Affirmed and Majority and Concurring Opinions filed November 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00896-CR

DANNY LANCE JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 98CR1530

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

Appellant, Danny Lance Jones, was charged by indictment with aggravated robbery. A jury found appellant guilty and entered an affirmative finding that appellant used or exhibited a deadly weapon. Appellant entered a plea of true to an enhancement allegation of a prior felony conviction and the jury assessed punishment at thirty years in the Texas Department of Criminal Justice, Institutional Division. On appeal, appellant asserts his trial counsel rendered ineffective assistance in violation of the United States and Texas Constitutions, and the trial court erred in overruling an objection to prosecutorial argument based on facts not in evidence. We affirm.

I. Factual Background

Appellant and three other armed men kicked in the door to the Bedard apartment. Ronald, Shane, Ryan, Elizabeth, who was visibly pregnant, and her two-year old daughter, Arial, were inside the apartment. Once the men gained access into the apartment, they told everyone to get on the ground and duct-taped their hands together. Some of the men ransacked the apartment, while the others beat up two members of the Bedard family. Elizabeth identified appellant as the one who grabbed her and pushed her into the Christmas tree while she was holding Arial in an attempt to shield her. In response to Arial's crying, appellant pointed a gun to her head and said: "Let's just end it now." One of the men told appellant to put his gun up because they were just going to get bags and put them over the victims' heads and slit their throats instead. After the Bedard's gave the men all the money and jewelry they had, the men demanded more and kept asking about a safe. Ronald told them he did not have anything else to give them, but he knew where they could find a safe.

While holding a gun to Arial's head, appellant and one other man led Elizabeth and Arial to Danny Norris' apartment, where Ronald said they could find a safe. Appellant instructed Elizabeth to knock on the door. Unaware that appellant was with them, Danny opened the door to let Elizabeth and Arial in. Once inside, appellant took jewelry from Danny and his girlfriend, Christy Dobson, who was also in the apartment. Christy, like Elizabeth, was visibly pregnant. A few minutes later, one of the other men appeared and told appellant that the police were on their way.

The offense for which appellant was tried and which is at issue in this appeal is the aggravated robbery of Danny Norris' apartment, not the Bedard apartment.

II. Ineffective Assistance of Counsel

In his first and second points of error, appellant contends he was denied the effective assistance of counsel when his trial counsel: (1) failed to conduct the minimum required pretrial investigation; (2) failed to object to prejudicial evidence; (3) gave counterproductive

arguments; and (4) failed to preserve error regarding arguments made by the prosecutor.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). The right to counsel necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The U.S. Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id*. First, appellant must demonstrate counsel's performance was deficient and not reasonably effective. *Id*. at 688–92. Second, appellant must demonstrate the deficient performance prejudiced the defense. *Id*. at 693. Essentially, appellant must show that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*.; *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and we are to indulge the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). 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, by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id*. Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *overruled on other grounds by, Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998).

If appellant proves his counsel's representation fell below an objective standard of reasonableness, he must still affirmatively prove prejudice as a result of those acts or omissions. *Strickland*, 466 U.S. at 693; *McFarland*, 928 S.W.2d at 500. Counsel's errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors

had no effect on the judgment. *Strickland*, 466 U.S. at 691. Appellant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *McFarland*, 928 S.W.2d at 500. If appellant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id*.

First, appellant contends his trial counsel did not engage in a proper pretrial investigation. Specifically, appellant argues that his counsel failed to interview the witnesses to the crime and that many of his errors could have been avoided with better preparation. Moreover, without the proper pretrial investigation, counsel's errors cannot be considered strategy.[1] Second, appellant asserts that his trial counsel failed to object to the admission of evidence concerning extraneous offenses. Appellant argues that trial counsel did not object to the admission of evidence concerning the robbery of the Bedard apartment. Appellant also contends that trial counsel failed to object to a non-responsive answer given by Shane, which referred to a high-speed car chase that appellant was involved in. Third, appellant argues that trial counsel failed to object at the punishment stage when the State admitted into evidence a picture of Arial posing on Santa Claus' lap. Appellant suggests that this photo had no relevance to anything the jury could consider at that stage and was highly prejudicial.

Fourth, appellant contends that trial counsel made counter-productive arguments in his opening and closing statements that were detrimental to appellant's case. In his opening remarks, trial counsel told the jury that this was a case of misidentification. However, in his closing argument, trial counsel said he was wrong about this being a case of misidentification. Instead, he asserted that the witnesses knew appellant and they identified him because of a self-serving motive. Throughout trial, appellant's counsel suggested that

[1] Although appellant claims that his trial counsel did not prepare for trial, the record indicates that trial counsel was able to impeach some of the witnesses with their criminal history, identify inconsistencies and conflicts in the witnesses' testimony, present a motive for the witnesses to lie, and point out weaknesses in the witnesses' identification of appellant. Thus, appellant's trial counsel must have engaged in some pretrial preparation.

because Shane and Ryan had cases pending against them, they had an incentive to cooperate with the police. Trial counsel insinuated that by naming the appellant, Shane and Ryan could get their situations resolved in a favorable manner. In his opening statement, appellant's trial counsel also said that the apartment was a known drug-house. At trial, appellant's counsel pointed out that the Bedard family had a police scanner in their apartment and questioned the State's witnesses regarding whether the apartment was being used as a drug-house. However, the witnesses who were asked denied this accusation.

Finally, appellant complains that trial counsel failed to preserve error by not getting a ruling, requesting curative instructions, or seeking a mistrial when appropriate. Appellant acknowledges that his trial counsel "pretty much recognized the overreaching arguments by the prosecution . . ." throughout the trial. However, trial counsel's objections were wasted because he failed to preserve error for appeal.

We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Jackson,* 877 S.W.2d at 771; *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (holding that when the record provides no explanation as to the motivation behind trial counsel's actions, an appellate court should be hesitant to declare ineffective assistance of counsel). Appellant bears the burden to rebut this presumption, by a preponderance of the evidence, and illustrate why counsel did what he did. *Id.* Where the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *Id*. at 771–72. An appellate court is not required to speculate on the reasons behind trial counsel's actions when confronted with a silent record. *Id*. at 771. Appellant fails to provide this Court with any evidence to affirmatively demonstrate the ineffectiveness of his trial counsel. Thus, appellant has not satisfied his burden on appeal to rebut the presumption that counsel's actions were reasonably professional and motivated by sound trial strategy. Because appellant fails to adequately show either deficient performance or prejudice, his first and second points of error regarding ineffective assistance of counsel are overruled. *McFarland,*

928 S.W.2d at 500

III. Prosecutorial Argument–Punishment Phase

Appellant asserts the trial court erred in overruling an objection to prosecutorial argument made during the punishment phase of the trial, not based on facts in evidence, suggesting a psychological impact on the child-victim. In his argument, the prosecutor stated: "This is real life. This isn't 'Cops,' some T.V. show, some H.BO. drama. This is real life. And believe it that this child is going to know about this. She asked her mother about the man with the gun a day before trial."

To fall within the realm of proper jury argument, the argument must encompass one of the following areas: (1) summation of the evidence presented at trial; (2) reasonable deduction drawn from the evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000), *cert. denied*, 121 S. Ct. 1407 (2001). Counsel is allowed wide latitude in drawing inferences from the evidence, provided those inferences are reasonable, fair, legitimate, and offered in good faith. *Lagrone v. State*, 942 S.W.2d 602, 619 (Tex.Crim.App.1997).

Under the Texas Rules of Appellate Procedure, with regard to non-constitutional error in criminal cases, which includes improper prosecutorial argument, we disregard the error unless it "affects substantial rights." TEX. R. APP. P. 44.2(b); *see also Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 1998) (acknowledging that improper jury argument is generally treated as non-constitutional error). A substantial right is thus affected when the error had a "substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 27 (Tex. Crim. App.1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

The only evidence in regard to the psychological impact the robbery had on Arial came from Elizabeth's testimony. She stated that even Arial remembered appellant's face. However, the prosecutor's statement that Arial asked her mother about "the man with the

gun" cannot be characterized as a summation of this evidence, a reasonable deduction drawn from this evidence, an answer to opposing counsel's argument, or a plea for law enforcement. Therefore, the prosecutor's argument was improper.

Concluding that the prosecutor's argument does not fall within the realm of proper jury argument, we must decide whether the improper argument affected appellant's substantial rights. In order to do so, we must examine the record as a whole to determine whether we can say, with a fair assurance, that the error did not influence the jury or had but a slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In making that determination, we will consider the following factors: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct; and (3) the certainty of conviction (or, as here, punishment) absent the misconduct (the strength of the evidence supporting the conviction). *Mosley*, 983 S.W.2d at 259.

The improper statement made by the prosecutor was an isolated comment. Despite the fact that appellant's objection was overruled, the State did not continue discussing this issue. Furthermore, the jury heard testimony during the guilt/innocence stage of trial that Arial remembered appellant's face even though three years had passed since the crime. The jury was informed that appellant's sentence was enhanced with a prior felony conviction and it could assess punishment for not less than fifteen and not more than ninety-nine years, and in its discretion, it could assess a fine of up to ten-thousand dollars. Given these options, the jury assessed punishment at thirty years confinement in the Department of Corrections, Institutional Division and did not impose a fine.

Considering the nature of the offense appellant was convicted of, that appellant held a gun to a two-year old's head, and that two of appellant's victims were visibly pregnant, we cannot conclude that the jury's assessment of punishment was substantially or injuriously affected by the prosecutor's improper statement. Thus, we find that appellant's substantial rights were not affected by the error and accordingly, we disregard it and overrule appellants

third point of error.

IV. Conclusion

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed November 8, 2001.(Frost, J. concurring).

Panel consists of Justices Anderson, Hudson, and Frost.

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

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C O N C U R R I N G O P I N I O N

Although I concur in the result the majority reaches, I disagree with part of its ineffective-assistance-of-counsel analysis. Appellant contends he was denied effective assistance of counsel in four distinct ways: (1) failure to conduct pretrial investigation; (2) failure to object to prejudicial evidence; (3) assertion of counterproductive arguments; and (4) failure to preserve error regarding improper jury argument. The majority concludes that,

because the record contains no evidence of the reasoning behind trial counsel's actions and decisions, we must presume all four alleged shortcomings were reasonably professional and motivated by sound trial strategy. I agree as to the last three areas. However, the majority incorrectly applies the presumption of sound trial strategy to appellant's claim that his trial counsel did not conduct an adequate pretrial investigation.

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). 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 id.*; *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 Bohnet v. State*, 938 S.W.2d 532, 536 (Tex. App.–Austin 1997, pet. ref'd).

The record before us affirmatively demonstrates that trial counsel failed to independently investigate the facts and circumstances surrounding the offense. Specifically, he failed to interview any of the testifying witnesses before trial. Despite his apparent ignorance of the facts of the case, defense counsel formulated a theory that the case was about misidentification and explained this defensive posture to the jury in opening argument. Witness after witness then came forward and identified appellant as the gold-toothed intruder who had invaded the Bedards' home and held a toddler at gunpoint. By the end of the trial, defense counsel candidly acknowledged that he had been "wrong" about his misidentification theory because he "*didn't know what these people would say when they got up here.*"

Trial counsel had a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *See Butler v. State,* 716 S.W.2d 48, 54 (Tex. Crim. App. 1986). Appellant's trial counsel, however, went to trial without knowing what the evidence was likely to reveal. The record shows that his first encounter with each of the witnesses was during cross-examination. Before trial, defense counsel did

not speak with a single testifying witness. *That decision could not have been motivated by sound trial strategy.*

A trial lawyer who lacks knowledge of technical rules of evidence and procedure can easily compromise the presentation of his client's case or jeopardize the preservation of error for appellate review, but a trial lawyer who is unaware of what the evidence is likely to show and what the witnesses are likely to say operates under a far greater handicap. As illustrated by the record now before us, a trial lawyer ignorant of the facts of a case cannot effectively identify available defenses nor formulate appropriate defensive theories. At the outset of the trial, defense counsel told the jury the case was about misidentification. However, as the evidence unfolded, appellant's trial counsel realized that this defensive theory was not viable in light of the witnesses' testimony. By the end of the trial, defense counsel had completely abandoned his misidentification theory in favor of one that had some correlation to the evidence. Had defense counsel made these discoveries during a pretrial investigation, he would not have had to abandon one theory and take up another during trial. Defense counsel's abdication of his threshold responsibility to ascertain the facts and seek out and interview potential witnesses is the antithesis of sound trial strategy because, unless and until counsel has made the necessary investigation of the facts and witnesses, it cannot be argued that this conduct was within the realm of trial strategy. *Smith v. State*, 894 S.W.2d 876, 880 (Tex. App. – Amarillo 1995, pet. ref'd).

Although trial counsel's failure to conduct an adequate pretrial investigation fell below an objective standard of reasonableness under prevailing professional norms, there is not a reasonable probability the result of the trial would have been different but for counsel's deficient performance. As the majority points out, defense counsel was able to impeach some of the witnesses, identify inconsistencies and conflicts in the witnesses' testimony, and present a motive for the witnesses to give false testimony. Given these facts and the strength of the evidence in the record, defense counsel's substandard performance is not sufficient to undermine confidence in the outcome. *See Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex.

Crim. App. 1993). Absent showings under both prongs of *Strickland*, an appellate court cannot conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* Therefore, appellant's ineffective-assistance challenge still fails.

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Kem Thompson Frost
Justice

Judgment rendered and Opinion filed November 8, 2001.
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