Affirmed and Opinion filed November 2, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-01139-CR

———————————

RONALD LEON MINOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 36,423

O P I N I O N

Ronald Leon Minor appeals a conviction for aggravated sexual assault of a child on the grounds that: (1) he received ineffective assistance of counsel; (2) the trial court erred in allowing appellant to be cross-examined about his prior felony convictions; and (3) the trial court erred by allowing the State, in its closing argument, to encourage the jury to use appellant's prior convictions as evidence of his guilt. We affirm.

Background

Appellant was charged by indictment with aggravated sexual assault of a child, found guilty by a jury, and sentenced to thirty five years confinement.

Ineffective Assistance of Counsel

Appellant's first issue contends that he was denied effective assistance of counsel because his defense counsel failed to: (1) keep him informed of pre-trial matters and plea bargain discussions; (2) pursue pretrial motions in limine or request a limiting instruction in the jury charge with regard to evidence of his prior convictions; (3) investigate key defense witnesses; (4) object to the State's closing argument urging the jury to find appellant guilty based on his prior convictions; and (5) make an opening statement or put on adequate defense evidence.

Generally, to prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The burden falls on the appellant to show ineffective assistance of counsel by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 813. In reviewing claims of ineffective assistance of counsel, scrutiny of counsel's performance must be highly deferential. *See Strickland*, 466 U.S. at 689; *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999) *cert. denied*, 120 S. Ct. 803 (2000). Also, the record of the case must affirmatively demonstrate the alleged ineffectiveness. *See Thompson*, 9 S.W.3d at 813. An appellate court is not required to speculate on trial counsel's actions; where the record contains no evidence of the reasoning behind those actions, we cannot conclude counsel's performance was deficient. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

In this case, although appellant claims trial counsel failed to keep him informed of pre-trial matters, the only evidence appellant cites in support of this complaint is a letter appellant sent the District Clerk's office six days after counsel received his notice of appointment and nearly six months before trial. This letter: (1) claimed appellant had only seen his attorney twice; (2) alleged counsel had failed to keep him informed; (3) requested the name of the judge and district attorney; and (4) sought information on obtaining a new attorney. However, there is no evidence of any particular matter of which counsel failed to inform appellant. Similarly, with regard to appellant's claim that he was not informed of plea bargain discussions,

the record shows that the State made only one offer to appellant of twenty years, it was communicated to appellant, and he refused.

Appellant also contends that counsel failed to pursue a pretrial motion in limine or request a limiting instruction in the jury charge regarding evidence of appellant's prior convictions. However, counsel filed such a motion in limine on the day trial began and presented it to the trial court, but it was denied. Additionally, a motion in limine would not have prevented the presentation of appellant's prior convictions for impeachment purposes because appellant not only placed his credibility in issue by electing to testify at trial, but also testified about his prior convictions on direct examination. *See* TEX. R. EVID. 609(a). As to the failure to request a jury instruction, appellant has not developed a record of the reason for counsel's action. However, as discussed in the following section, it was appellant who originally introduced evidence of his prior convictions for the purpose of offsetting its impeachment value to the State. Because he introduced it without qualification or request for limiting instruction,[1] it was admissible for all purposes, could be considered by the jury accordingly, and was not eligible for a limiting instruction in the jury charge. *See, e.g., Prystash v. State*, 3 S.W.3d 522, 533 (Tex. Crim. App. 1999); *Garcia v. State*, 887 S.W.2d 862, 878-79 (Tex. Crim. App. 1994).

Appellant further complains that counsel failed to object to the State's closing argument which urged the jury to find appellant guilty based upon his prior convictions. However, taken in context, the State's argument requested the jury to consider the appellant's prior convictions in evaluating the credibility of his testimony, and thus, counsel was not deficient for failing to object to it.[2] *See Caballero v. State*,

---

[1] Appellant assigns no error to counsel's decision not to request a limiting instruction or otherwise qualify the evidence he introduced regarding appellant's prior convictions.

[2] Appellant complains of the following portion of the State's final argument:

> They don't want you to–he complaining about the list of prior here. He doesn't want you to consider this and hold it against his client. *You have to judge the credibility of witnesses in this case.* Who's got motive to lie? Who's got something to lose? And is the person who is telling you that they left the room after ten minutes and went to Wal-Mart, is that person being truthful to you? *What is their credibility?* What kind of person are they? Is this the person who teaches little league softball? No. *This person is the kind of person who commits a burglary of a vehicle, delivers a controlled substance, then possesses with*

881 S.W.2d 745, 750 (Tex. App.—Houston [14th Dist.] 1994, no pet.). Moreover, because the evidence could be considered by the jury for all purposes, as discussed above, any argument that the jury do so was not objectionable.

Appellant also claims counsel was ineffective for failing to call Barrion Oliver, Floyd Cox, and Brittney Wiley as defense witnesses. However, appellant has developed no record to indicate what these witnesses's testimony would have been or whether it was in appellant's favor. In addition, although appellant claims counsel did not interview these witnesses, there is nothing in the record to support that assertion.

Finally, appellant claims trial counsel was ineffective for waiving opening statement and for not putting on more defense evidence. However, a decision whether to make an opening statement is a matter of trial tactics and is thus not a sufficient basis for an ineffective assistance claim. *See Taylor v. State*, 947 S.W.2d 698, 704 (Tex. App.—Fort Worth 1997, pet. ref'd). Similarly, appellant has not shown what additional favorable evidence could have been introduced in order for counsel to put on a lengthier case. Because appellant's first issue thus fails to establish that he received ineffective assistance of counsel, it is overruled.

Cross-Examination on Prior Convictions

Appellant's second issue asserts that the trial court erred in allowing the State to cross-examine him on his prior convictions because his testimony about those convictions on direct examination amounted to a stipulation to them. Because of this stipulation, appellant contends that the State's cross-examination served no impeachment purpose, but operated only to negate his direct testimony and thereby deny him the right to introduce impeachment evidence on direct examination. *See McKinney v. State*, 722 S.W.2d 506 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd) (reversing conviction because trial judge

---

> *intent to deliver, goes to prison, gets out, does it again, goes to prison, gets out, and rents a motel room so that they can have sex with a 13-year-old girl*. You better consider it because that is who he is. That is what you have to deal with in deciding whether or not he committed this offense. *Are you going to believe him or not[?]*

(emphasis added).

denied defendant the right to testify on direct examination as to his prior criminal record). Appellant contends that the State's cross-examination also amounted to a plea for the jury to convict appellant for his prior crimes.

Because defense counsel failed to object to the State's questions on this basis, this complaint presents nothing for our review. *See* TEX. R. APP. P. 33.1(a). Moreover, regarding his prior convictions, appellant testified on direct examination only to several "drug related" offenses and a burglary of a vehicle. He stated that he was placed in prison twice, but failed to mention the convictions for which he was placed on probation. The State's questions on cross-examination filled in the dates and types of offenses, dates of convictions, sentences, and offenses appellant committed while on probation, parole, or bond, most of which were not provided by appellant's testimony on direct examination. In voluntarily testifying on his own behalf, appellant was subject to the same rules as any other witness regarding being impeached, made to give evidence against himself, and cross-examined as to new matters. *See Portuondo v. Agard*, 120 S. Ct. 1119, 1125 (2000); *Moreno v. State*, 22 S.W.3d 482, 485 (Tex. Crim. App. 1999). Appellant's prior convictions were proper subjects for such impeachment on cross-examination. *See* TEX. R. EVID. 609(a).

Appellant also complains that the trial court failed to instruct the jury in the charge that it could not consider his prior convictions as direct evidence of guilt. However, appellant's failure to object to the court's charge on this basis waived this complaint. *See* TEX. CODE CRIM. PROC. ANN. arts. 36.14, 36.15 (Vernon Supp. 1999). In addition, as discussed above, appellant was not entitled to a limiting instruction in the jury charge.

Finally, appellant contends that the trial court erred by allowing the State to ask the jury to consider his prior convictions as direct evidence of his guilt. Again, however, because appellant failed to object to this argument at trial, this complaint presents nothing for our review. *See Valencia v. State*, 946 S.W.2d 81, 82-3 (Tex. Crim. App. 1997). Moreover, for the reasons discussed in the preceding section on ineffective assistance, the State's argument was not improper. Accordingly, appellant's second issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 2, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).