**Affirmed and Opinion filed March 16, 2000.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-98-00652-CR**

**DAVID CARR, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 262nd District Court**
**Harris County, Texas**
**Trial Court Cause No. 773,922**

## O P I N I O N

David Carr appeals his conviction by a jury for aggravated robbery. The jury assessed his punishment at eight years imprisonment. In five points of error, appellant contends he received ineffective assistance of counsel. We affirm.

Appellant, Shannon Howard (Howard), and Tunisia Johnson (Johnson) were tried jointly for an aggravated robbery of a convenience store owned by Helen Pham that occurred on January 24, 1998. After finding the three co-defendants guilty, the jury gave Howard thirty years, Johnson five years, and appellant eight years for their participation in the robbery.

In five points, appellant contends he received in effective assistance of trial counsel for the following reasons:

1. Counsel failed to ask for a limiting instruction as to an extraneous offense of co-defendant Johnson.

2. Counsel failed to request a limiting instruction at the punishment stage of the trial as to Howard's gang affiliation.

3. Counsel failed to request a severance as to the joint trial with Howard and Johnson.

4. The cumulative effect of counsel's errors at the guilt-innocence and punishment stages of trial denied appellant a fair trial (points four and five).

The U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. 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). A reasonable probability is defined as probability sufficient to undermine confidence in the outcome. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

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. The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *Cannon v. State*, 668 S.W.2d

401, 403 (Tex. Crim. App. 1984). Both prongs of the two-prong *Strickland* test are applicable to ineffective assistance of counsel claims alleging a deficiency of attorney performance at noncapital sentencing proceedings. *Hernandez v. State*, 988 S.W.2d 770 (Tex.Crim.App. 1999) (overruling *Ex parte Duffy*, 607 S.W.2d 507, and *Ex parte Cruz*, 739 S.W.2d 53).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *Jackson,* 877 S.W.2d at771. 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 filed a motion for new trial, but did not raise ineffectiveness of trial counsel in his motion. Appellant did not request a hearing on his motion for new trial, and therefore failed to develop evidence of trial counsel's strategy as was suggested by Judge Baird in his concurring opinion in *Jackson,* 877 S.W.2d at 772. *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); *Phetvongkham v. State,* 841 S.W.2d 928, 932 (Tex.App.–Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim). *See also Beck v. State*, 976 S.W.2d 265, 266 (Tex.App.–Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim).

We address appellant's points of error as follows:

1. Failure to ask for limiting instruction. The State was allowed to introduce evidence of another aggravated robbery which occurred the next day at another convenience store. The complainant in that

case, Patel, testified only that Johnson was one of the participants. Patel testified he could not identify either of the males that participated in the robbery. At a bench conference prior to Patel's testimony, appellant's trial counsel did not request a limiting instruction from the trial court, although the trial court agreed to verbally give a limiting instruction if requested by appellant and Howard. Appellant's trial counsel did request a limiting instruction in the jury charge that the jury could not consider evidence of offenses other than the one alleged against appellant in the indictment. The jury charge included this requested limiting instruction. The record in this case is silent as to the reasons why appellant's trial counsel did not request a limiting instruction, and these reasons were not developed in a motion for new trial by appellant's new counsel on appeal.

Absent something in the record explaining why counsel did not request a rule 105(a), Texas Rules of Evidence, limiting instruction during trial, we cannot say counsel's action was not sound trial strategy. *See Howland v. State*, 966 S.W.2d 98, 105 (Tex.App.-Houston[1st Dist.] 1998), *affirmed*, 990 S.W.2d 274 (Tex.Crim.App.1999); *Ryan v. State*, 937 S.W.2d 93, 104 (Tex.App.--Beaumont 1996, pet. ref'd) ("[Absent anything in the record explaining counsel's reasoning], we can only conclude his trial strategy may have been not to draw further attention to the extraneous offenses"); *cf. Curry v. State*, 861 S.W.2d 479, 484-85 (Tex.App.--Fort Worth 1993, pet. ref'd) (holding counsel not ineffective for not requesting limiting instruction during punishment, because instruction was requested when extraneous offense evidence was admitted and strategy may have been not to remind the jury of the evidence). We have found no case holding defense counsel ineffective because he receives a limiting instruction in the jury charge rather than asking for one during trial. Appellant has failed to meet his burden of proof under the first prong of *Strickland* by demonstrating counsel was ineffective for this reason.

2. Failure to ask for a limiting instruction as to Howard's gang affiliation during the punishment phase. At the punishment stage of the trial, the State introduced testimony concerning co-defendant Howard's gang affiliation, and numerous prior convictions. Howard was required to display his tattoos to the jury. There was no mention of appellant during this testimony, and no implications that appellant was a gang member. At closing argument, appellant's trial counsel emphasized that this testimony was directed to Howard, and appellant was not in any way affiliated with any gang.

There is nothing in the record indicating the reasons for appellant's trial counsel not requesting a limiting instruction. We cannot say counsel's action was not sound trial strategy. *See Howland*, 966 S.W.2d at 105. Appellant has failed to meet his burden of proof under the first prong of *Strickland* by demonstrating counsel was ineffective for this reason.

3. Failure of trial counsel to request severance. There are only two grounds for mandatory severance: (1) when one defendant has an admissible prior conviction and the person seeking the severance does not, and (2) when a joint trial would be prejudicial to one of the defendants. TEX. CODE CRIM. PROC. ANN. art.36.09 (Vernon 1981 & Supp. 2000).

Several convictions were admitted against Howard at the punishment stage. Earlier in the guilt-innocence state, appellant's trial counsel stated on the record that he and the other defense attorneys had an off-record conference with Judge Shaver prior to the trial, and they all agreed not to oppose a joint trial. There is no record of this conference, and there was no hearing on a motion for new trial; therefore, the record is silent as to trial counsel's reasons for not asking for a severance.

Even when a severance is mandatory upon the request of counsel, counsel may have strategic reasons for not requesting severance. For example, the evidence may be such that it is advantageous to be tried along with a co-defendant with a criminal record because the contrast in culpability or involvement between the two defendants favors a strategy of allowing the jury to focus on the co-defendant, rather than the alternative of being tried alone. Thus, even though appellant may argue ineffective assistance under these circumstances, that alone does not overcome the presumption that counsel's failure to request a severance was sound trial strategy.

We will not speculate regarding the manner in which trial counsel conducted appellant's defense. *Gamble v. State*, 916 S.W.2d 92, 93 (Tex.App.--Houston [1st Dist.] 1996, no pet.). Appellant has not rebutted the presumption that his failure to request a severance was a decision made in the exercise of reasonable professional judgment. *See Woods v. State*, 998 S.W.2d 633, 635-637 (Tex.App.-Houston[1st Dist.] 1999, no pet. h.). Appellant has failed to meet his burden of proof under the first prong of *Strickland* by demonstrating counsel was ineffective for this reason

4. The cumulative effect of counsel's errors at the guilt-innocence and punishment stages of trial denied appellant a fair trial (points four and five). Appellant reiterates his argument under points one, two, and three, and contends the cumulative effect of all the "various errors" deprived appellant of a fair trial. Because the record is silent as to trial counsel's reasons for his actions, we cannot conclude he was ineffective. Appellant has failed to meet his burden of proof under the first prong of *Strickland* by demonstrating counsel was ineffective for this reason.

Under all points of error, we have found the record is silent as to the reasons appellant's trial counsel chose the course he did. The first prong of *Strickland* is not met in this case. *Jackson,* 877 S.W.2d at 771; *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*. 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 points of error one, two, three, four, and five that his trial counsel was ineffective.

We affirm the judgment of the trial court.

_____

Sam Robertson
Justice

Judgment rendered and Opinion filed March 16, 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.