Affirmed and Opinion filed June 15, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01137-CR

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DAYNA LEIGH DEMENY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 748,565

O P I N I O N

A jury convicted Dayna Leigh Demeny of theft over $20,000 and sentenced her to ten years, probated, and fined her $10,000. In three points of error appellant contends the trial court erred in not granting her motions for new trial based on jury misconduct and ineffective assistance of counsel. We affirm.

The granting or denying of a motion for new trial lies within the discretion of the trial court. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995); *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex.Crim.App.1993). We do not substitute our judgment for that of the trial court,

but rather decide whether the trial court's decision was arbitrary or unreasonable. *Gonzalez*, 855 S.W.2d at 695 n. 4.

Appellant first contends the trial court erred by not granting her motion for new trial based on jury misconduct. Appellant's problem lies in the fact that the motion for new trial hearing was not recorded. The docket sheet reflects that a motion for new trial hearing was held, but that appellant waived her option to have a court reporter record the proceedings. Therefore, the only evidence before us on this matter is the affidavit of James Richard Davis[1] in which he related his conversation with one of the jurors. We do not know if this affidavit was "presented" at the motion for new trial hearing, whether the State objected to its introduction, or whether the trial court considered it at all.

We find that appellant has failed to preserve error. Appellant must show that the trial court's action in denying her motion for new trial was arbitrary or unreasonable. If the only evidence before the trial court was the aforementioned affidavit, the trial court's action in overruling appellant's motion for new trial was not arbitrary or unreasonable. And because the actual hearing was not recorded, there is no other competent evidence in this record. Appellant's first and second points of error are overruled.

In her third point of error appellant contends the trial court erred in not granting a new trial based on a showing of ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court held that in order to show ineffective assistance of counsel, a convicted defendant must (1) show that his trial counsel's performance was deficient, in that counsel made such serious errors he was not functioning effectively as counsel; and (2) show that the deficient performance prejudiced the defense to such a degree that the defendant was deprived of a fair trial. In this connection, a strong presumption exists that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. at 689, 104

[1] Davis is not further identified in our record. He did not make any trial appearances on behalf of appellant.

S.Ct. at 2065. "Prejudice," however, is demonstrated when the convicted defendant shows "a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id*. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. *Id*.; *Ex parte Guzmon*, 730 S.W.2d 724, 733 (Tex.Crim.App.1987). Furthermore, complaints pertaining to ineffective assistance of counsel must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 812-813 (Tex. Crim. App. 1999).

Once again, the only evidence that supports appellant's contention is the aforementioned affidavit, in which the affiant states that one juror overheard trial counsel telling appellant to "shut up." Because we believe this complaint is neither firmly founded in the record nor sufficient to overcome the presumption in favor of adequate assistance, we overrule appellant's third 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.