Affirmed and Opinion filed June 15, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00096-CR

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LAUD RICHARD NELSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 769,937

O P I N I O N

The State charged appellant with the felony offense of aggravated assault. See TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). Appellant pleaded not guilty to the indictment and the case was tried before a jury. The jury found appellant guilty and assessed his punishment at 55 years' confinement. In two points of error, appellant contends that his trial counsel rendered ineffective assistance and that the prosecutor made an improper closing argument during the guilt/innocence phase of the trial. We affirm the judgment of the trial court.

Background

Appellant and David Mohammed drove to Rushwood Park to buy marijuana. When they arrived at the park, they saw Chris Williams, a known marijuana dealer. Appellant asked Williams for two sacks of marijuana. Instead of delivering it, Williams punched appellant in the face. Apparently, Williams was angry with him concerning a fight appellant had with one of Williams' friends.

Williams watched appellant drive away from the park; he then saw appellant stop the car and reach under his seat. Believing appellant had a gun, Williams ran into the park. Appellant fired the gun toward Williams. The shot missed him, but hit Reggie McGee, an innocent bystander. A bullet fragment fractured McGee's L-1 vertebrae; he is now a paraplegic.

Appellant confessed to the shooting to his friend Jose Lozano. He told Lozano that he was leaving town to "go to Florida or something." Appellant was subsequently arrested in Naples, Florida and charged with aggravated assault.

Ineffective Assistance of Counsel

In his first point of error, appellant contends that he was denied the right of effective assistance from counsel under both Federal and state constitutions. Both the federal and state constitutions guarantee an accused the right to have assistance from counsel. *See* U.S. Const. Amend. VI; Tex. Const. Art. I, § 10; TEX. CODE CRIM. PROC. ANN. Art. 1.05 (Vernon 1977). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App.1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App.1999).

The first prong requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts and/or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and/or omissions fell below

the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App.1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App.1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id*.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption. *See id*. The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd).

When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.–Houston [1st Dist.] 1996, no pet.) (*citing Jackson v. State*, 877 S.W.2d at 771). We will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court.

In his brief, appellant alleges that his attorney failed to interview witnesses, failed to file any defense motions, and was generally not prepared to represent him at trial. The record does not support any of these contentions. Without such evidence, we cannot determine whether his attorney's actions actually occurred, were based on strategy, or the result of negligent conduct. *See Thompson*, 9 S.W.3d at 814. We hold that appellant did not defeat the strong presumption that the decisions of his counsel during trial fell within the wide range of reasonable professional assistance. We overrule appellant's first point of error.

Closing Argument

In his second point of error, appellant argues that the prosecutor made an improper closing argument during the guilt/innocence phase of the trial. During closing argument, the prosecutor responded to statements made by the defense counsel that David Mohammed had a deal with the State:

> When the defense attorney gave his opening statement, he told you that you would hear evidence that David Mohammed had a deal. Now, he didn't say with whom. He didn't say for what. Why did he not tell you about that? Because there is no deal. There was never a deal. I asked David Mohammed, "Do you have a deal to testify?" No. "Did Detective Wichkoski give you a deal or something?" No. "Was he ever a suspect?" No. "Was he ever under arrest?" No. That was manufactured to inflame you or make you angry or something.

Appellant's trial counsel objected to the last statement and claimed that the prosecutor was attacking his credibility or integrity. The trial judge sustained the objection as far as counsel being on trial, but allowed the prosecutor to draw presumptions from the evidence. The trial judge then instructed the prosecutor not to attack defense counsel's credibility. Appellant's trial counsel did not ask the judge to instruct the jury to disregard the statement or move for a mistrial.

Closing arguments that personally attack defense counsel and that imply wrongful conduct on the part of defense counsel are improper. *See Gomez v. State*, 704 S.W.2d 770, 771 (Tex. Crim. App. 1985). We view such attack with special disfavor. *See Orona v. State*, 791 S.W.2d 125, 128 (Tex. Crim. App. 1990). Nevertheless, a defendant's failure to pursue his objection to an adverse ruling to a jury argument forfeits his right to complain about the

argument on appeal. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); TEX. R. APP. P. 33.1. Appellant's counsel did not request a motion to disregard the statement or ask for a mistrial. We find that appellant received all the relief that he requested at trial and that error was not preserved.

Moreover, the prosecutor did not say that the defense attorney manufactured evidence as argued by appellant. The prosecutor argued that the statement made by defense counsel was "manufactured" to anger the jury. The record shows that Mohammed did not have a deal with the State to testify. The complained of comment appears to have been intended as a response to the argument of defense counsel. *See also Cannady v. State*, 11 S.W.3d 205, 213 (Tex. Crim. App. 2000). Answering arguments made by opposing counsel are generally permissible. The comment by the prosecutor did not rise to the level of a personal attack on defense counsel. We overrule appellant's second point of error.

We affirm the judgment of the trial court.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed June 15, 2000.

Panel consists of Justices Robertson, Sears, and Lee.*

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

* Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.