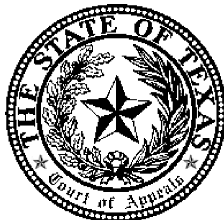
Affirmed and Opinion filed December 6, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-01292-CR

RAY ANTHONY FERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District
Harris County, Texas
Trial Court Cause No. 834,155

O P I N I O N

Appellant, Ray Anthony Fernandez, was convicted by a jury of the offense of aggravated sexual assault of a child and sentenced to thirty years' imprisonment. In three issues, appellant contends: (1) the trial court erred in denying his motion for a directed verdict; (2) the trial court erred in refusing to permit him to develop testimony regarding the victim's sexual history in an effort to show bias and motive; and (3) he was denied effective assistance of counsel. We affirm.

On December 12, 1999, M. C., accompanied by her three daughters, M. C., L. C., and P. C., met with officers of the Houston Police Department and reported that appellant, M.

C.'s live-in companion, had made inappropriate physical advances toward the children. After being separated from her siblings, P. C., then eight years old, told various interviewers and later testified that appellant had placed his fingers in her "private part," forced her to place her mouth on his penis, placed his private parts on hers, and threatened to "choke her to death" if she told anyone. Appellant offered no evidence in his defense.

In his first point of error, appellant contends the trial court erred in denying his motion for directed verdict because the evidence at trial varied significantly from the information contained in the indictment, and thus he was denied due process due to lack of adequate notice. Specifically, appellant complains the indictment alleged the offense occurred on or about December 11, 1998, while the evidence offered shows the offense could only have occurred sometime in 1999.

Appellant misstates the record. When reporting the abuse on December 12, 1999, both M. C. and P. C. stated the abuse had been ongoing for approximately one year. Moreover, an indictment need not specify "the precise date when the charged offense occurred, or [even] a narrow window of time within which it must have occurred." *Garcia v. State*, 981 S.W.2d 683 685–86 (Tex. Crim. App. 1998) (en banc); *see also Sledge v. State*, 953 S.W.2d 253, 255 (Tex. Crim. App. 1997) (en banc) (holding that "the State need not allege a specific date in an indictment"). The phrase "on or about," when used in an indictment, has long been held to allow the State to prove a date other than the one alleged in the indictment "as long as the date is anterior to the presentment of the indictment and within the statutory limitation period." *Sledge*, 953 S.W.2d at 256; *see also Scoggan v. State*, 799 S.W.2d 679, 680 n. 3 (Tex. Crim. App. 1990); *Thomas v. State*, 753 S.W.2d 688, 692 (Tex. Crim. App. 1988); *Ex parte Alexander*, 685 S.W.2d 57, 60 n. 1 (Tex. Crim. App. 1985). The statute of limitations for aggravated sexual assault of a child under the age of fourteen is ten years from the date of the victim's eighteenth birthday. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(5)(c) (Vernon Supp. 2001). In the instant case, the "on or about" date in the indictment, December 11, 1998, was anterior to the presentment date of the

indictment, April 14, 2000, and was within the limitations period. Appellant's first point of error is thus without merit, and is overruled.

In his second point of error, appellant claims the trial court erred in refusing to permit him to develop testimony regarding the victim's sexual history in an effort to show bias and motive. Specifically, appellant complains of the exclusion of evidence that P. C. was molested by a man when she was so young as to have no independent recollection of the incident, and was also assaulted by a teenage boy at an earlier time.

Rule 412 of the Texas Rules of Evidence proscribes, in sexual assault prosecutions, the admission of specific instances of an alleged victim's past sexual behavior. *See* TEX. R. EVID. 412(b). An exception is provided, however, where the evidence "relates to the motive or bias of the alleged victim." *Id.* § 412(b)(2)(C). Because P. C. blamed appellant for coming between her mother and father, appellant contends she had a motive for fabricating an alleged assault, and thus these prior incidents of molestation were relevant to show that P. C. was aware a charge of sexual misconduct could result in the removal of appellant from her life.

We doubt whether Rule 412, with its express application only to instances of prior "sexual behavior," permits the introduction of evidence concerning previous sexual abuses a child may have suffered. Regardless, any motive P. C. may have had to concoct a sexual assault charge against appellant was well developed by appellant's counsel at trial, without resort to evidence of the two earlier assaults committed against her. Testimony was elicited from P. C. that she had observed appellant hitting her mother, threatening her mother with an axe, and blackening her mother's eye. Further, P. C. testified that she herself had suffered various depredations at appellant's hands, and was still so angry at appellant that she would like to hit him. Thus, the victim's bias against appellant was well established. We conclude, therefore, that the trial court did not err in excluding evidence of other sexual molestations P. C. had suffered at the hands of other perpetrators. We overrule appellant's second point of error.

In his third point of error, appellant complains of ineffective assistance of counsel. Specifically, appellant avers his trial counsel erred (1) in asking several of the State's witnesses on cross-examination whether they believed P. C., and (2) in raising indictment error through a motion for directed verdict.

Judicial scrutiny of counsel's performance must be highly deferential and we are to indulge the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption, by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *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), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998). Where the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *Jackson*, 877 S.W.2d at 771–72. An appellate court is not required to speculate on the reasons behind trial counsel's actions when confronted with a silent record. *Id.* at 771.

Cross-examination is inherently risky, particularly in criminal cases, and involves tactical decisions we cannot second guess in hindsight. *Dannhaus v. State*, 928 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *Butler v. State*, 892 S.W.2d 138, 141 (Tex. App.—Texarkana 1994, no pet.). The record is silent as to why appellant's trial counsel conducted the cross-examinations at issue as he did, and we do not take this opportunity to wonder whether such a strategy was sound.

Appellant's claim that his trial counsel erred in raising an alleged deficiency in the date set forth in the indictment through a motion for directed verdict rather than a postponement is curious, in that this motion is the selfsame one appellate counsel contends in his first point of error should have been granted. Nonetheless, we know of no authority

for the position that a lawyer is ineffective because he sought relief the law does not allow. Accordingly, appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed December 6, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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