Affirmed and Opinion filed January 27, 2000.

In The

Fourteenth Court of Appeals

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NOS. 14-98-01395-CR &
14-98-01396-CR

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ROBERT LEE FERGUSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Harris County, Texas
Trial Court Cause Nos. 95-40147 & 95-40146

O P I N I O N

Appellant, Robert Lee Ferguson (Ferguson), was charged with assault and criminal trespass. After pleading not guilty, a jury convicted him and sentenced Ferguson to 180 days in jail for assault and 120 days in jail for criminal trespass. In two points of error, Ferguson challenges his convictions claiming: (1) the trial court erred by allowing the State to introduce evidence of Ferguson's extraneous offenses, and (2) he was denied effective assistance of counsel. We affirm.

I.
Extraneous Offenses

Because both of Ferguson's points on appeal only concern issues relating to the trial proceedings below, we will omit a factual recitation. In his first point, Ferguson complains the trial court erred by allowing the State to cross-examine him on the witness stand concerning two previous convictions. This was error, Ferguson insists, because the State failed to notify him that it would introduce evidence of extraneous offenses in violation of Texas Rule of Evidence 404(b). The rule Ferguson invokes states that evidence of other crimes, wrongs or acts is not admissible except for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident, "provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction." TEX. R. EVID. 404(b).

We do not reach Ferguson's complaint, however, because he failed to object to the prosecution's questions. *See* TEX. R. APP. P. 33.1(a)(1) (requiring appellants, as a prerequisite to presenting a claim for appellate review, to bring forward a record showing that the complaint was made to the trial court by a timely objection). It is fundamental that an error to the examination of witnesses or to the admission of evidence is not preserved for appellate review absent a timely objection at trial. *See Cisneros v. State*, 692 S.W.2d 78, 82 (Tex. Crim. App. 1985). Failure to do so constitutes a waiver of the objection or matter. *Id.* In his brief, appellant concedes he failed to object to the introduction of this evidence. Accordingly, there is nothing for us to review because Ferguson's first point of error has been waived.

II.
Ineffective Assistance of Counsel

In his second, and related, point of error, Ferguson complains he was denied effective assistance of counsel because his trial counsel failed to object to the extraneous offense

evidence elicited by the State on cross-examination of the defendant. This error was so egregious, he claims, that the confidence in the outcome of the trial was compromised and the defendant's ability to have a fair trial diminished. We disagree.

The standard for testing claims of ineffective assistance of counsel was announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the Supreme Court stated that the benchmark for judging any claim of ineffectiveness must be whether counsel's representation so undermined the "proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. Appellant must prove: (1) that his counsel's representation was deficient; and (2) that the deficient performance was so serious that it prejudiced his defense. *See id.* at 687, 104 S.Ct. at 2064. This means appellant must prove by a preponderance of the evidence that counsel's representation fell below the standard of prevailing professional norms, and that there is a reasonable probability that but for counsel's deficiency the result of the trial would have been different. *See McFarland v. State*, 845 S.W.2d 824, 842 (Tex. Crim. App.1992).

The review of counsel's representation is highly deferential; we indulge a strong presumption that counsel's conduct falls within a wide range of reasonable representation. *See McFarland v. State*, 928 S.W.2d 499, 500 (Tex. Crim. App. 1996). Therefore, appellant must prove that the errors, judged by the totality of the representation, rather than by isolated instances of error, denied him a fair trial. *See Webb v. State*, 995 S.W.2d 295, 300 (Tex.App.—Houston [14th Dist.] 1999, no pet. h.). Finally, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See McFarland*, 845 S.W.2d at 500.

Here, there is no explanation in the record why defense counsel failed to object to the extraneous offense cross-examination by the State. There is merely defense counsel's silence from which we can discern nothing. The absence of a record of this alleged ineffectiveness is precisely the reason the Court of Criminal Appeals recently stated, "[a] substantial risk of failure accompanies an appellant's claim of ineffective assistance on direct appeal. Rarely will

a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel." *Thompson v. State*, No. 1532-98, slip op. at 10, 1999 WL 872394, *9-10 (Tex. Crim. App. October 13, 1999). Thus, without record evidence indicating the basis, or lack thereof, for defense counsel's silence during the cross-examination, appellant has failed to rebut the presumption, indulged by appellate courts, that Ferguson's counsel was performing within the wide range of reasonable representation. *See McFarland*, 928 S.W.2d at 500. Accordingly, we overrule Ferguson's second point of error.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed January 27, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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