Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00386-CR

KEVIN LEHMAR COPELAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 99-41407

O P I N I O N

A jury convicted appellant, Kevin Lehmar Copeland, of misdemeanor assault and assessed punishment at 90 days in the Harris County Jail and a $500.00 fine. On appeal, he claims that he was denied effective assistance of counsel at guilt/innocence, punishment, and in connection with his trial lawyer's failure to file a motion for new trial. We affirm.[1]

The standard for determining claims of ineffective assistance under the Sixth

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[1] The underlying facts are not relevant to our disposition of this case; therefore, we have not included a factual recitation.

Amendment is the standard adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Our Court of Criminal Appeals adopted the *Strickland* standard in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). In *Strickland*, the Court adopted a two-pronged analysis for claims of ineffective assistance. First, the defendant must show that counsel's performance was deficient, *i.e.*, counsel failed to function as "counsel" within the meaning of the Sixth Amendment guarantee. The defendant must then show that counsel's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Strickland places the onus on the defendant to prove his claim of ineffective assistance by a preponderance of the evidence. *Id*. at 687; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000); *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999) (stating defendant must present record to support claim of ineffective assistance of counsel);[2] *see also Jackson v. State*, 877 S.W.2d 768, 771–72 (Tex. Crim. App. 1996) (rejecting "I know it when I see it" analysis of reviewing claims of ineffective assistance of counsel). We consider both the totality of the representation and circumstances of each case. *See Thompson*, 9 S.W.3d at 813. But "reasonably effective assistance" does not mean a defendant is entitled to error-free or perfect counsel. *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991); *Lanum v. State*, 952 S.W.2d 36, 40 (Tex. App.—San Antonio 1997, no pet.). Under this standard, a claimant must prove that counsel's representation so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686. Stated differently, the defendant must prove that his attorney's representation fell below

[2] *Thompson* also noted that, while an ineffective assistance claim will not always fail on direct appeal, "in the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy *Strickland*." 9 S.W.3d 808, 814 n.6.

the standard of prevailing professional norms and that there is a reasonable probability that, but for his attorney's deficiency, the result of the trial would have been different. *Tong*, 25 S.W.3d at 712.

As a reviewing court, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Jackson*, 877 S.W.2d at 771 (quoting *Strickland*, 466 U.S. at 689). Thus, a major hurdle a defendant must overcome is the presumption that whatever alleged "error" occurred may have been part of his lawyer's trial strategy. *Ex parte Varelas*, No. 73,632, 2001 WL 76964 (Tex. Crim. App. Jan. 31, 2001) (stating "to hold trial counsel's actions or inaction ineffective in the instant case would call for speculation and such speculation is beyond the purview of this Court."); *but see Mitchell v. State*, 23 S.W.3d 582, 583–84 (Tex. App.—San Antonio 2000, pet. ref'd) (reversing conviction upon ineffective assistance claim where counsel allowed defendant to remain before jurors throughout voir dire in exact (and unusual) clothing worn by robbery suspect). To overcome this presumption, the defendant must come forward with evidence illustrating why trial counsel did what he did. *Jackson*, 877 S.W.2d at 771. Generally, however, a reviewing court, in considering a claim of ineffective assistance of counsel, should be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Thompson*, 9 S.W.3d at 813 (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)).

Appellant first claims that his trial lawyer was ineffective during the guilt/innocence phase of trial. Ten of the eighteen alleged errors are based upon his lawyer's failure to object to the admission of certain evidence—testimonial or otherwise; two concern her failure to request adverse rulings; her failure to file a motion to prevent the State from cross-examining appellant with a prior conviction and her failure to seek a mid-trial instruction to the jury that such conviction could only be used for purposes of evaluating his credibility; her elicitation of damaging evidence from a witness for the State; her

failure to make an offer of proof; her failure to request a defensive issue of involuntary conduct; and her leaving the jury with the impression appellant had a restraining order against him. Any one of these—or collectively—may have been part of reasoned trial strategy. To address but a few of appellant's claims, she may have calculated that the chance of obtaining a favorable ruling with regard to appellant's prior conviction was slim. Similarly, she may have not wanted to appear obstreperous before the jury by making numerous objections. And she may have wanted hearsay statements from various witnesses to come in for the purpose of showing inconsistencies in the witnesses' testimony. Insofar as the "impression" that may have been left with the jury that the complainant previously sought a restraining order against appellant, the question asked of the complainant was whether she "ever secured a restraining order against any other parties other than [appellant] in the last five years . . . ?" Perhaps the reason for this question was to impeach the complainant's credibility by suggesting she has a history of seeking unwarranted restraining orders. Indeed, one of appellant's complaints is that his lawyer compounded this supposed error by failing to make an offer of proof concerning other people who may have threatened or assaulted the complainant. However, we cannot speculate about counsel's possible reasons. *Ex parte Varelas*, 2001 WL 76964, at * 3–4.

Appellant next claims that his lawyer was ineffective during punishment.[3] Finally, appellant complains that his lawyer was ineffective by failing to file a motion for new trial. As we indicated in an earlier order issued in connection with appellant's motion to abate

[3] Among these claims, appellant claims counsel was ineffective for failing to request an instruction defining reasonable doubt. We note that *Geesa* has been overruled to the extent that it *required* a reasonable doubt instruction and now holds that "the better practice" is to give no definition at all. *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000); *see also Huizar v. State*, 29 S.W.3d 249 (Tex. App.—San Antonio 2000, pet. ref'd) (stating failure to include "beyond a reasonable doubt" instruction is harmless error). Appellant also complains that his lawyer failed to seek pretrial discovery of what evidence the State would seek to introduce during punishment. But as appellant notes, the purpose of this rule is to avoid unfair surprise. *Nance v. State*, 946 S.W.2d 490, 493 (Tex. App.—Fort Worth 1997, pet. ref'd). For all we know, counsel may have known—and, hence, not been surprised—at what evidence the State wanted to introduce. *Cf. Jaubert v. State*, Nos. 10-99-090-CR to 10-99-094-CR, 2000 WL 287950, at *7 (Tex. App.—Waco Oct. 31, 2000, no pet.) (stating purpose of rule is to "provide[] a mechanism for a defendant to discover what evidence the State is aware of and whether it intends to offer it to affect his punishment.").

the appeal, however, appellant's trial counsel was retained for the purpose of trial only and filed a notice of appeal solely as a courtesy.

Appellant has not brought forward any evidence explaining his counsel's actions.[4] Accordingly, he has failed to rebut the presumption that his counsel's actions were part of sound trial strategy. Appellant's points of error are overruled and the judgment of the trial court is affirmed.

Leslie Brock Yates
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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

[4] Appellant requests that we consider two affidavits he attached to his motion to abate this appeal. However, affidavits are not self-proving and cannot be considered as part of the appellate record. *Lamb v. State*, 680 S.W.2d at 13 (Tex. Crim. App. 1984). An affidavit attached to a motion is a mere pleading, not evidence in itself. *Bahlo v. State*, 707 S.W.2d 249, 251 (Tex.App.—Houston [1st Dist.] 1986, pet ref'd); s*ee also Yarborough v. State*, No. 06-00-00066-CR, (Tex. App.—Texarkana May 29, 2001, no pet. h.) (citing Rule 34.1 and stating affidavit attached to defendant's motion to abate are not part of appellate record). Accordingly, we are not at liberty to consider these affidavits.