Affirmed and Opinion filed November 29, 2001.

In The

Fourteenth Court of Appeals

NO. 14-01-00078-CR

STEPHEN STONE STROTHER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 35,835

O P I N I O N

Stephen Strother appeals his conviction and four-year prison sentence for indecency with a child. Appellant submits that his trial counsel was ineffective. Appellant also argues and that the trial court erred in admitting evidence of prior, uncharged sexual conduct between appellant and two girls ages fourteen and sixteen. We affirm.

Background

Appellant was convicted on six counts of indecency with a child. Appellant received a probated four-year sentence on one count and probated ten-year sentences on the other five

counts, the later five to run concurrently. At the time of the alleged offenses, appellant was twenty-five years old. The complainants, K.F. and B.C. were ages fourteen and sixteen, respectively. Both complainants testified that they had lied to appellant about their age and that the sexual contact had been consensual. Both testified that appellant had asked for and received a pair of their panties.

At trial, the State offered extraneous conduct testimony from D.L. and R.S. These two women testified that appellant had sex with them when they were ages sixteen and fourteen, respectively. However, the contact between appellant and R.S. had occurred in 1991, when appellant was eighteen and R.S. was fourteen. The contact with D.L. occurred in 1999, after appellant had been formally charged for indecency with K.F. and B.C. Both R.S. and D.L. testified that appellant had also asked for a pair of their panties.

At the hearing on appellant's Motion for New Trial, appellant's trial counsel, Mr. William Orr, described his voir dire and trial strategy thus:

> Q: Now, when – so, you're telling the Court that when you went into voir dire, you were looking for a jury that would be amenable to probation as a penalty?
>
> A: Yes, I was.
>
> Q: Because you thought you would probably lose the case?
>
> A: Yes. I felt like all they had to prove was the difference in the ages and we were whipped.

Mr. Orr indicated he was aware that appellant's lack of knowledge of the true ages of the complainants, *i.e.*, mistake of fact, was not a defense. Nevertheless, Mr. Orr to argued that appellant had ceased to contact the complainants once he became aware they had lied to him about their true ages. The defense's goal to achieve probation was predicated upon this non-legal, moral-mitigation defense.

Issues

Appellant presents two issues on appeal. First, appellant submits that trial counsel was ineffective in: (1) failing to properly voir dire the jury; (2) exercising peremptory challenges against jurors unlikely to be seated; (3) delivering a poor opening statement; (4) investigating and preparing for trial; (5) failing to cross-examine the complaining witnesses regarding the elements of the crime charged; and (6) opening the door to the extraneous offenses involving R.S. and D.L. Second, appellant argues that the trial court committed reversible error in admitting evidence of appellant's conduct with R.S. and D.L. We address each issue in turn.

Ineffectiveness

Texas courts apply the *Strickland* test to determine whether counsel's representation was so inadequate as to violate a defendant's Sixth Amendment right to counsel. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). *See generally Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must first show by a preponderance of the evidence that counsel's performance was deficient, *i.e.*, that his assistance fell below an objective standard of reasonableness. *Thompson*, 9 S.W.3d at 812. Next the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S. Ct. 966 (1997). When reviewing a claim of ineffective assistance, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

We begin our analysis with the second prong of *Strickland*. As Mr. Orr correctly stated at the hearing on appellant's motion for a new trial, appellant had no real defense to statutory rape. The uncontroverted testimony from both complainants established that criminal conduct occurred. If the jury believed the complainants, appellant's guilt would be established as a matter of law. None of the conduct appellant complains of on appeal could have rendered the credibility of the complainants more suspect. Therefore, even if Mr. Orr's conduct did fall below an objective standard of reasonableness, the result of the proceeding would not have been different. We hold that appellant cannot overcome the second prong of *Strickland*.

Additionally, we note that the defense put forth by the Mr. Orr was a plea for a reduced sentence that was not based on an attack on any statutory element of the crime charged. We cannot say that the defense did not constitute sound trial strategy. While pursuit of this strategy clearly allowed the State to introduce extraneous conduct evidence, this negative consequence does not render the strategy professionally unreasonable. No testimony was elicited from Mr. Orr at the hearing on the motion for new trial that would allow us to conclude that this negative consequence was not reasonably considered and accepted as a matter of trial strategy. Rather, it is reasonably clear from the record that the strategy had potential for success. We would therefore hold that appellant has also failed to overcome the first prong of *Strickland*.

We overrule appellant's first issue.

Substantive Ruling on Extraneous Offenses

Appellant initially argues that the evidence of the sexual conduct between appellant and R.S. and D.L. was irrelevant and inadmissible under Texas Rule of Evidence 404(b). We disagree. The Texas Rules of Evidence provide that evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID.

401; *see also Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990). However, evidence of extraneous conduct, though relevant, is nevertheless inadmissible if offered to prove that the accused acted in conformity therewith in the crime charged. TEX. R. EVID. 404(b). Extraneous conduct is admissible if offered to prove or to controvert defensive theories bearing on motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*; *see also Webb v. State*, 995 S.W.2d 295, 297-98 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

In the context of non-statutory sexual assaults, evidence of a defendant's intent is required. In those cases, extraneous offenses showing the defendant's *modus operandi* are often admissible to show intent to have non-consensual sex. *See, e.g., Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980) (en banc); *Webb v. State*, 995 S.W.2d at 297-98. By contrast, a charge of statutory rape requires no proof of intent. *Johnson v. State*, 967 S.W.2d 848 (Tex. Crim. App. 1998). Extraneous conduct bearing only on the accused's intent is therefore normally inadmissible. *See generally Rankin v. State*, 974 S.W.2d 707, 710 (Tex. Crim. App. 1996) (An evidentiary fact that stands unconnected to an elemental fact is not a fact of consequence). The novel question presented here is whether *modus operandi* evidence is relevant in a statutory rape case where the (non-legal) defensive theory is lack of intent to have sex with the under-aged.

We answer this question in the affirmative. Presenting an intent-based defense under these circumstances has the same effect as "opening the door" in other, non-sexual-assault contexts. *See, e.g., Hammett v. State*, 713 S.W.2d 102, 105 (Tex. Crim. App. 1986) (false impression exception to Rule 608(b) of the Texas Rules of Evidence). Insofar as such a defense may be misleading, we hold that extraneous conduct evidence is admissible to fully inform the jury and rebut the defensive proffer. This holding is consistent with similar decisions in past sexual assault cases involving novel defensive theories. *See, e.g. Robison v. State*, 35 S.W.3d 257 (Tex. App.—Texarkana 2000, pet. ref'd) (admissible to rebut defensive theory that improper touching was accidental); *Mendiola v. State*, 995 S.W.2d 175

(Tex. App.—San Antonio 1999, *rev'd on other grounds*, 21 S.W.3d 282 (Tex. Crim. App. 2000) (admissible to rebut defendant's claim that surgery prevented erection); *Darby v. State*, 922 S.W.2d 614 (Tex. App.—Fort Worth 1996, writ ref'd) (admissible to rebut claim of lack of intent to arouse); *see also Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1991) (on rehearing) (admissible to support a "logical inference not anticipated by the rulemakers").

Having determined the testimony of R.S. and D.L. to be relevant and admissible under Rule 404(b), we next review the trial judge's decision to overrule appellant's Rule 403 objection. *See Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999); TEX. R. EVID. 403. Rule 403 allows the admission of all relevant evidence unless the probative value is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403. We review a Rule 403 decision for an abuse of discretion, meaning we reverse only if the decision is outside the zone of reasonable disagreement. *See Salazar v. State*, 38 S.W.3d 141, 151 (Tex. Crim. App. 2001). The relevant criteria in determining whether the prejudice of an extraneous offense substantially outweighs its probative value include the following:

> (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable--a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;
>
> (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way";
>
> (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense;
>
> (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

See Mozon v. State, 991 S.W.2d at 847. These factors were presented to and properly analyzed by the court below. The extraneous offenses were compellingly similar to the crime charged: appellant asked for and received a pair of panties from R.S. and D.L.;

appellant initiated contact with each girl; appellant consistently encountered problems with the girls' parents. The testimony from R.S. and D.L. was not likely to impress the jury in an irrational way, especially considering the mistake of fact/lack of intent defense offered by appellant at trial. Both R.S. and D.L. testified only briefly. The jury suffered no undue distraction. Last, the State's need for the evidence was great. Both complainants admitted that they had initially lied to appellant about their age. The complainants then testified that the relationship had continued even after appellant had learned their true age. The testimony from R.S. and D.L. was the only evidence supporting the complainants' assertion that, though they had lied, they had eventually told appellant they were under seventeen. Last, we observe that appellant's knowledge of the complainants' true ages was disputed at trial. For these reasons, the trial court properly overruled appellant's trial objections under Texas Rules of Evidence 404(b) and 403.

Appellant's second issue is overruled. Accordingly, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed November 29, 2001.

Panel consists of Justices Yates, Edelman, and Wittig[1] (Edelman, J. concurring in the result only).

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

[1] Senior Justice Don Wittig sitting by assignment.