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OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

10/21/2020 **COA No. 01-18-00698-CR**
ROMERO, RAMIRO **Tr. Ct. No. 1493513** **PD-0873-20**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

STATE PROSECUTING ATTORNEY
STACEY SOULE
P. O. BOX 13046
AUSTIN, TX 78711
* DELIVERED VIA E-MAIL *

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Deana Williamson, Clerk

MARK HOCHGLAUBE
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HOUSTON, TX 77004-3808
* DELIVERED VIA E-MAIL *

Opinion issued August 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00698-CR

RAMIRO ROMERO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1493513

MEMORANDUM OPINION

A jury found appellant, Ramiro Ramirez, guilty of the offense of continuous sexual abuse of a child[1] and assessed his punishment at confinement for life. In two

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1 *See* TEX. PENAL CODE ANN. § 21.02.

issues, appellant contends that the trial court erred in denying his motion for new trial and making impermissible remarks revealing its opinion of the case.[2]

We affirm.

Background

The complainant testified that she when she was a young child, she stuttered a lot and "couldn't really hear" out of one ear because she had a lot of ear infections. These problems made it difficult for her to communicate until after she had surgery when she was about nine years old.

The complainant was about six years old when appellant, her father, began sexually abusing her. She "would be playing with [her] dolls" and "this one time," appellant called her into his bedroom. "And he made it seem like [they] were playing." He closed the door and, after removing his pants and underwear, "started putting . . . [her] hand on his private area." These incidents of sexual abuse would last a short time, until her mother "would come knock on the door or [one of her siblings] was about to come in from the outside." When he heard one of them, "[h]e would push [her] out of the room."

"[O]ne time" when the complainant was six or seven years old, "[appellant] took off all his clothes" and then removed her clothes. His "private area" touched her vagina. She thinks it "actually went inside." "It hurt. It was very sore. It hurt.

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2 *See* TEX. CODE CRIM. PROC. ANN. art. 38.05 ("Judge shall not discuss evidence").

And [she] was shocked." This happened "two or three" times. She thought she saw "liquid stuff" come out of appellant's penis. Some got on her, and she "would go shower." Afterward, she would "go to her "best friend's house" and "just try to forget about everything that happened."

Another time, when the complainant was playing soccer with her brother outside, appellant stood "by the door and called [her] in." She thought he "was going to tell [her] to wash the dishes or something." When she went inside, he put his penis inside her vagina. These incidents of sexual abuse began when she was about six and went on for about two years. When she was seven years old, she told her best friend, Daisy, about the sexual abuse but made her keep it a secret.

According to the complainant, appellant told her not to tell anyone about what he did to her and threatened that if she did, "he was going to burn the house down with everyone in it." She believed he would do that because she "knew he was capable of doing many things." "[O]ne time" when she "did something wrong," he "threw" her "across the room, all the way to the bed." Another time, appellant hit her "many times" with a belt. The complainant did not remember what she did wrong; she thought that she may have been running around with her brother.

Appellant left the family when the complainant was about eight years old. Apart from her friend Daisy, the complainant told no one about the sexual abuse until she was about twelve or thirteen years old. Then, she told her sister, and her

"sister told her mom." The complainant told them then because she "saw [appellant]" and "had a nightmare that he would come back and hurt" the rest of her family.

When the complainant's mother found out about the sexual abuse, she called law enforcement. The complainant had been "too embarrassed" to tell her mother more than "a little bit" about what happened. But when she spoke to a law enforcement officer, the complainant told him "in detail" about what had happened to her.

Houston Police Department ("HPD") Sergeant S. Kim testified that he was dispatched to the complainant's family's apartment in response to the mother's call about sexual abuse. He asked the complainant's mother what the call was about, then he asked to speak with the complainant "to find out what her side of the story was to make sure that the information her mother was giving [him] was correct." The complainant was twelve years old when Kim interviewed her. She identified appellant as the person who had been sexually abusing her. The complainant was crying, and she seemed embarrassed and ashamed. Kim could tell that she did not want to speak with him. He sat down with her at the kitchen table and tried to make her feel comfortable. And Kim let the complainant's mother stay with her so the complainant would feel safe. The complainant told Kim "what [had] happened."

According to Sergeant Kim, the complainant explained that when she was young, she had delayed speech development because she had problems with her hearing. The complainant stated that appellant would beat her and pull her hair all the time. And the first time that appellant sexually abused her, she was about six years old. On that occasion, the complainant "was stepping out of the shower and had a towel wrapped around her." "She said [appellant] took her towel off [and] began touching her breasts and vagina[l] area." "[T]hen [appellant] penetrated her vagina with his fingers." The complainant also told Kim about a second incident. That time, "[appellant] pulled her into the room," "undressed her[,] and began touching her in the breast and buttocks and all over her body. And, again, penetrated her vagina with his fingers." The complainant explained to Kim that, "as time went [on], it became worse and . . . he began raping her," penetrating her vagina with his penis. "And then on several occasions [appellant] covered her head with a blanket and penetrated her anally." The complainant told Kim that the sexual abuse was "very painful" and that "[s]he was very confused [and] didn't know what was going on, she was so young, [but] [s]he knew it was wrong." When the complainant's hearing and speech improved, appellant stopped sexually abusing her.

Sergeant Kim also spoke to the complainant's sister. She told Kim that she had recently seen appellant's car near the family's apartment. "[Appellant] wouldn't look at her, but she knew it was him. She was able to copy down [his] license plate

[number]." Kim searched the license plate number provided by the complainant's sister on the computer in his patrol car, and the number "c[a]me back registered to [appellant]." After Kim finished his interviews, he passed the case along to HPD's sex crimes unit for further investigation.

The complainant's friend, Daisy, testified that she had been friends with the complainant for ten years, since they were five years old. When they were in elementary school, the complainant told her the secret about appellant. The secret was why Daisy was testifying at trial.

The complainant's sister testified that she has lived independently from the complainant's family since 2017. In 2009, she, her mother, and her little sister—the complainant—and brother were living in the apartment with appellant. She was about nine or ten years old and the complainant and her twin brother were five or six years old. At the time, the complainant was "very shy, very withdrawn. She didn't speak much." The complainant had "issues with her hearing" and "went to speech therapy." During that time, their mother was "mostly working . . . and attending beauty school, cosmetology," so she was mostly away from the apartment, and the complainant's sister, the complainant's brother, and the complainant were left with appellant. As far as her observations of the complainant's interactions with appellant, the complainant's sister recalled that the complainant "never wanted to be around him" and "never wanted to hug him." "She never wanted any close contact

with him." At first, she "mostly" acted like that just with appellant, but later, "she started showing that same behavior with all men."

The complainant's sister also testified that about three years before trial, the complainant revealed to her and their mother that appellant had sexually abused her. The complainant made the revelation shortly after the sister saw appellant drive by their apartment. Appellant never visited them, and the complainant's sister "thought that [it] was weird that he passed by without saying anything or doing anything." The complainant's sister memorized the license plate number for appellant's car and a friend confirmed that it was appellant's car by tracing the license plate number to him.

After the incident, the complainant's sister told her mother that she saw appellant drive by, and when the complainant found out, she became upset. The complainant's sister recalled that the complainant spoke with their mother and then their mother "started becoming very emotional." The complainant's sister "didn't really know what was going on until [their mother] called the police," and she overheard her making the report of sexual abuse. And that was when the complainant's sister found out about what had happened to the complainant.

When a law enforcement officer came to the apartment after her mother's call, the complainant's sister stayed to help interpret for their mother and to tell the officer "everything [the complainant] was telling [her]." The complainant "was crying" and

"very hesitant" at first, "but as soon as she said what happened," the complainant began crying like her sister had "never seen her cry before."

The complainant's mother testified that in 2007, she was living with her children and appellant, but she and appellant did not have a "relationship as a couple." They were married but there were times that appellant was not living with the family at the apartment. In late 2009, the complainant's mother "kicked him out [of the apartment] and . . . told him that [she] . . . never want[ed] to see him near there" again.

The complainant's mother also testified that the complainant began participating in speech therapy at three years old. Between the ages of three and seven years old, she had to have "two or three surgeries" on her ears. She could not speak properly at that time. Between the ages of five and nine years old, the complainant was a loner. "She would always go to the side and play with her own toys" and "was in her own little world." "She was afraid to sleep by herself," so the complainant's mother "would sleep with her sometimes." The complainant was afraid of appellant and refused to be near him. The complainant also had trouble in school at that time and was held back one year.

In June 2015, the complainant became "very scared because [her] sister had seen [appellant] . . . in his car . . . in front of the [apartment]." After the sighting of appellant, the complainant "would go around locking doors and windows, making

sure everything was locked." "[S]he would have nightmares and would wake up screaming."

On June 8, 2015, the complainant's mother called for a law enforcement officer to come to the apartment because the complainant "had confessed to [the complainant's mother] that [appellant] had abused her." The complainant had asked her mother, "Mommy, do you remember when I had a bruise here on this part?" "She said, 'I did not fall down, Mommy. [Appellant] asked me to tell you that. He hit me so hard that I was not able to breathe. He removed my clothes. And he also removed his clothes.'" And the complainant told her mother about one time when appellant "bathed her and began touching all over [her] body."

According to the complainant's mother, while the law enforcement officer interviewed the complainant, the complainant appeared emotionally "destroyed." After the officer left the apartment, the complainant's mother called Children's Protective Services and took the complainant to a doctor as instructed. The doctor directed her to take the complainant to the Children's Assessment Center ("CAC").

HPD Detective M. Resnick, a forensic interviewer for the CAC, testified to the procedures for interviewing sexual abuse victims and stated that she had interviewed the complainant. She saw no signs that the complainant had been coached, and the complainant was consistent in recounting the details of her the sexual abuse.

Ineffective Assistance of Counsel

In his first issue, appellant argues that the trial court erred in denying his motion for new trial because his trial counsel did not provide him with effective assistance.

The Sixth Amendment to the United States Constitution guarantees the right to the reasonably effective assistance of counsel in criminal prosecutions. U.S. CONST. amend. VI; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also* TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05; *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (test for ineffective assistance of counsel same under both federal and state constitutions). To prove a claim of ineffective assistance of counsel, appellant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance fell within the wide range of reasonable

professional assistance or trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006). Appellant has the burden to establish both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). "[A]ppellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Strickland*, 466 U.S. at 697.

Appellant presented his ineffective-assistance-of-counsel claim to the trial court in a motion for new trial and received a hearing on his motion. We, therefore, analyze his issue under an abuse-of-discretion standard as a challenge to the denial of his new-trial motion. *Biagas v. State*, 177 S.W.3d 161, 170 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). We view the evidence in the light most favorable to the trial court's ruling and will uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). We do not substitute our judgment for that of the trial court, but rather decide whether the trial court's decision was arbitrary or unreasonable. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007); *see Biagas*, 177 S.W.3d at 170. If there are two permissible views of the evidence, the trial court's choice between them cannot be held to be clearly erroneous. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012), *overruled on other grounds by Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018). A trial court abuses its discretion in denying a motion for

new trial only when no reasonable view of the record could support the trial court's ruling. *Webb*, 232 S.W.3d at 112.

We note that a trial court is in the best position to "evaluate the credibility" of witnesses and resolve conflicts in evidence. *See Kober v. State*, 988 S.W.2d 230, 233 (Tex. Crim. App. 1999). And a trial court may choose to believe or disbelieve all or any part of the witnesses' testimony. *See id.* at 234.

Appellant argues that his trial counsel's performance was deficient because she did not conduct a thorough investigation, which resulted in her failing to interview and call Veronica Sanchez, with whom appellant had a relationship after divorcing Hernandez, and Sanchez's minor daughters to testify in his behalf. According to Sanchez's affidavit and her testimony at the motion-for-new-trial hearing, she would have testified that she and her minor daughters had positive relationships with appellant and Hernandez had threatened to "ruin [appellant's] life," ostensibly because she was jealous of his relationship with Sanchez.

The record shows that appellant's trial counsel made some effort to contact Sanchez. She sent three text messages to Sanchez and called her at least twice but was unable to leave a message. Sanchez admitted that she received the text messages from appellant's trial counsel and stated that she tried to call trial counsel numerous times but did not reach her and did not leave any messages. Sanchez acknowledged that she received a text message from appellant's trial counsel on the first day of

appellant's trial but stated that she did not respond because she was angry about the short notice.

In its findings of fact and conclusions of law supporting the denial of appellant's motion for new trial, the trial court found: "The trial lasted five days. [Appellant's trial counsel] sent several text messages to Sanchez. There was no response from Sanchez. Sanchez admitted [to] receiving the [text] messages and admits she did not respond."

Appellant relies on our sister court's decision in *Perez v. State* to assert that his trial counsel provided ineffective assistance by failing to act more diligently in pursuing Sanchez's testimony. 403 S.W.3d 246 (Tex. App.—Houston [14th Dist.] 2008), *aff'd*, 310 S.W.3d 890 (Tex. Crim. App. 2010). There, the Fourteenth Court of Appeals affirmed the trial court's denial of the defendant's motion for new trial, holding that, where trial counsel "interviewed no witnesses before trial," including an alibi witness, and "never asked the court to appoint an investigator to interview witnesses or search for potential witnesses," counsel failed to provide reasonably effective assistance, but that defendant was not prejudiced by the deficient representation. *Id.* at 251, 253.

We find *Perez* distinguishable. Here, appellant criticizes the diligence of his trial counsel's efforts to contact one witness. In *Perez*, though, counsel made no effort to prepare any witnesses, not even one who might have provided alibi

testimony. *See id.* at 252–53. Also in contrast here, appellant's trial counsel actually reached Sanchez by text message before trial, and the trial court could have reasonably found that Sanchez's absence at trial had more to do with her own unwillingness to respond to appellant's trial counsel than it did with the quality of appellant's trial counsel's representation. We defer to the trial court's evaluation of the witnesses' credibility and its resolution of conflicts in the evidence. *See Kober*, 988 S.W.2d at 233.

Because appellant has not established that his trial counsel's performance fell below an objective standard of reasonableness, we hold that the trial court did not err in denying appellant's motion for new trial.

We overrule appellant's first issue.

Article 38.05 Violation

In his second issue, appellant argues that the trial court erred in making an oral, sua sponte instruction prefacing the court's written instructions to the jury because the trial court violated Texas Code of Criminal Procedure article 38.05, commented on the evidence, indicated a judicial bias, and appellant was harmed as a result.

Article 38.05 prohibits a trial court from commenting on evidence or letting the jury know its opinion of the case. *See* TEX. CODE CRIM. PROC. ANN. art. 38.05.

Before reading its charge to the jury, the trial court told the jury:

> Let me just tell you, the jury charge contains the law that's involved in this case. There are definitions, legal definitions that you must read and be bound by. There are instructions that you must follow during your deliberations. And then while you're deliberating, when you conclude your deliberations, you'll apply the facts to the law that's in the charge and reach your verdict.
>
> Now, let me tell you a couple of things about this charge. It's written in what I call legalese, a lot of legal mumbo-jumbo and legal jargon. I'm sorry that we can't seem to take the English language and make it plain and simple for you in the legal profession.
>
> One reason we can't do that is because we are bound by precedent, laws that have been talked about by appellate [c]ourts in the past. And the appellate [c]ourts say this is the way you do it. And through the years, it's come down to this point to where we pretty much have all this legal jargon that we have to talk about because if we deviated, some [c]ourt may look at it and say, well, you did it wrong. So, we have to follow all that. I know it's going to be confusing as I read it to you.

Appellant argues that the second and third paragraphs of the trial court's remarks violate article 38.05 because the trial court said that "some [c]ourt may look at" the jury charge, suggesting that appellant would need to appeal an adverse judgment. We disagree with appellant's proposed interpretation. Read in context with the initial paragraph, the thrust of the trial court's remarks are fairly interpreted as informing the jury of some general reasons for the complexity of the trial court's charge language, not as suggesting that this particular case would be scrutinized on appeal. And the trial court read the charge immediately after making these remarks, reinforcing its focus on the charge's language. Appellant does not assert that any instruction in the charge itself was improper. Because the trial court's remarks do not constitute an opinion of appellant's case, we hold that they do not violate Texas

Code of Criminal Procedure article 38.05 and the trial court did not err in making them. *Cf. Fleeks v. State*, No. 01-18-00904-CR, 2020 WL 3393072, at *18 (Tex. App.—Houston [1st Dist.] Jun. 18, 2020, no pet.) (trial court's statement was correct statement of the law and did not reflect trial court's opinion of case).

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).

MARE CARTER
JUDGE

THE STATE OF TEXAS
VS.
RAMIRO ROMERO

01760286

SPN:
DOB: **WM 9/8/74**
DATE PREPARED: **12/31/2015**

D.A. LOG NUMBER:**2222768**
CJIS TRACKING NO.:
BY: **KL** DA NO: **002473870**
AGENCY:**HPD**
O/R NO: **071727015**
ARREST DATE: **TO BE**

NCIC CODE: **1199 03**

RELATED CASES:

FELONY CHARGE: **Continuous Sexual Abuse of a Child**
CAUSE NO:
HARRIS COUNTY DISTRICT COURT NO: **1493513**
FIRST SETTING DATE: **228**

BAIL: **$100,000**
PRIOR CAUSE NO:

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, **RAMIRO ROMERO**, hereafter styled the Defendant, heretofore on or about **NOVEMBER 14, 2009**, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age, including an act constituting the offense of AGGRAVATED SEXUAL ASSAULT OF A CHILD, committed against A.R. on or about NOVEMBER 14, 2007, and an act constituting the offense of AGGRAVATED SEXUAL ASSAULT OF A CHILD, committed against A.R. on or about NOVEMBER 14, 2009, and the Defendant was at least seventeen years of age at the time of the commission of each of those acts.

FILED
Chris Daniel
District Clerk
OCT 14 2016
Time: 1220
Harris County, Texas
By: CSC
Deputy

Asst. Foreman

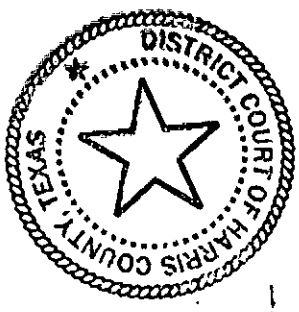
230th

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Rosemary R. Pardo

FOREMAN OF THE GRAND JURY

INDICTMENT



STATE OF TEXAS
COUNTY OF HARRIS

I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this

10/14/16

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

_____ Deputy