Affirmed and Opinion filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00508-CR

MONDUE ALLEN BRYANT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 801,816

O P I N I O N

A jury found appellant guilty of aggravated robbery. Upon appellant's plea of true to an enhancement allegation, the court assessed punishment at confinement for forty years in the Institutional Division of the Texas Department of Criminal Justice.

Appellant's appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which he concludes that the appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386

U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. Appellant has filed a response alleging three points of error: (1) ineffective assistance of counsel at trial; (2) insufficient evidence; and (3) error by the trial court in finding probable cause to arrest.

Background

The complainant testified that she was employed as a dancer at a lingerie modeling studio when appellant rang the intercom in the early morning hours of December 27, 1998. Complainant was present at the studio with one other model, Ms. Villarreal. Complainant admitted appellant into the locked business after determining he was not intoxicated, and he requested a thirty minute "rub-down" and show. After giving appellant a massage for about twenty minutes in a private room, during which time appellant wore either boxer shorts or a towel tied around his waist, complainant left the room so appellant could get dressed. As she attempted to escort him to the front door, he asked to use the restroom. After exiting the restroom, appellant pulled a gun, placed it at complainant's back, and demanded to be taken to the model's dressing room. Once there, appellant demanded and received money and a cellular phone from the two models. After Ms. Villarreal escaped from the building, appellant fled the scene. When Joe, an employee from the adult bookstore next door, entered the business after being informed by Ms. Villarreal that a robbery had occurred, he discovered a wallet just inside the front door of the modeling studio. No wallet had been on the floor prior to appellant entering the business. The wallet contained appellant's driver's license. Complainant immediately recognized the photograph from the driver's license to be the person who had just committed the robbery. About a week after the

robbery, complainant and Ms. Villarreal both identified appellant in a photo-spread.

Effective Assistance of Counsel

Appellant contends he was denied effective assistance of counsel at trial. Appellant argues counsel demonstrated his ineffectiveness in three instances: (1) by failing to object to complainant's in-court identification of appellant; (2) by failing to contact and call alibi witnesses; and (3) by failing to object to hearsay testimony by Ms. Villarreal.

The standard of review for ineffective assistance of counsel was set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999). A defendant seeking relief must demonstrate that: (1) counsel's performance failed to constitute reasonably effective assistance by falling below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Ex parte Walker*, 777 S.W.2d 427, 430 (Tex. Crim. App. 1989). Whether this standard has been met is to be judged by "the totality of the representation." *See Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Our review of counsel's performance must be highly deferential. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Garcia v. State*, 887 S.W.2d 862, 880 (Tex. Crim. App. 1994).

The burden of proving ineffective assistance of counsel is on the appellant and is one which requires proof by a preponderance of the evidence. *See Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). An allegation of ineffective assistance of counsel will be sustained only if it is firmly founded and if the record affirmatively demonstrates counsel's alleged ineffectiveness. *See Ex parte McWilliams*, 634 S.W.2d 815, 819 (Tex. Crim. App. 1980). In determining whether trial counsel rendered deficient performance, we employ a

strong presumption that counsel's conduct constitutes sound trial strategy and do not utilize appellate hindsight to second-guess the strategy adopted by counsel. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992); *Harvey v. State,* 681 S.W.2d 646, 648 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd) . An error in trial strategy will be deemed inadequate representation only if counsel's actions are without any plausible basis. *See Schaired v. State*, 786 S.W.2d 497, 499 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

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); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). 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 Strickland*, 466 U.S. at 688, 104 S. Ct. at 2052; *Stafford v. State*, 813 S.W.2d at 506. 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 Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex. Crim. App. 1994). This record may be provided via a motion for new trial hearing or through a hearing in a habeas corpus collateral attack. *See Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.—Corpus Christi 1992, pet. ref'd, untimely filed).

In the instant case, the record before us does not demonstrate that counsel was ineffective for failing to object to complainant's in-court identification of appellant. Complainant positively identified appellant in court as the person who robbed her. She stated that she got a good look at appellant during the thirty minutes she spent with him prior to the robbery. Complainant also recognized the driver's license photo of appellant as the robber after she examined the wallet left behind by the robber. Additionally, complainant

testified that about a week after the robbery, she positively identified a photograph of appellant from a photo-spread as the robber. A police officer also testified that complainant picked appellant out of a photo-spread. Trial counsel did not file a motion to suppress the identification and lodged no objections to the identification testimony of complainant.

Counsel's failure to object to admissible testimony does not constitute ineffective assistance of counsel. *See Jackson v. State,* 846 S.W.2d 411, 414 (Tex. App.—Houston [14th Dist.] 1992, no pet.); *Cooper v. State*, 707 S.W.2d 686, 689 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). A witness who has identified the defendant at trial may also testify that she identified the defendant while the defendant was in police custody or from a photo-spread. *See Franklin v. State*, 606 S.W.2d 818, 823-24 (Tex. Crim. App. 1978). Further, the testimony of the police officer, that complainant identified appellant from a photo-array, was admissible.[1]

Counsel's failure to file a motion to suppress identification does not per se constitute ineffective assistance of counsel. *See Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist.] 1992, no pet.). The pretrial procedure must be unnecessarily suggestive and conducive to irreparable mistaken identification before it is objectionable. *See Garza v. State*, 633 S.W.2d 508, 512 (Tex. Crim. App. 1981). The task of proving that the in-court identification was tainted has been described by the Court of Criminal Appeals as a "difficult and heavy burden" for a defendant to meet. *See Jackson v. State*, 628 S.W.2d

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[1] Case law and prior TEX. R. CRIM. EVID. 801(e)(1)(c) eliminated bolstering as a valid objection. *See Jackson*, 846 S.W.2d at 413-14. Bolstering a witness' identification of a defendant was historically disallowed because the testimony was hearsay. *See Franklin v. State*, 606 S.W.2d at 823; *Smith v. State*, 830 S.W.2d 328, 329 (Tex. App.—Houston [14th Dist.] 1992, no pet). Bolstering occurs when an item of evidence is improperly used by a party to add credence or weight to some earlier unimpeached piece of evidence offered by the same party. *See Guerra v. State*, 771 S.W.2d 453, 474 (Tex. Crim. App. 1988). However, the adoption of TEX. R. CRIM. EVID. 801(e)(1)(C) changed the law concerning the State's bolstering of a witness' identification of a defendant. The current rule, TEX. R. CRIM. EVID. 801(e)(1)(C), provides that a statement is not hearsay and is admissible if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him.

446, 448 (Tex. Crim. App. 1982). We have reviewed the photographs from the photo-spread and find them remarkably similar in appearance, in spite of the fact that appellant is the only man with closed eyes. Further, it is clear from the record that complainant's in-court identification of appellant as the robber was of an independent origin and was admissible. *See Garza v. State*, 633 S.W.2d at 513. Ineffective assistance of counsel is not demonstrated by counsel's failure to object to the identification testimony.

Neither is ineffective assistance demonstrated by counsel's failure to contact and call alibi witnesses to testify in appellant's behalf. Counsel's failure to call witnesses at the guilt-innocence stage is irrelevant absent a showing that such witnesses were available and appellant would have benefitted from their testimony. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983); *Kennerson v. State*, 984 S.W.2d 705, 708 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). An attorney's strategic decision in failing to call a witness will be reversed only if there was no plausible basis for failing to call the witness to the stand. *See Velasquez v. State*, 941 S.W.2d 303, 310 (Tex.App.—Corpus Christi 1997, pet. ref'd)(*citing Brown v. State*, 866 S.W.2d 675, 678 (Tex.App.—Houston [1st Dist.] 1993, pet. ref'd)).

The record before us does not show that counsel failed to investigate the alibi. Consequently, appellant has failed to establish by a preponderance of the evidence that counsel's performance was ineffective. Appellant's attorney could have found that appellant had no credible alibi defense by these witness statements, or that this testimony could hurt appellant more than help. However, the reasons for not contacting or calling these witnesses to testify at the guilt/innocence stage do not appear in the record and we will not speculate why counsel chose this course of conduct. There is nothing in the record to show that potential defenses were precluded or that a visit with these witnesses would have made any difference in appellant's defense. Appellant fails to satisfy, if the not the deficiency prong

of *Strickland*, then the prejudice prong. *See McFarland v. State,* 928 S.W.2d 482, 501-02 (Tex. Crim. App. 1996). We find that appellant cannot show a reasonable probability that had counsel called appellant's wife and other unnamed witnesses to testify, the result of the proceeding would have been different. *See Moore v. State*, 4 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Appellant has failed to rebut the strong presumption that counsel's performance was the result of sound or reasonable trial strategy.

Finally, appellant complains that counsel was ineffective for failing to object to hearsay testimony by Ms. Villarreal, who testified that she heard complainant tell appellant which room to go into for his rub-down and that she heard someone say a wallet was found on the floor after the robbery. Isolated instances in the record reflecting errors of commission or omission do not cause counsel to become ineffective, nor can ineffective assistance of counsel be established by isolating or separating out one portion of the trial counsel's performance for examination. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). No Texas court defines the right to effective counsel as the right to error-free counsel. *See Hernandez v. State*, 726 S.W.2d at 58. An applicant must show omissions or other mistakes made by counsel that amount to professional errors of a magnitude sufficient to raise a reasonable probability that the outcome of the trial would have been different but for the errors. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

Since the statements were properly admissible when they came in by virtue of complainant's testimony, trial counsel was not ineffective by failing to object when they came in through Ms. Villarreal's testimony. The admission of improper evidence does not constitute reversible error when the same evidence is admitted through another without objection. *See Marlow v. State*, 886 S.W.2d 314, 316, 318 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Because of the complainant's earlier testimony, the hearsay evidence of

which appellant complains on appeal is cumulative, and the failure to object to its admission does not support a claim of ineffective assistance of counsel. *See id*. There is nothing in the record to explain why counsel chose not to object to the complained of testimony. Thus, the record on direct appeal is insufficient to support appellant's claim of ineffective assistance of counsel at trial. *See Thompson v. State*, 9 S.W.3d at 813-14. No arguable grounds of error are presented for review.

Sufficiency of Evidence

Appellant argues his conviction should be reversed because the evidence is insufficient to prove identity. There is no question that the State is required to prove beyond a reasonable doubt that the accused is the person who committed the crime charged. *See Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Rice v. State*, 801 S.W.2d 16, 17 (Tex. App.—Fort Worth 1990, pet. ref'd). Identity may be proved by direct or circumstantial evidence. *See Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986). In fact, identity may be proven by inferences. *See United States v. Quimby*, 636 F.2d 86, 90 (5th Cir. 1981); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd).

Appellant was positively identified in court by two eyewitnesses, complainant and Ms. Villarreal, as the robber. Complainant testified that appellant's driver's license photograph discovered in a wallet on the floor after the robbery was a photo of the robber. Both eyewitnesses positively identified appellant from a photo-spread about a week after the incident. This evidence is both factually and legally sufficient to support the verdict. No arguable ground of error is presented for review.

Probable Cause to Arrest

Appellant argues that the trial court erred in finding probable cause to arrest.

Appellant points to no place in the record, and we have found none, where the issue of illegal arrest was presented to the trial court. Appellant's failure to raise this argument in the trial court waived error, if any. *See Gomes v. State,* 9 S.W.3d 373, 380 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Stanley v. State*, 866 S.W.2d 306, 309 (Tex. App.—Houston [14th Dist.] 1993, no pet.). Nothing is presented for review.

Conclusion

After careful review of the record, we agree with counsel that the appeal is wholly frivolous and without merit. Accordingly, we grant counsel's motion to withdraw and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed March 15, 2001.
Panel consists of Senior Chief Justice Murphy and Justices Hudson and Seymore.[**]
Do Not Publish TEX. R. APP. P. 47.3(b).

[**] Senior Chief Justice Paul C. Murphy sitting by assignment.