 1991). Nor does failure to object to admissible evidence constitute ineffective assistance of counsel. *See McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992). Accordingly, we overrule Phillips' first point of error.

III.
Sufficiency Of The Evidence

A. Legal Insufficiency

In his second point of error, Phillips asserts the evidence was legally insufficient to support the jury's finding that he used a deadly weapon in his assault against Warner.[2] In reviewing legal sufficiency, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the verdict only if a rational trier of fact could not have found all the elements of the offense beyond a reasonable doubt. *See Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996).

The record demonstrates Warner told Officer Garner that Phillips threatened her with a knife. Although a knife is not a deadly weapon per se, it can qualify as a deadly weapon through the manner of its use, its size and shape and its capacity to produce death or serious bodily injury. *See Alvarez v. State*, 566 S.W.2d 612, 614 (Tex. Crim. App. 1978). Further, it is not necessary for the knife to have caused any injury in order for it to be a "deadly weapon." *See Ford v. State*, 828 S.W.2d 525, 527 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd.).

Although Warner refused to testify during the guilt/innocence phase of the trial, Officer Garner and Warner's sister, Cynthia Blocker, who witnessed the assault, both testified concerning the assault. Officer Garner testified that Warner told him Phillips kicked her and hit her in the face with his fist several times, sexually assaulted her by pushing his hand inside her vagina and "trying to tear out [her] uterus," and threatened her with "a butcher knife" and a gun, telling her "not to do anything stupid or [he would] kill her." As discussed above, this testimony was admitted into evidence at trial under the "excited utterance" hearsay exception. Further, Cynthia Blocker, Warner's sister, testified to the manner of the knife's use and its size when she described the incident. She told the jury that Phillips made Warner telephone the man he believed she was seeing while he held a knife over her, that she and Warner were scared, and that the knife was similar to one produced by the State for demonstrative purposes,

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[2] The Penal Code defines a "deadly weapon" as: "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *See* TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon 1994).

which had an eight inch blade and a five inch handle. Finally, the doctor who treated Warner in the emergency room testified that a knife of this size could cause death or serious bodily injury. Therefore, the prosecution introduced evidence demonstrating that the knife used in the assault was a "deadly weapon" through the manner of its use, its size and shape and its capacity to produce death or serious bodily injury. *See Alvarez*, 566 S.W.2d at 614. Viewing the evidence in the light most favorable to the prosecution, we hold a rational trier of fact could have found beyond a reasonable doubt that the knife Phillips used was a deadly weapon in the manner of its use or intended use. *See Clewis*, 922 S.W.2d at 132. Accordingly, we overrule Phillips' second point of error.

B. Factual Insufficiency

Finally, Phillips complains the evidence is factually insufficient to support the jury's finding that he used a deadly weapon in his assault against Warner. To review the factual sufficiency of the evidence, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See id* at 129. Here, the only direct evidence Phillips presented to challenge the prosecution's evidence was his own testimony. During his cross-examination, Phillips asserted that he never used a knife against Warner, in fact he was concerned she might use a knife against him or herself, and that all of the prosecution's witnesses were wrong or lying. Furthermore, Phillips attempted to discredit Blocker's testimony by pointing to her inability to remember much of what happened during the assault. However, the jury heard Phillips' and Blocker's testimony, as well as that of the other witnesses and found that Phillips used a knife as a deadly weapon in his assault of Warner. Viewing all of the evidence on the "deadly weapon" finding, we cannot say the jury's finding that Phillips used a knife as a deadly weapon is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. Therefore, we overrule Phillips' third point of error.

Accordingly, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

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