Affirmed and Majority Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-00223-CR

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BRIAN STEVEN PREJEAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 731,613

M A J O R I T Y O P I N I O N

Appellant, Brian Steven Prejean, was found guilty of aggravated assault and sentenced to ten years' confinement in the Texas Department of Criminal Justice, Institutional Division. He presents one point of error on appeal, complaining of ineffective assistance of counsel during the guilt-innocence phase. We affirm.

Appellant's complaint concerns his counsel's failure to object to statements made by the trial court during guilt-innocence jury deliberations, and discussion of the underlying facts of the offense is not necessary. Suffice it to say, appellant was accused of pointing a gun at the complainant and threatening to shoot him over an incident regarding rottweiler dogs.

Immediately before and shortly after the jury retired to deliberate during the guilt-innocence phase of trial, the jury foreman and the trial judge exchanged written and in-court oral communications, the effect of which informed the jury that it was being sequestered overnight as appellant opposed separation of the jury. The jury reconvened at 9:00 a.m. the next morning and returned a verdict of guilty less than thirty minutes later. On appeal, appellant raises ineffective assistance of counsel based on his attorney's failure to object to the court informing the jury that it was being sequestered at appellant's request. This, argues appellant, was prejudicial and denied him a fair trial. Appellant correctly states that under TEX. CODE CRIM. PROC. ANN. Art. 35.23, "Any person who makes known to the jury which party made the motion not to allow separation of the jury shall be punished for contempt of court." Although the trial court's comments may have been improper under this provision, we must determine whether trial counsel's failure to object constituted ineffective assistance of counsel requiring reversal of the conviction.

To determine if an appellant has received ineffective assistance of counsel in the guilt/innocence phase of his trial, we apply the two-pronged test set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). *See Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App.1986). Under this test, an appellant must show (1) that his trial counsel's performance was so deficient that counsel made such serious errors that he was not functioning effectively as counsel; and (2) that the deficient performance prejudiced the defense to such a degree that appellant was deprived of a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. We entertain a strong presumption that the trial attorney rendered adequate assistance and exercised reasonable professional judgment. *Id*. at 689, 104 S.Ct. at 2065. An appellant will succeed in a claim of ineffective assistance of counsel when he or she can demonstrate a "reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id*. Rather than point out isolated attorney errors, a reviewing court must consider the totality of the representation to determine if counsel was ineffective. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App.1983). As recently emphasized by the Texas Court of Criminal Appeals, it is essential that harm or prejudice caused by trial counsel's conduct or omission be firmly grounded in the record; harm or prejudice cannot be presumed under circumstances such as those raised here. *Mitchell v. State*, 989 S.W.2d 747, 748 (Tex. Crim. App. 1999).

Under the limited circumstances of this case, and given the overwhelming evidence of appellant's guilt, we do not believe that this omission, isolated in a record of generally competent representation, amounts to ineffective assistance of counsel. The error meets neither prong of the *Strickland* test: it neither demonstrates errors so egregious that they amounted to ineffective representation nor supports a reasonable probability that, but for this error, a different outcome might have been achieved. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Nothing in the record substantiates appellant's argument that the jury was prejudiced against him because of the sequestration. No evidence of harm was produced through a motion for new trial by witnesses or affidavits of any juror regarding harm or prejudice due to the court's comments. We are not required to rely on appellant's unsupported, subjective allegations of harm, nor is harm shown by the trial court's complained-of conduct itself. *See Mitchell v. State*, 989 S.W.2d at 748-49. There was sufficient relevant, competent evidence to support the jury's finding. *See Ybarra v. State*, 890 S.W.2d 98, 113-14 (Tex. App.– San Antonio 1994, pet. ref'd).

Moreover, the record is silent as to whether the failure to object was trial strategy on the part of appellant's trial counsel; counsel may have reasonably wanted to keep that particular jury for the punishment phase, or may not have wanted to risk a new trial. In any absence of any evidence to the contrary we must indulge a strong presumption that trial counsel's conduct falls within the presumption that the challenged conduct can be considered sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant's point of error is overruled.

Appellant has failed to meet his burden of proving ineffectiveness of trial counsel, and the judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Sears, Cannon and Hutson-Dunn (Justice Sears's dissenting opinion to follow).
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Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon and Camille Hutson-Dunn sitting by assignment.