**Reversed and Remanded and Majority and Dissenting Opinions filed September 21, 2000.**

**In The**

# Fourteenth Court of Appeals

**———————————**

**NO. 14-98-00204-CR**

**———————————**

**ALBERT JOSEPH MELANCON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

---

**On Appeal from the 179th District Court**
**Harris County, Texas**
**Trial Court Cause No. 759,642**

---

## MAJORITY OPINION

Appellant was charged by indictment with the offense of aggravated robbery. A jury convicted appellant of the charged offense and the trial court assessed punishment at ten years confinement in the Texas Department of Criminal Justice—Institutional Division. Appellant raises nine points of error. We reverse and remand.

## I. Factual Summary

### A. Trial on the Merits

#### i. The State's Case-In-Chief

The complainant lived with her father during the school year and spent the summer months with her mother. In July of 1997, the thirteen year old complainant was living with her mother in the Oak Villa Apartments in Houston. Also living in the apartment were the complaint's sisters, Tammy and Tracie, Tracie's husband, Alijua Eze, and Tammy's child, "Little Kenneth" Driver.

In the late night hours of July 28, the complainant was in the apartment with her nephew, Little Kenneth, and his father, Kenneth Driver, while Tammy, Tracie and Eze were at work. During the course of the night, Kenneth Driver left and returned to the apartment several times. Shortly after his final return, two men suddenly entered the apartment. The men had their faces covered with t-shirts pulled over their heads, exposing only their eyes. One of the men went directly to the complainant. Before being told to get on the floor, the complainant had a couple of seconds to see the man. The apartment was dimly lit in order to permit Little Kenneth to sleep.[1] The man pushed the complainant to the ground, held the knife to her throat, took her to the bathroom and closed the door. The complainant stated she had a total of six or seven seconds to get from where she was sitting at the time the men entered the apartment to the bathroom. The complainant could not see the men clearly and for some period of time the complainant could not see them at all as her face was toward the ground. The complainant identified appellant as the man with the knife; she identified appellant by his eyes and by his shoes, which were the kind she had seen appellant wear around the apartment complex.

After a while, Kenneth Driver came into the bathroom and stated the robbers had left. The complainant called her sister, Tracie, who was at work, and told her of the robbery. After

---

[1] The complainant testified the dining room light was on and the television was on but no lights were on in either the living room or the kitchen.

her sisters arrived at the apartment, the complainant told Tracie that appellant was one of the robbers. Tracie called the police, who subsequently arrived to investigate.

Tracie Johnson testified she had about $300 - $400 from her summer job hidden in a paper bag behind her bed. Around midnight, Tracie received a page from the complainant. Tracie telephoned the complainant who was in an excited and emotional state and was told of the robbery. Tracie, Tammy and Eze returned to the apartment. Several neighbors and friends were at the apartment when Tracie arrived.

Tracie spoke with the complainant before calling the police. The complainant told her she recognized appellant as the robber who put a knife to her throat. Tracie knew appellant through Kenneth Driver and from around the apartment complex. Tracie called the police, who subsequently arrived and spoke with the complainant.

At 12:43 a.m. on July 29, Officer Eric Johnson, of the Houston Police Department was dispatched to the robbery scene. Officer Johnson spoke with the complainant and Kenneth Driver. The complainant described her assailant as a black male, 5' 7" tall, weighing 190 pounds, wearing a long-sleeved black shirt, black jeans and a black ski mask. The complainant stated the assailant's first name was Albert, and gave Officer Johnson the apartment number where Albert lived in the same complex. The complainant did not mention the assailant's shoes. Kenneth Driver was unable to identify the robbers other than their being two black males. A search of the apartment for a knife or masks was fruitless. Although Officer Johnson requested a crime scene unit to process the apartment for finger prints, the request was denied. Officer Johnson did not attempt to locate appellant while at the apartment complex.

After the police left, the complainant and her sisters began cleaning the apartment and discovered one of their kitchen knives on top of the television set. The complainant identified it as the knife used in the robbery. A while later, they discovered the money saved by Tracie was missing.

Sergeant David Rieks, of the Houston Police Department, conducted the follow up

investigation. Sergeant Rieks met with the complainant two days after the robbery and showed her a photo spread containing appellant's photograph. The complainant picked appellant's picture out of the spread. Sergeant Rieks obtained a warrant and arrested appellant. While processing appellant, Sergeant Rieks noted appellant was 5' 7" tall and weighed 150 pounds.

**ii. Appellant's Case-In-Chief**

During his case-in-chief, appellant presented the defenses of alibi and misidentification which are "two sides of the same coin." *See Butler v. State*, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986). These defenses were asserted through a single witness, appellant's girl friend, Ava Germany. In July 1997, Germany was living with appellant and his mother in same apartment complex as the complainant. On July 28, 1997, Germany had a conversation with the complainant's sister, Tammy, who asked Germany to keep an eye on the complainant and Little Kenneth, while Tammy was at work. On that date at approximately 11: 00 p.m., Germany, appellant and a friend were listening to a radio in the common area of the apartment complex. This area was approximately 500 feet from the complainant's apartment. Germany testified appellant was wearing a white t-shirt. Germany left appellant to check on the complainant. The complainant stated she was fine so Germany left the complainant's apartment.

Upon leaving the apartment, Germany began speaking with a friend who was standing by a nearby dumpster in the parking lot. Ten to 15 minutes after leaving the complainant's apartment and while talking with her friend, Germany saw Kenneth Driver enter the complainant's apartment. A few minutes later, Germany saw two black males enter the complainant's apartment. Germany testified that neither of the two males were appellant. She made this determination because the males' skin color, heights and weights were different than appellant's. Germany did not see the men leave the apartment. Germany then returned to appellant and his friend, who, by this time had moved even farther away from the complainant's apartment and were joined by two others. Germany testified appellant did not appear to be excited, sweaty or to have "just done something physical."

Later, Germany learned the complainant had been robbed and both she and appellant went to the apartment. Germany went to console complainant and stayed with her approximately 50 minutes until her sisters arrived. At one point in time, Germany and the complainant left the apartment. During this time, the complainant did not tell Germany that appellant had been involved in the robbery.

Following the robbery, Germany did not see appellant with an amount of money consistent with that taken in the robbery. Further, Germany testified that appellant's financial situation did not change after the robbery.

After deliberating for several hours, the jury indicated they were deadlocked and could not reach a verdict.[2] However, the trial court ordered the jury to continue deliberating. As a result of the continued deliberations, the jury found appellant guilty of aggravated robbery.

**B. The Motion for New Trial Hearing**

Following appellant's conviction, trial counsel was relieved of any further duty to appellant and other counsel was appointed to prosecute this appeal. Trial counsel contacted appellate counsel and notified her of a possible claim of ineffective assistance of counsel at the trial. In this connection, trial counsel forthrightly stated: "[I]f I drop the ball, you know, that I got to stand up and accept it. ... I think it's the right way to handle it, rather than to hide and not confront it." Appellate counsel filed a motion for new trial, supported by several affidavits and the trial court conducted an evidentiary hearing where the following testimony was developed.

Trial counsel wrote appellate counsel of a witness, Rita Hearn, who could have testified on behalf of appellant. Trial counsel spoke to Hearn on two different occasions; the latter was the weekend before trial. Because Hearn could corroborate the testimony of Germany, trial counsel wanted Hearn to be a witness and Hearn indicated a willingness to testify. Trial

[2] According to trial counsel, the trial took four hours and fifty minutes. Yet the jury deliberated for a longer period of time.

counsel testified corroboration was especially important because of Germany's close relationship with appellant. Trial counsel considered Hearn an important witness for the defense.

Trial counsel made arrangements for Hearn, Germany and appellant's mother to meet trial counsel at a certain location and then the four would proceed to trial. When Hearn did not appear at the appointed location, trial counsel was told Hearn was working at a Jack In The Box restaurant. Trial counsel testified that he did not make any attempt to secure Hearn's presence as a witness. When asked why he had not made any such attempt, trial counsel answered: "I don't know."

At the conclusion of the hearing, the court denied appellant's motion for new trial.

**II.**

The first point of error contends trial counsel was ineffective for failing to subpoena an available witness, Rita Hearn, to corroborate the alibi/misidentification defense presented through appellant's girl friend, Ava Germany.

**A. Standard of Appellate Review**

The right to the effective assistance of counsel is guaranteed to criminal defendants by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Texas Constitution. The standard established in *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 2062-2063 (1984), is utilized when reviewing ineffective assistance of counsel claims under either the United States or the Texas constitutions. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The Supreme Court in *Strickland* outlined a two-step analysis. First, the reviewing court must decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below this standard, the reviewing court must decide whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability

sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Absent both showings, an appellate court cannot conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* at 687. *See also Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991).

The defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998); *Riascos v. State*, 792 S.W.2d 754, 758 (Tex. App.—Houston [14th Dist] 1990, pet. ref'd). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded and affirmatively demonstrated in the appellate record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997); *Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.—San Antonio 1991, pet. ref'd). When handed the task of determining the validity of a defendant's claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).

Generally, the trial record will not be sufficient to establish an ineffective assistance of counsel claim. *See Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). This is true because normally a silent record cannot rebut the presumption that counsel's performance was the result of sound or reasonable trial strategy. *See Strickland*, 466 U.S. at 688, 104 S.Ct. at 2052; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). However, a defendant may rebut the presumption by providing a record from which the appellate court may determine that trial counsel's conduct was not based upon a strategic or tactical decision. *See Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex. Crim. App. 1994); *Bohnet v. State*, 938 S.W.2d 532, 536 (Tex. App.—Austin 1997, pet. ref'd). This record may be provided *via* a motion for new trial hearing.

Normally, the appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. *See Ex Parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App.1991). While appellate courts have been hesitant to designate any error as per se ineffective assistance of counsel as a matter of law, it is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance. *See Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985) (failure of trial counsel to advise appellant that judge should assess punishment amounted to ineffective assistance of counsel); *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991) (failure to challenge a void prior conviction used to enhance punishment range rendered counsel ineffective); *Ex parte Welch*, 981 S.W.2d 183 (Tex. Crim. App. 1998) (counsel ineffective for failing to file motion for probation); *Menchaca*, 854 S.W.2d at 131 (counsel ineffective in failing to object to inadmissible prior conviction); *Ex parte Zepeda*, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991) (counsel ineffective for failing to request accomplice-witness instruction in case based entirely on accomplice witness testimony); *Ex parte Canedo*, 818 S.W.2d 814, 815 (Tex. Crim. App. 1991) (counsel's mistaken belief regarding shock probation eligibility lead defendant to choose sentencing by trial court); *Jackson v. State*, 766 S.W.2d 504, 510 (Tex. Crim. App. 1985) (trial counsel did not advise defendant about the consequences of electing jury to assess punishment on retrial); *May v. State*, 722 S.W.2d 699 (Tex. Crim. App. 1984) (failure to submit sworn application for probation); *Ex parte Scott*, 581 S.W.2d 181, 182 (Tex. Crim. App. 1979) (trial counsel did not investigate circumstances of convictions used for enhancement); *Howard v. State*, 972 S.W.2d 121, 129 (Tex. App.—Austin 1998, no pet.) (failure to request accomplice witness instruction); *Valencia v. State*, 966 S.W.2d 188, 190 - 191 (Tex. App.—Houston [1st Dist] 1998, pet. ref'd) (failure to object to improper argument); *Oliva v. State*, 942 S.W.2d 727, 734-35 (Tex. App.—Houston [14th Dist.] 1997), *pet. dism'd* 991 S.W.2d 803 (Tex. Crim. App. 1998); *Durst v. State*, 900 S.W.2d 134, 142 (Tex. App.—Beaumont 1995, pet. ref'd) (trial counsel impeached own punishment witness with inadmissible unadjudicated conduct).

*See also Nero v. Blackburn,* 597 F.2d 991, 994 (5th Cir.1979) ("Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard."). This position finds support in opinions of the United States Supreme Court, which has also held that a single error can sufficiently demonstrate ineffective assistance of counsel. *See Murray v. Carrier,* 477 U.S. 478, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657 (1984).

As noted above, appellant contends trial counsel was ineffective for failing to subpoena Rita Hearn to corroborate testimony by Ava Germany establishing appellant's alibi/misidentification defense. We must first decide whether counsel rendered deficient performance by failing to secure Hearn's presence at trial. If we so find, we must then decide whether the absence of Hearn's testimony is sufficient to undermine our confidence in the outcome of the trial.

## III. The First Prong of *Strickland*

### A. Deficient Performance

Counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *See Butler,* 716 S.W.2d at 54 citing *Ex parte Ewing,* 570 S.W.2d 941, 947 (Tex. Crim. App. 1978), and quoting *Ex parte Lilly,* 656 S.W.2d 490 (Tex. Crim. App. 1983); *Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App. 1979); *State v. Thomas,* 768 S.W.2d 335, 336-37 (Tex. App.—Houston. [14th Dist.] 1989, no pet.)("[D]efense counsel has a responsibility to seek out and interview potential witnesses[.]"); *Nealy v. Cabana,* 764 F.2d 1173, 1177 (citing *Bell v. Watkins,* 692 F.2d 999, 1009 (5th Cir. 1982), and *Rummel v. Estelle,* 590 F.2d 103, 104 (5th Cir. 1979)). The obvious corollary to that rule is that once counsel has investigated the facts and developed a defensive theory, counsel has the obligation to present sufficient available evidence in support of that defensive theory. *See Butler,* 716 S.W.2d at 48*; Shelton v. State,* 841 S.W.2d 526, 527 (Tex. App.—Fort Worth 1992, no pet.); *Everage v. State,* 893 S.W.2d 219 (Tex. App.—Houston

[1st Dist.] 1995, pet. ref'd); *Thomas*, 768 S.W.2d at 336-37 ("An attorney has a professional duty to present all available testimony and other evidence to support the defense of his client.").

Consequently, counsel has the obligation to exercise due diligence in securing the testimony of prospective witnesses through the issuance of a subpoena. *See Drew v. State*, 743 S.W.2d 207, 228 n.17 (Tex. Crim. App. 1987)(citing Tex.Jur.3d, Vol. 25, Criminal Law, § 3490, pp. 370-371). This duty arises even when the witness promises to attend. See *Drew*, 743 S.W.2d at 228 n.17 ("It is no excuse for the failure to issue a subpoena that the defendant relied on the witness' promise to attend."). Recently this court recognized:

> Because a missing witness is a risk inherent in almost every case, the party seeking to present the witness must exercise reasonable diligence to protect against the possibility that a witness will not appear as promised. Taking appropriate measures (i.e., arranging for the timely issuance and service of a subpoena to compel the witness's appearance at trial) is especially critical when the witness is material to the case. *Failure to take the necessary steps to secure attendance of a key witness demonstrates a lack of reasonable diligence.* Here, appellant argues he was entitled to a continuance notwithstanding his failure to arrange for the issuance of a subpoena for the missing witness because she had appeared voluntarily on prior occasions and had assured him she would be available for trial. While the witness may have led appellant to believe that a subpoena was unnecessary to secure her attendance, appellant must be held ultimately responsible for his failure to seek compulsory process for a witness as important to his case as [], even if she had proved reliable and cooperative in the past.

*See Rodriguez v. State*, ___ S.W.3d ___ No. 14-97-01292-CR; (Tex. App.—Houston [14th Dist.] delivered May 11, 2000, opinion on rehearing, 2000 WL 730229) (emphasis added).

In *Butler*, 716 S.W.2d 48, the defendant was charged with aggravated robbery. His identification rested on the testimony of a single eyewitness. He presented the defenses of alibi and misidentification. Although defense counsel called one witness to advance this defensive theory, counsel failed to call other witnesses who could have cast doubt on the complainant's identification and establish an alibi. The Court of Criminal Appeals found that

both prongs of *Strickland* had been met and reversed the conviction.

In *Shelton*, 841 S.W.2d 526, the defendant was charged with sexual assault of a child. His initial conviction was reversed and he was tried a second time. At re-trial, the defendant's attorney failed to call as an alibi witness the defendant's great-niece, who had testified at the first trial, and whose testimony would have directly contradicted the complainant. *Ibid*. It was established the niece would have been available to testify in the second trial, but the defense attorney never contacted her. *Id*. at 527. In strong language, the Fort Worth Court of Appeals held counsel was ineffective and reversed the conviction:

> When counsel neglected to present available testimony in support of Shelton's alibi defense, he failed in his professional duty to his client. *See Ex parte Ybarra*, 629 S.W.2d 943, 948 (Tex. Crim. App. 1982). The attorney's failure to advance the one defense apparently available to Shelton clearly made his assistance ineffective, if not incompetent. *See Ex parte Duffy*, 607 S.W.2d 507, 517 (Tex. Crim. App. 1980).

*Ibid*.

Similarly, in *Everage*, 893 S.W.2d 219, a prosecution for felony theft, the complainant testified at trial that Everage, accompanied by another individual, Marcus Jenkins, filled out a credit application in the name of a third person, and then purchased a television in the name of the third person. *Id*. at 220. After the State rested its case, Everage's counsel requested a recess in order to call his witnesses to court after he had instructed them to leave due to his mistaken belief that the State would take longer with its case and the witnesses would not be necessary until the next day. *Id*. at 221. The witnesses included Jenkins and Kimberly Mayfield, a friend who allegedly saw Jenkins sign the credit application. The trial court denied the requested recess and ordered counsel to call witnesses. When counsel stated, "We don't have any witnesses," the trial court noted, "Both sides rest." *Id*. at 221. At the punishment stage, Mayfield subsequently testified that she accompanied Everage to the Circuit City where they met Jenkins who was already at the store. While in the store, Mayfield observed Jenkins, not Everage, fill out the credit application and did not see him sign the name of the third party. *Id*. at 222.

The First Court of Appeals held counsel was ineffective for failing to assure Mayfield's presence at the guilt phase of trial. The court found Mayfield's testimony would have tended to show that Jenkins, rather than Everage, was guilty of theft. Further, Mayfield's testimony would have corroborated testimony by the complainant in a pretrial hearing which indicated that Jenkins, rather than Everge, was the primary actor. The court stated:

> Because counsel failed to call witnesses, the jury did not hear Mayfield's testimony that Jenkins alone committed the theft. Because counsel failed to obtain pretrial testimony or rebuttal witnesses, the jury did not hear [the complainant's] prior testimony that Jenkins alone committed the theft. If they had heard this testimony, the jury may have acquitted appellant, under either theory of guilt. In fact, with no evidence that appellant knew of Jenkins' actions, he would have been entitled to acquittal as a matter of law.

*Id*. at 224.

This court has also been called upon to deal with this issue. In *Thomas*, 768 S.W.2d 335, this court held the trial court did not err in granting a motion for new trial based on ineffective assistance of counsel where the record showed the defensive theory was not fully advanced due to trial counsel's failure to interview and call certain witnesses. *Id.* at 337.

At the hearing on appellant's motion for new trial, appellant's trial attorney testified that he was aware of Hearn and had spoken with her on at least two occasions prior to trial, the last time being the weekend before trial. Counsel stated Hearn's testimony would have benefitted appellant because it would have corroborated Ava Germany's testimony in support of appellant's alibi/misidentification defense.[3] Although Hearn agreed to be a witness, trial counsel did not issue a subpoena for her. Trial counsel made arrangements for Hearn,

---

[3] The dissent argues the record is not sufficient to establish the nature of Hearn's testimony. We disagree. Trial counsel testified without objection and related the substance of his interviews with Hearn and what he expected her testimony would have been had she testified at trial. Further, counsel testified Hearn's testimony would have aided in establishing appellant's alibi/misidentification defense. All of this testimony was received without objection and shall not be denied probative value. *See* Tex. R. Evid. 802. Moreover, any degree of corroborative testimony would have been important because, as discussed in part IV, *infra*, said testimony would have served the dual purpose of establishing appellant's misidentification/alibi defense and supporting Germany's credibility which was suspect because of her relationship with appellant.

Germany and appellant's mother to meet trial counsel at a certain location and then the four would proceed to trial. When Hearn did not appear at the appointed time, Germany and appellant's mother informed counsel that Hearn was working at a Jack In The Box restaurant. However, counsel did not inform the trial court of Hearn's nonappearance, request a continuance, or issue a subpoena to secure her presence. Therefore, we find the record establishes a lack of reasonable diligence on the part of trial counsel to take the necessary steps to secure the attendance of Hearn.

Under the first prong of *Strickland*, the remaining question is whether this lack of diligence was the result of a strategic or tactical decision on the part of trial counsel.

**ii. Strategic Decision**

An attorney's strategic decision in failing to call a witness will be reversed only if there was no plausible basis for failing to call the witness to the stand. *See Valesquez v. State*, 941 S.W.2d 303, 310 (Tex. App.—Corpus Christi 1997, pet. ref'd)(citing *Brown v. State*, 866 S.W.2d675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd)). Further, the failure to call a witness may support an ineffective assistance of counsel claim only if it is shown the witness was available and the defendant would have benefitted from the testimony. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App.1983).

Hearn was one of two witnesses who could have supported appellant's misidentification/alibi defense. Additionally, because Hearn was a disinterested witness, her testimony would have had the further importance of corroborating the testimony of Germany who was obviously subject to impeachment as a result of her relationship with appellant. Although he was clearly aware of the importance of Hearn's testimony, counsel failed to subpoena Hearn. And when counsel learned on the day of her proposed testimony that Hearn had failed to appear, despite her importance as a witness, counsel made no attempt to secure

Hearn's presence at trial.[4] The record demonstrates that the failure to secure Hearn's presence was not part of a calculated strategy or tactical decision to not present Hearn's testimony. *See Butler*, 716 S.W.2d at 56. To the contrary, when questioned why he did not make any efforts to secure Hearn's presence after learning of her non-appearance, counsel forthrightly stated: "I don't know." In sum, there was no plausible basis for failing to call Hearn as a witness.[5] Therefore, we find the strong presumption that counsel's performance was the result of sound or reasonable trial strategy is rebutted by the record.

The evidence is uncontradicted that Hearn was both available and that her testimony would have benefitted appellant. Moreover, the record is clear that counsel did not make a strategic or tactical decision not to present Hearn's testimony. Accordingly, we hold trial counsel's failure to secure Hearn's presence at trial and consequent failure to present her testimony in support of appellant's misidentification/alibi defense fell below objective standards of professional conduct. *See Butler,* 716 S.W.2d at 48; *Shelton,* 841 S.W.2d 526; *Everage,* 891 S.W.2d at 219; and *Thomas,* 768 S.W.2d at 335. The first prong of *Strickland* has been established.[6]

## IV. The Second Prong of *Strickland*

The Supreme Court has explained that the "reasonable probability"standard under the

---

[4] Counsel could have sought a recess or requested a continuance. *See* TEX. CODE CRIM. PROC. ANN. arts. 29.03, 29.06 & 29.13. Our research reveals that under the circumstances, it would have been an abuse of discretion for the trial court to have refused a motion for continuance. *See Foster v. State*, 497 S.W.2d 291, 292 - 293 (Tex. Crim. App. 1973) (trial court abused discretion in denying motion for continuance where counsel first located material witness on Saturday prior to trial).

[5] The dissent's argument that the decision not to subpoena Hearn could have resulted from a strategic desire to avoid disclosing Hearn's identity to the prosecution, post at ____, is puzzling because there is no support in the record for this argument. Instead, trial counsel's testimony conclusively establishes there was no strategy whatsoever in not securing Hearn's presence.

[6] We need not determine whether this was an isolated error or one that affected the totality of counsel's representation. However, we believe it was the latter because Hearn's testimony would have served the dual purpose of supporting appellant's misidentification/alibi defense and corroborating testimony by appellant's girlfriend, Germany.

second prong is not an "outcome-determinative" test: that is, a defendant need not show that it is more probable than not that the jury would have arrived at a different verdict had the errors not occurred. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2068; and, *Snow v. State*, 697 S.W.2d 663, 668 (Tex. App.—Houston [1st Dist]. 1985) pet. dism'd 794 S.W.2d 371 (Tex. Crim. App. 1987) ("A probability may be reasonable even though it does not constitute a preponderance of the evidence."). *See also*, *Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990)("reasonable probability" standard is lower than "preponderance of evidence" standard); and, *Nealy v. Cabana*, 764 F.2d 1173, 1178 - 1179 (5th Cir. 1985)(The [Supreme] Court found [the] "outcome determinative" standard was too heavy a burden on defendants and that its use was not appropriate. Instead, "the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt."). Thus, a "reasonable probability" is merely one that is sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Accordingly, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Butler*, 716 S.W.2d at 54. *See also Lockhart v. Fretwell*. 506 U.S. 364, 369, 113 S.Ct. 838, 842 (1993); *Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999)(Second part of the *Strickland* test "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.")(quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.). While advising that the harm prong of *Strickland* is not an outcome determinative test, the Supreme Court nevertheless observed that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. 696, 104 S.Ct. at 2069.

The State's case rested upon the soundness of the complainant's identification of appellant. An objective review of the complainant's testimony raises serious questions about that identification. The complainant, thirteen years of age, had seen appellant around the

apartment complex on approximately six occasions, but had never spoken with him. According to the complainant, when the two robbers suddenly burst into the apartment, their faces were covered with t-shirts pulled over their heads, exposing only their eyes. The complainant had only a couple of seconds to see the robber before being pushed to the ground and dragged to the bathroom. The lighting in the apartment was dim, consisting only of one dining room light and light from the television set. *See* n. 1, *supra*. Kenneth Driver, who was also present at the time of the robbery, was unable to identify the robbers other than their being two black males.

Appellant's alibi/misidentification defense was presented solely through his girlfriend who testified that shortly before the offense, she, appellant, and another friend were talking outside in the common area, approximately 500 feet from the complainant's apartment. Appellant was wearing a white t-shirt that evening. Shortly before the offense, Germany went to the complainant's apartment to check up on her, and after determining that she was fine, went to speak with a friend standing by a trash dumpster in the parking lot. Germany had a view of the apartment from her location, and while speaking with her friend, she observed two black males enter the complainant's apartment. Germany testified that neither individual was appellant. Germany then returned to where she and appellant had previously been standing, but discovered appellant and his friend had moved farther away from the complainant's apartment and were speaking with two other people. Nothing appeared out of the ordinary. Germany later learned of the robbery and both she and appellant went to see what had occurred.

On cross-examination, the State sought to establish Germany's bias in favor of the defendant, and that she was incorrect regarding the date on which she was providing an alibi for appellant. The State questioned Germany whether the robbery occurred on July 28th or 29th, attempting to portray the events to which Germany testified as having happened on a day other than the day of the robbery. During its closing argument, the State attacked Germany's credibility resulting from her relationship with appellant and the accuracy of her memory of

the date on which she was with appellant.[7]

Following this argument, the jury deliberated for several hours and even indicated that it was hopelessly deadlocked before being ordered to continue deliberating and ultimately reaching its verdict. *See* n. 2, *supra*.

The harm from failing to present corroboration evidence to the sole witness establishing appellant's misidentification/alibi defense is self evident. Germany's testimony was irreconcilable with the complainant's testimony. Therefore, in order to convict appellant, the jury necessarily had to disbelieve Germany. Thus, the instant case boiled down to a classic "swearing match" between the complainant and Germany. Counsel's failure to secure testimony from a neutral witness resulted in the jury being forced to weigh the credibility of the complainant against Germany who was arguably biased in favor of appellant. Corroborative testimony from a disinterested witness would have had the two-fold effect of independently establishing appellant's misidentification/alibi defense, as well as supporting Germany's credibility.

Accordingly, we hold trial counsel's deficient performance in failing to secure Hearn's presence at trial and the failure to present her testimony in support of appellant's misidentification/alibi defense is sufficient to undermine our confidence in the verdict which is weakly supported by the record. The second prong of *Strickland* has been established.

## V. Conclusion

Having found the first point of error's allegation of ineffective assistance of counsel is firmly founded and affirmatively demonstrated in the appellate record and that appellant has

---

[7] On appeal, the State contends this argument "neutralized any probative value Germany's alibi testimony could have had by establishing that what Germany witnessed did not even occur the evening of the robbery." It is clear that the complainant was robbed only once. It is equally clear the robbery occurred on the night Germany saw two men enter the complainant's apartment and subsequently went to console the complainant following that lone robbery. Therefore, the State's contention that its closing argument neutralized any probative value of Germany's testimony actually bolsters the proposition that Germany's testimony needed the corroboration which Hearn could have provided.

proven this allegation by a preponderance of the evidence, we sustain the first point of error.

The judgment of the trial court is reversed and remanded.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed September 21, 2000.

Panel consists of Justices Amidei, Edelman, and Baird.[8]

Publish — TEX. R. APP. P. 47.3(b).

[8] Former Judge Charles F. Baird sitting by assignment.

**Reversed and Remanded Majority and Dissenting Opinions filed September 21, 2000.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-98-00204-CR**

**ALBERT JOSEPH MELANCON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 179th District Court**
**Harris County, Texas**
**Trial Court Cause No. 759,642**

## D I S S E N T I N G  O P I N I O N

The majority opinion reverses appellant's conviction due to the ineffective assistance of his trial counsel in failing to subpoena Hearn to testify on appellant's behalf at trial. I disagree for two reasons. First, counsel's decision not to subpoena Hearn could have been based on a plausible trial strategy to avoid disclosing Hearn's identity to the prosecution in the hope that the prosecution would remain unaware of her and thus be unprepared to effectively cross-examine or rebut her testimony at trial.[1] Like many trial strategies, this is a calculated

[1] Indeed, in some instances, a particular witness's testimony might *only* be beneficial to the defense where the prosecution has had no opportunity to prepare a cross-examination or rebuttal. As the sole judge of the weight and credibility of the evidence, the trial court was within its discretion to

risk that will not always prove successful. However, taking risks is inherent in trying cases, and particularly in doing so effectively, and the element of risk does not render a plausible trial strategy ineffective assistance of counsel in the instances in which it happens to prove unsuccessful.

Secondly, as evidence to support its reversal, the majority opinion relies on testimony from appellant's trial counsel at the hearing on the motion for new trial. The majority opinion does not indicate that Hearn testified at that hearing,[2] or specify how, even according to appellant's trial counsel, Hearn was involved in the underlying facts or what testimony counsel expected Hearn to give. Without such rudimentary information, no basis exists to conclude that Hearn's testimony would have corroborated the alibi/misidentification testimony of appellant's girlfriend or had any other beneficial effect.

Moreover, even if such information had been provided by appellant's trial counsel, I do not believe that the hearsay impressions of a lawyer can establish what an absent witness would have really testified if placed under oath and subjected to cross-examination. Therefore, without the actual testimony of Hearn at the hearing on appellant's motion for new trial, I would not reverse the conviction for ineffective assistance of trial counsel in failing to subpoena Hearn to testify at trial.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 21, 2000.

Panel consists of Justices Amidei, Edelman, and Baird.[3]

Publish — TEX. R. APP. P. 47.3(b).

---

disbelieve the testimony of trial counsel that he didn't know why he failed to subpoena Hearn.

[2] Somehow, Hearn was so important a witness that the failure to subpoena her at trial was ineffective assistance, but was not so important a witness as to warrant issuing a subpoena for her to testify at the hearing on the motion for new trial.

[3] Former Judge Charles F. Baird sitting by assignment.