COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

PATRICK MARTINEZ,	§	No. 08-14-00242-CR
Appellant,	§	Appeal from the
v.	§	171st District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC#20130D04142)

O P I N I O N

Patrick Martinez appeals his conviction of continuous sexual abuse of a child younger than fourteen. In two issues, Martinez asserts: (1) the trial court abused its discretion in excluding his statement from a recorded interview that he agreed to take a polygraph exam because it was admissible under the rule of optional completeness; and (2) the trial court abused its discretion in denying his motion for new trial because, when communicating a plea offer from the State, his attorney did not inform him he would be ineligible for parole if convicted and he thus received ineffective assistance of counsel. We affirm.

BACKGROUND

On May 3, 2013, Appellant went to pick up his two children at school. When he arrived, he was met by the school principal and a police officer. The officer told him that something had

happened with his stepdaughter, S.F., and that his other child, A.M., had been taken by Child Protective Services. Appellant was told to go the police station to meet with a detective about the incident involving S.F. S.F. had been seeing a school counselor for anger issues, so Appellant believed the incident was somehow related to her anger problems. At the station, Appellant was interviewed by Detective Olga Gomez, who informed him that S.F. had accused him of sexually assaulting her on multiple occasions. Appellant made a voluntary waiver of his rights and denied the allegations. At the end of the nearly hour-long interview, Detective Gomez asked if Appellant would be willing to take a polygraph exam, and he agreed to do so. Detective Gomez then concluded the interview and Appellant was arrested. No polygraph was ever administered.

Prior to trial, the State offered Appellant a plea deal of ten years' deferred adjudication probation. Appellant refused the offer, and his attorney stated his client's refusal was based partially on the fact that his client did not want to register as a sex offender.

The case proceeded to trial, and the State called S.F. to testify. S.F. testified that she first met Appellant at the age of seven when Appellant started dating her mother. Eventually, she and her mother moved in with Appellant, and her mother and Appellant married and had a child together, A.M. S.F. testified her relationship with Appellant was good, that he was like a real father to her, and that she called him "Daddy." She stated she was eleven when he first touched her. While she was lying on her bed at night watching television, Appellant came into her room, laid down next to her, and moved his hand down under her shorts and rubbed his fingers on her vagina. S.F. stated that he touched her "about every week" for the next year, and then recounted four other instances of touching in graphic detail. Shortly after the first incident, S.F. began speaking with a school counselor about her anger issues. Months later, on the day Appellant had

gone to pick her and her brother up from school, she made an outcry statement to her counselor.

Appellant testified he was thirty-five years' old at the time of trial and that he had worked full-time as a recruiter for the Army National Guard before being fired over the charges. He denied all allegations during his testimony. Following his testimony, the State introduced a video recording of his interview with Detective Gomez. The video had been redacted to remove references to a prior conviction and remove his statement he was willing to take a polygraph. Appellant objected to the redacted video, and argued the full, unredacted video should be admitted under the rule of optional completeness to show his willingness to take a polygraph. The trial court overruled his objection, and admitted the redacted recording.

After deliberations, the jury returned a verdict of guilty and sentenced him to fifty-two years imprisonment with the Texas Department of Criminal Justice. Following the court's pronouncement of sentence, defense counsel stated he had failed to inform Appellant he would be ineligible for parole if found guilty when he had communicated the State's offer of deferred adjudication to him. Appellant moved for a new trial, both he and defense counsel testified during the hearing that Appellant had not been informed he would be ineligible for parole if convicted. Further, Appellant claimed he would have accepted the State's offer and pleaded guilty if he had been so informed. Appellant continued to maintain his innocence. After listening to the testimony and arguments, the trial court denied the motion for new trial. This appeal followed.

DISCUSSION

Polygraph Admissibility

In his first issue, Appellant contends the trial court abused its discretion in excluding evidence he was willing to take a polygraph. Specifically, he complains the State opened the door

to this evidence when the State played a redacted video of his interrogation that excluded his statement he would be willing to take a polygraph, claiming it was admissible under the rule of optional completeness.

Standard of Review

A trial court is given broad discretion in determining the admissibility of evidence. *Allridge v. State*, 850 S.W.2d 471, 492 (Tex.Crim.App. 1991). Accordingly, we review a trial court's admission or exclusion of evidence under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex.Crim.App. 2010). A reviewing court should not reverse a trial court's ruling that falls within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990)(op. on reh'g).

Analysis

In Texas, the results of or references to a polygraph examination are inadmissible "for all purposes." *Martinez v. State*, 272 S.W.3d 615, 626 (Tex.Crim.App. 2008); *Nethery v. State*, 692 S.W.2d 686, 700 (Tex.Crim.App. 1985). This is so even if the State and defendant agree and stipulate to use the results of a polygraph test at trial. *Nethery*, 692 S.W.2d at 700. The two primary reasons for excluding polygraph evidence are: (1) the inherent unreliability of polygraphs; and (2) the tendency of the results to be unduly persuasive to the fact finder. *Martines v. State*, 371 S.W.3d 232, 250 (Tex.App.--Houston [1st Dist.] 2011, no pet.). Regardless of whether the case involves the results of a polygraph test or a defendant's willingness to take a polygraph test, evidence of either will result in the same problem: the fact finder will speculate about its outcome or a witness or defendant's position will be bolstered. *Ex Parte Huddlestun*, 505 S.W.3d 646, 664 (Tex.App.--Texarkana 2016, pet. ref'd). Therefore, it is generally error to

allow the introduction of evidence of polygraph results or a defendant's willingness to submit to a polygraph. *Tennard v. State*, 802 S.W.2d 678, 684 (Tex.Crim.App. 1990).

A limited exception has been carved out for instances where one party "open[s] the door" for the other party to introduce evidence regarding a polygraph. *Lucas v. State*, 479 S.W.2d 314, 315 (Tex.Crim.App. 1972). In *Lucas*, the defendant testified that he took a polygraph test and the results showed he was not guilty of the charged offense. *Id*. In response, the district attorney took the witness stand and testified the defendant had not passed the polygraph test. *Id*. On appeal, the defendant complained of the erroneous admission by the trial court of testimony regarding his polygraph. *Id*. While acknowledging the results of polygraph tests are ordinarily inadmissible, the Court of Criminal Appeals held that under the facts of the case the defendant had opened the door for the State to introduce testimony about his polygraph test by testifying about it himself. *Id*.

Here, the State introduced a video recording of Appellant's interview with Detective Gomez, but redacted the portion of the video where Appellant agreed to take a polygraph test. In the unredacted video, after denying the charges throughout the interview, Appellant was asked if he would take a polygraph test and he responded affirmatively. Appellant asserts his willingness to take the polygraph test was admissible under the rule of optional completeness to correct the false impression that he had been uncooperative in the video and to rebut the State's assertions that he was being untruthful. Texas Rules of Evidence 107, known as the rule of optional completeness, provides in relevant part as follows:

> If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the *same subject*. An adverse party may also introduce any other act, declaration, conversation,

> writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. [Emphasis added].

TEX.R.EVID. 107. The statements given to the detective denying his guilt are not the "same subject" as Appellant's willingness to take a polygraph. *Hoppes v. State*, 725 S.W.2d 532, 537 (Tex.App.--Houston [1st Dist.] 1987, no pet.)(State's introduction of statements made by defendant during polygraph test—without referring to the polygraph test—did not open the door under the rule of optional completeness for defendant to discuss polygraph test because "[s]tatements from the polygraph examination are not the 'same subject' as the results of the polygraph examination, which are inadmissible."). Further, the Court of Criminal Appeals has expressly declined to hold that polygraph evidence becomes admissible to correct a false impression not created by inadmissible polygraph evidence. *Robinson v. State*, 550 S.W.2d 54, 60 (Tex.Crim.App. 1977). The State introduced admissible evidence that did not make reference to a polygraph, and that cannot open the door to inadmissible polygraph evidence. *Id*. To admit the redacted portion would have resulted in the type of harm the rule seeks to prevent: the jury would have speculated what the results of the test may have been; why the state did not accept his offer to take the polygraph test; and Appellant's position would have been impermissibly bolstered. *Tennard*, 802 S.W.2d at 684; *Bradley v. State*, 48 S.W.3d 437, 443 (Tex.App.--Waco 2001, pet. ref'd). Accordingly, the trial court did not abuse its discretion in denying Appellant's request to admit the unredacted portion of the video where he stated he was willing to submit to a polygraph test. Appellant's first issue is overruled.

Ineffective Assistance of Counsel

In his second issue, Appellant contends the trial court abused its discretion in denying his motion for new trial based on ineffective assistance of counsel. Specifically, Appellant asserts

his counsel rendered deficient performance by failing to inform him, while communicating a plea offer from the State, that he would be ineligible for parole if convicted of the charged offense.

Standard of Review

A trial court's decision to deny a motion for new trial is reviewed for abuse of discretion. *Riley v. State*, 378 S.W.3d 453, 457 (Tex.Crim.App. 2012). A trial court is granted broad discretion in assessing the credibility of witnesses and weighing the evidence when considering a motion for new trial. *Messer v. State*, 757 S.W.2d 820, 824 (Tex.App.--Houston [1st Dist.] 1988, pet. ref'd). The trial court abuses its discretion only if no reasonable view of the record supports its ruling. *Webb v. State*, 232 S.W.3d 109, 112 (Tex.Crim.App. 2007). In applying this deferential review, the appellate court must view the evidence in the light most favorable to the trial court's ruling, and must uphold the ruling if it is within the zone of reasonable disagreement. *Riley*, 378 S.W.3d at 457.

Analysis

A criminal defendant is entitled to be represented by effective, competent counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). When challenging the effectiveness of counsel, an appellant must show that there was no plausible professional reason for a specific act or omission by counsel. *Bone v. State*, 77 S.W.3d 828, 836 (Tex.Crim.App. 2002). If counsel was ineffective, we determine whether there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.*; *Adekeye v. State*, 437 S.W.3d 62, 73 (Tex.App.--Houston [14th Dist.] 2014, pet. ref'd). This two-prong test need not be analyzed in any particular order: appellant's failure to satisfy either prong defeats a claim of

ineffective assistance of counsel. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex.Crim.App. 2001) (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069).

In order to make an intelligent decision to accept or reject a plea, a defendant must be given all the information relevant to the decision. *Turner v. State*, 49 S.W.3d 461, 465 (Tex.App.--Fort Worth 2001, pet. dism'd). To establish prejudice in a claim of ineffective assistance of counsel where a defendant rejects a plea-bargain because of bad legal advice, the defendant must show there is a reasonable probability that: (1) he would have accepted the plea but for the deficient advice; (2) the prosecution would not have withdrawn its offer; and (3) the court would have accepted the plea bargain. *Ex parte Argent*, 393 S.W.3d 781, 784 (Tex.Crim.App. 2013). A reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Here, defense counsel testified that when he conveyed the State's offer of ten years' deferred adjudication, he did not inform Appellant he would be ineligible for parole if convicted for continuous sexual abuse of a child. Appellant also testified he was not told he would be ineligible for parole when his attorney informed him of the State's plea offer. Had he known parole was not an option, Appellant asserts, he would have accepted the State's offer and pleaded guilty. Conversely, the State directs the Court's attention to statements made during the pretrial hearing. While discussing Appellant's rejection of the State's plea offer, defense counsel made the following remarks:

> DEFENSE COUNSEL: Anything -- my major problem is the sex offender registration situation, and his take on it is, I'm [sic] might as well be in prison for 20 years than been [sic] a registered sex offender. You know, he was --
>
> THE COURT: So the problem is the registration?

DEFENSE COUNSEL: Yeah, if they were to offer something that did away with the registration . . .

THE COURT: Okay. That's a counter.

DEFENSE COUNSEL: We would be interested in that.

PROSECUTOR: That we can't do.

THE COURT: That you can't do.

. . .

DEFENSE COUNSEL: I don't see anyway [sic] around it, frankly.

THE COURT: Well, you did come up with a counter offer, Mr. Gibson.

DEFENSE COUNSEL: Okay.

THE COURT: Very well. We tried and if it's the registration then we have to go with the registration, so we will be in trial.

As noted above, the trial court has broad discretion in assessing the credibility of witnesses and evidence, and we will not disturb its judgment unless no reasonable view of the record supports its ruling. *Webb*, 232 S.W.3d at 112; *Messer*, 757 S.W.2d at 824. One reasonable view of the record, per the testimony of Appellant and defense counsel, is counsel rendered ineffective assistance by failing to inform Appellant he would be ineligible for parole when he conveyed the State's offer of deferred adjudication, and Appellant would have accepted the offer if he had been so informed. Another reasonable view, based on the statements at the pretrial conference, is that Appellant's primary concern in rejecting the plea was that it required him to register as a sex offender, and he was willing to risk a lengthy prison sentence to avoid that burden. In assessing the credibility of Appellant and counsel's subsequent testimony that Appellant had not been informed of the ineligibility of parole upon conviction, the trial court was within its right to

disbelieve any of those assertions provided that disbelief is based on a reasonable view of the record. *Odelugo v. State*, 443 S.W.3d 131, 137 (Tex.Crim.App. 2014).

Based on the record, it was reasonable to conclude defendant had serious regrets about not accepting the State's original offer of ten years' deferred adjudication—now that he has received a fifty-two-year sentence—and his testimony supporting his ineffective claim was not credible. Applying the highly deferential standard we are required to provide on matters of credibility, we cannot conclude the trial court abused its discretion in denying Appellant's motion for new trial based on allegedly ineffective assistance of counsel. Accordingly, Appellant's second issue is overruled.

CONCLUSION

Having overruled Appellant's first and second issue, we affirm the judgment of the trial court.

May 23, 2018

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J. (Not Participating)

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