Affirmed and Opinion filed September 30, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-00570-CR

———————————

ROBERT GEORGE SWAIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 97-10853

O P I N I O N

Appellant Robert George Swain appeals his conviction by a jury for the misdemeanor offense of operating a sexually oriented business in violation of Section 28-122(a), Houston City Ordinance. The jury assessed appellant punishment of 180 days in jail and a $4,000.00 fine. Appellant brings two points of error: (1) he was denied effective assistance of counsel at trial; (2) the trial court failed to obtain subject-matter jurisdiction by taking judicial notice of the ordinance under which he was convicted. We affirm.

Ineffective Assistance of Counsel

In issue one, appellant contends his trial counsel (1) failed to properly object to law enforcement officers' hearsay testimony and testimony regarding extraneous offenses and extrinsic acts alleged to have occurred in or near appellant's club; (2) failed to request a limiting instruction and a beyond a reasonable doubt instruction regarding the extrinsic acts; and (3) "practically conceded guilt" at closing argument by stating appellant knew what was going on at the club.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992), *cert. denied,* 113 S.Ct. 3062 (1993).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670.

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *Jackson v. State,* 877 S.W.2d 768, 771 (Tex.Crim.App.1994)(en banc). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id*. In *Jackson*, the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course

he did. *Id.* at 772. *See also Jackson v. State,* 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

Appellant did not file a motion for a new trial, and therefore failed to develop evidence of trial counsel's strategy. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial).

Here, the record is silent as to the reasons appellant's trial counsel chose the course he did.

The record, however, does indicate trial counsel was an experienced lawyer and that based on the totality of his representation, his assistance was effective. He conducted a thorough voir dire, cross-examined State's witnesses, made plausible objections to their testimony, and put on his own witnesses. The record also indicates he made objections to testimony on the basis of extraneous offenses and hearsay but was overruled, making it plausible that his strategy was not to object to matters that would likely be overruled again and would draw even greater attention to the damaging testimony. *Hardin v. State*, 951 S.W.2d 208, 212 (Tex. App.–Houston [14th Dist.] 1997, no pet.). Much of the alleged hearsay, extraneous offenses, or extrinsic acts testimony appellant contends trial counsel should have objected to was within the trial judge's broad discretion to admit as background testimony or for other permissible purposes.

Appellant also contends that trial counsel's statement at closing argument practically conceded his guilt by stating:

> I would not insult you [sic] intelligence to say Mr. Swain might not have known what was going on there. But it goes to the observer to say that he was operating it, that he was somebody's boss. Nobody ever said he was somebody's boss.

The State had put on strong evidence appellant did indeed know what was going on at the club but it still bore the burden to prove that appellant was its operator. As such, it could easily be concluded defense

counsel's strategy was to launch a gambit by being open and honest with the jury about this in hopes they would be disarmed and more likely to find for his client on the necessary and more difficult element of whether he actually operated the club.

The first prong of *Strickland* has not been met. *Jackson*, 973 S.W.2d at 957. Due to the lack of evidence in the record concerning trial counsel's reasons for these alleged acts of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. *Id.*

Even if this record rebutted the *Strickland* presumption of sound trial strategy, appellant has not demonstrated that trial counsel's performance prejudiced the defense. There was more than sufficient admissible evidence to establish each element of the crime beyond a reasonable doubt. Thus, appellant has not shown a reasonable probability that but for counsel's alleged unprofessional performance, the result of the proceeding would have been different. *Strickland*, 104 S.Ct. at 2064. Therefore, appellant has not met the second prong of the *Strickland* test. *Id.*

Because appellant produced no evidence concerning trial counsel's reasons for choosing the course he did, nor did he demonstrate prejudice to his defense, we overrule appellant's contention in point of error one that his trial counsel was ineffective.

Subject Matter Jurisdiction

Appellant contends the trial court did not acquire subject matter jurisdiction because the State failed to show proof of the ordinance and that the punishment sought is permitted by the ordinance, nor did the trial court take judicial notice of it.

None of these acts were required to vest the trial court with subject matter jurisdiction. Rather, jurisdiction is provided for by statute. Point of error two is overruled. The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed September 30, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

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