

Affirmed and Opinion filed June 21, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00115-CR

SALEEM MEHMOOD, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 13
Harris County, Texas
Trial Court Cause No. 99-42364**

MEMORANDUM OPINION

The parties are familiar with the background of the case and the evidence adduced at trial. Therefore, we limit recitation of the facts. Because the law to be applied to the case is well settled, we issue this memorandum opinion pursuant to Texas Rule of Appellate Procedure 47.1.

Appellant was charged by information with misdemeanor assault, enhanced with two prior misdemeanors. After the jury found him guilty as charged in the information and after appellant pleaded true to the two enhancement paragraphs, the court assessed punishment at 180 days' confinement and imposed a \$1,000 fine. Finding appellant failed

to demonstrate that trial counsel was constitutionally deficient, we affirm the trial court's judgment.

In a single point of error, appellant complains trial counsel was ineffective because counsel failed to object at trial to references of appellant's purported gang affiliation.

During the State's questioning of complainant's friend, Yaamin Ghadiyali, the prosecutor asked why appellant had approached Yaamin's brother, Yaseen, after prayers. Yaamin said, "Because a week before we were at the [Al Noor] mosque and me and my brother, Yaseen, we had an argument with [appellant's] gang – I think, HK's, that's what they are called." In describing the assault, Yaamin said, "And then the H [sic] gang members, the other members, came running after us; and, like, five or six of them came on me and started jumping me."

Later, the prosecutor asked, "Now, this group of people, the H gang – HK gang members that you call them – did you see where they came from?" Later still, the prosecutor asked, "Do you know who was in this HK gang, who was in it that was coming toward you?"

Yaamin further testified that appellant and his friends were angry with Yaamin and his companions because they were afraid Yaamin and his companions would "tell on them" for their gang membership. Yaamin also testified that people had told him that appellant was the leader of the HK gang. In connection with this final reference, appellant's counsel raised a hearsay objection, which the trial court sustained. Counsel, however, did not object to other gang references. The trial record contains other gang references that appellant does not mention on appeal.

To demonstrate he received ineffective assistance of counsel at trial under the Sixth Amendment, appellant must show counsel's performance was deficient and the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 692 (1984). The state constitution imposes no higher standard. *See Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). We must indulge a strong presumption that the

counsel's conduct fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Appellant must prove by a preponderance of the evidence the ineffective assistance. *Cannon v. State*, 660 S.W.2d 401, 403 (Tex. Crim. App. 1984). Any allegation of ineffectiveness must be founded in the record, which must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We should be especially hesitant to declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation behind counsel's actions. *Id.*

Gang affiliation may be considered evidence of an "other crime, wrong or act," subject to exclusion under Texas Rule of Evidence 404(b). *See Poindexter v. State*, 942 S.W.2d 577, 583-84 (Tex. Crim. App. 1996). Appellant argues that the evidence was inadmissible and that counsel erred by not objecting, thus allowing the references to gang affiliation into evidence and foreclosing appellate review.

Appellant did not file a motion for a new trial. The trial record gives no indication of counsel's reasons for his failure to object to the gang references. Appellant has thus failed to rebut the presumption that counsel's decisions were reasonable. Nor do we find that counsel's failure to object amounts an error sufficiently egregious to satisfy the first *Strickland* prong as a matter of law. *See Thompson* 9 S.W.3d at 814 (failure to object to inadmissible testimony not sufficiently egregious to constitute ineffective assistance). The record before us does not support a conclusion that, as a matter of law, counsel's actions were unreasonable.

Having overruled appellant's single point of error, we affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.¹

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

¹ Senior Chief Justice Paul C. Murphy sitting by assignment.