**Affirmed and Opinion filed June 15, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-01299-CR**

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**CHRISTOPHER HALE FAIR, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 230th District Court**
**Harris County, Texas**
**Trial Court Cause No. 772176**

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## O P I N I O N

The State charged Christopher Hale Fair, appellant, with the felony offense of aggravated sexual assault. *See* TEX. PEN. CODE ANN. § 22.021 (Vernon 1994). Appellant pleaded not guilty to the indictment and the case was tried before a jury. The jury found him guilty. The trial judge found the enhancement paragraph[1] true and sentenced appellant to sixty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division. In two points of error, appellant contends that the trial court erred in refusing to grant his

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[1] The enhancement paragraph alleged that appellant had a prior felony conviction for carnal knowledge of a juvenile in Catahoula Parish, Louisiana.

motion for continuance and that he was denied effective assistance from counsel. We affirm the judgment of the trial court.

**Background**

D.R. walked to a Stop-N-Go to buy a sandwich around 2:40 a.m. When she left the store, appellant drove next to her in his black Chevrolet truck. He asked her if she needed a ride. D.R. initially said no, but upon appellant's insistence, she agreed and got into the truck. Appellant did not stop the truck at her apartment complex, but continued to drive until he reached a dead-end street. He parked the truck and told her that he wanted to have sex with her. She refused.

Appellant grabbed D.R., held a pencil to her neck, and demanded to have sex with her. She refused again and the two began fighting. Appellant hit D.R. several times before he raped her. During the rape, D.R. asked appellant if she could use the restroom. Appellant let her out of the truck and followed her to a near-by field. He beat her in the field and pulled her back into the truck. Appellant then pulled out a knife and threatened to kill her. He raped her again.

Around 6:00 a.m., appellant told D.R. that he needed to get home to take his child to school. He dropped her off near her apartment complex. D.R. called the police and told them she had been raped. Houston Police Officer B.J. Simmons observed slap and bruise marks on her face and throat. Simmons also noticed bruises on her knees and on her thigh. She gave Simmons the license plate number for appellant's truck. The number, however, belonged to a Nissan, not a Chevrolet truck. She was later taken to Southwest Memorial Hospital where a rape kit was performed.

Eighteen days later, D.R. saw appellant driving his truck. She flagged down Sergeant John Lee and gave him appellant's license number. Sergeant Lee went to appellant's home and asked him about the rape. Appellant denied picking up D.R. Appellant was eventually arrested. His blood was drawn for a DNA analysis and was compared to the seminal body

fluids found on D.R.'s clothing and in her vagina. The results of the test conclusively established that seminal body fluids found on D.R. belonged to appellant.

**Motion for Continuance**

In his first point of error, appellant contends that the trial court erred in refusing to grant his motion for continuance. Appellants' trial counsel, Lloyd Oliver, filed a written motion for continuance on the day of trial. Oliver argued that he had not had enough time to prepare for trial, although he had been the attorney of record for over two months. He claimed he could not render effective assistance to appellant without additional investigation and preparation time. The trial judge denied the motion.

The record reflects that Oliver filed an unsworn written motion for continuance on the day of trial. Because the motion was not sworn to, as required by article 29.08 of the Code of Criminal Procedure, nothing was preserved for review. *See Dewberry v. State*, 4 S.W.3d 735, 755 (Tex. Crim. App. 1999); *Butler v. State*, 981 S.W.2d 849, 858 (Tex. App.–Houston [1st Dist.] 1998, pet. ref'd); TEX. CODE CRIM. PROC. ANN. Art. 29.08 (Vernon 1994).

Moreover, appellant failed to show that he was prejudiced by his counsel's inadequate preparation time. *See Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996); *Heiselbetz v. State*, 906 S.W.2d 500, 511 (Tex. Crim. App. 1995). Appellant did not show prejudice at the hearing on the motion, and there was no motion for new trial or request for a bill of exceptions through which appellant sought to show actual prejudice at trial. The mere assertion that counsel did not have time to investigate or prepare for trial, without any showing of actual harm, does not establish abuse of discretion. Accordingly, we overrule appellant's first point of error.

**Ineffective Assistance of Counsel**

In his second point of error, appellant contends that he was denied effective assistance of counsel under both state and federal constitutions because his trial counsel failed to perform at a reasonable level of professional competence. Appellant argues that his counsel's

inadequate preparation and investigation of the case are proof of his counsel's deficient performance.

Both the federal and state constitutions guarantee an accused the right to have assistance from counsel. *See* U.S. Const. Amend. VI; Tex. Const. Art. I, § 10; TEX. CODE CRIM. PROC. ANN. Art. 1.05 (Vernon 1994). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App.1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App.1999).

The first prong requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts or omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996). We will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App.1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App.1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id.*

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption. *See id*. The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd).

When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.–Houston [1st Dist.] 1996, no pet.) (*citing Jackson v. State*, 877 S.W.2d at 771). We will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court.

The record shows that appellant's trial counsel told the trial judge that he was not prepared for trial during his motion for continuance. Counsel said that he filed no pre-trial motions and had only reviewed the State's file on two occasions. He did not have a witness list; he did not know all of the facts of the case; he did not hire an investigator; and he did not subpoena any witnesses. Counsel concluded by telling the judge that he could not be effective without more time to prepare for trial.

The record is silent, however, as to whether appellant was prejudiced from counsel's deficient performance. Appellant did not file a motion for new trial to support his allegations that he suffered harm from his counsel's representation. Appellant failed to identify any basis in the record for the filing of pre-trial motions, or how they would have been beneficial. He did not describe what further investigation would have uncovered or who else would have testified on his behalf. The record contains no evidence to show that there is a reasonable

probability that but for counsel's deficient performance, the result of the proceeding would have been different. We overrule appellant's second point of error.

We affirm the judgment of the trial court.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed June 15, 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.