Affirmed; Majority and Dissenting Opinions filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00431-CR

GUADELUPE PEREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 795,931

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

Appellant was charged by indictment with the offense of possession with intent to deliver a controlled substance, namely cocaine. The indictment alleged two prior felony convictions for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense. The trial court found the enhancement allegations true and assessed punishment at forty years confinement in the Texas Department of Criminal Justice–Institutional Division and a fine of $5,000. Appellant raises four points of error on appeal. We affirm.

Houston police officer Frank Scoggins received a tip from a confidential informant that appellant was selling drugs from her home. Scoggins secured a warrant for appellant's arrest and the search of her home. Prior to executing that warrant, Scoggins and several other plain clothes officers maintained surveillance on the residence and saw appellant depart in a vehicle driven by her boyfriend, Romero Ramos. The officers followed the vehicle a sufficient distance to insure that anyone remaining in the house would not know appellant was being stopped. Scoggins then ordered a patrol officer to stop the vehicle in which appellant was traveling. Scoggins approached appellant, presented her with a copy of the warrant, informed her of her legal rights, and took her and Ramos into custody. Both were transported to the residence. Scoggins searched the home and discovered cocaine and marijuana in the master bathroom.

In her case-in-chief, appellant called Ramos as a witness. He testified the drugs recovered in the search of the residence were his and that he admitted possessing the contraband to a plain clothes officer following the search of the residence. Ramos further testified appellant knew nothing of the contraband.

In her first point of error, appellant claims the trial court erred in refusing to allow appellant to present her opening statement at the close of the State's case-in-chief. The record shows that after the State made its opening statement, the trial court asked defense counsel if he would like to make an opening statement. Defense counsel replied, "We would waive at this time, reserve the right for later." The court responded, "You need to make it now." Defense counsel then stated, "All right. Then we would waive." After the State presented its evidence and rested, the trial court asked defense counsel if he had any witnesses. Defense counsel responded, "Yes. Did the Court want me to call witnesses now?" The court responded, "Yes." Appellant did not request to make her opening statement at the close of the State's evidence.

Article 36.01 of the Texas Code of Criminal Procedure provides that in a jury trial a defendant's opening statement can follow the presentation of the State's evidence or follow

the State's opening statement. *Moore v. State,* 868 S.W.2d 787, 789 (Tex. Crim. App. 1993). A defendant can waive this right if she does not timely request an opening statement. *Id*. Appellant waived her right to an opening statement in this case. Initially, when told he must make his statement before the State presented its evidence, defense counsel stated, "All right, Then we would waive." Appellant's explicit waiver of her request for an opening statement precludes appellant from resurrecting this request on appeal. *See Atkins v. State,* 919 S.W.2d 770, 775 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (Defendant's explicit waiver of objection to State's use of peremptory challenge precluded *Batson* challenge on appeal).[1] Because error was waived, appellant's first point of error is overruled.

In his second point of error, appellant claims the trial court erred in denying a mistrial when the State argued evidence outside the record. On direct examination, the State asked Officer Scoggins what information he had received about the defendant prior to executing the search warrant. Officer Scoggins responded that he received information that the defendant was dealing cocaine. The trial court sustained appellant's hearsay objection. In closing argument, the prosecutor stated, "Officer Scoggins got up here and testified that he had an informant who told him that this defendant deals drugs." Appellant objected, requested an instruction to disregard, and moved for a mistrial. The trial court granted the instruction to disregard, but denied the motion for mistrial.

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[1] The dissent argues that appellant's waiver must be knowingly, voluntarily, and intelligently made. The authority on which the dissent relies requires an appellant to make a knowing, voluntary, and intelligent waiver of fundamental constitutional rights, such as the right to counsel or the right against self-incrimination. *See Johnson v. Zerbst,* 304 U.S.458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Robles v. State,* 577 S.W.2d 699, 703 (Tex. Crim. App. 1979); *Brumfield v. State,* 445 S.W.2d 732, 735 (Tex. Crim. App. 1969). There is no such requirement in Texas Rule of Appellate Procedure 33.1. We find no authority requiring a "knowing" waiver of error, such as that required when a party waives a constitutional right. Courts have repeatedly held that a party waives error by a failure to object or raise an issue. *See e.g. Massey v. State,* 933 S.W.2d 141, 149 (Tex. Crim. App. 1996); (Objection to evidence is waived if same information is conveyed to the jury in another form.) *Desselles v. State,* 934 S.W.2d 874, 876 (Tex. App.—Waco 1996, no pet.); *Norrid v. State,* 925 S.W.2d 342, 347 (Tex. App.—Fort Worth 1996, no pet.). Even if there were a requirement of a knowing waiver, by stating, "All right. Then we would waive," appellant affirmatively waived her right to complain on appeal.

If an instruction is given and the court denies the defendant's motion for mistrial, error results only when the argument is extreme, manifestly improper, injected new and harmful facts into the case, or violated a mandatory statutory provision and was thus so inflammatory that its prejudicial effect could not reasonably be removed from the minds of the jurors by the instruction given. *Washington v. State,* 822 S.W.2d 110, 118 (Tex. App.—Waco 1991) *rev'd on other grounds,* 856 S.W.2d 184 (Tex. Crim. App. 1993). It is considered a sufficient response to most well-founded objections that the material be withdrawn from jury consideration, if necessary, and that jurors be admonished not to consider it during their deliberations. *Barber v. State,* 757 S.W.2d 359, 362 (Tex. Crim. App. 1933), *cert. denied,* 489 U.S. 1091 (1989). The adversary system thus depends on a belief that the declaration of a mistrial ought to be an exceedingly uncommon remedy for the residual prejudice remaining after objections are sustained and curative instructions given. For this reason, our system presumes that judicial admonishments to the jury are efficacious. *Waldo v. State,* 746 S.W.2d 750, 754 (Tex. Crim. App. 1988). Only when it is apparent that an objectionable event at trial is so emotionally inflammatory that curative instructions are not likely to prevent the jury being unfairly prejudiced against the defendant may a motion for mistrial be granted. *Kemp v. State,* 846 S.W.2d 289, 308 (Tex. Crim. App. 1992), *cert. denied,* 508 U.S. 918 (1993). Here, the statement was not so inflammatory that an instruction to disregard would not have cured any prejudicial effect. Appellant's second point of error is overruled.

In her third and fourth points of error, appellant claims she received ineffective assistance of counsel. In the third point of error, appellant claims her counsel was ineffective in failing to cite statutory grounds for the exclusion of testimony of unrecorded custodial statements. In the fourth point of error, appellant claims her counsel was ineffective when he mistakenly requested a lesser offense instruction on less than one gram rather than four to two hundred grams.

The standard under which we review a claim of ineffective assistance of counsel was established in *Strickland v. Washington,* 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984). Under this standard, the reviewing court must first decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below this standard, the reviewing court must decide whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A defendant is entitled to reasonably effective counsel, not perfect counsel judged by hindsight; therefore, more than isolated errors and omissions will be needed to demonstrate ineffective assistance of counsel. *See Lanum v. State*, 952 S.W.2d 36, 40 (Tex. App.—San Antonio 1997, no pet.).

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). 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 by presenting evidence illustrating why trial counsel did what he did. *Id.* The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See Jackson*, 973 S.W.2d at 957.

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.). An appellate court 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. *Thompson,* 9 S.W.3d at 814.[2]

The Court of Criminal Appeals has recently re-affirmed its reluctance to reverse on ineffective assistance of counsel when there is no record of trial counsel's reasoning. In *Ex parte Varelas,* 2001 WL 76964 (Tex. Crim. App. January 31, 2001), the court reversed on applicant's claim of ineffective assistance of counsel in a habeas petition. Varelas claimed his trial counsel was ineffective for failing to object to the omission of an extraneous offense instruction in the court's charge. Varelas' habeas petition contained an affidavit from his trial counsel stating that counsel did not have a strategy for failing to request the instruction, but simply overlooked it. On direct appeal, however, without such an affidavit, the court held:

> In light of the number of ways and the degree to which a defendant can suffer harm from the admission of extraneous offense evidence, we have trouble understanding why trial counsel did not request a burden of proof or limiting instruction regarding these offenses. However, the bare record does not reveal the nuances of trial strategy. Further, to hold trial counsel's actions (or inaction) ineffective in the instant case would call for speculation and such speculation is beyond the purview of this Court. Rather, because of the strong presumptions that trial counsel's conduct falls within the wide range of reasonable professional assistance and that such conduct might be sound trial strategy, we must conclude, in light of an otherwise silent record, that appellant failed to meet his burden of showing that his trial counsel's assistance was ineffective.

Ex parte Varelas, 2001 WL 76964, slip op. at 4 (Tex. Crim. App. January 31, 2001) (quoting *Varelas v. State,* No. 72,178, slip op. at 8 (Tex. Crim. App. March 4, 1997) (not published)).

The record in this case is silent as to why appellant's trial counsel objected on constitutional grounds to the State's use of appellant's statement. Therefore, appellant has

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[2] The dissent states that we "prematurely" turn to the question of strategy. Slip op. at 7. The dissent asserts we must first determine whether trial counsel's conduct was deficient before looking to strategy. Before we reach the issue of counsel's deficient performance, however, we must determine whether the record in this case is adequate to evaluate counsel's performance. *See Stone v. State,* 17 S.W.3d 348, 350 (Tex. App.—Corpus Christi 2000, pet. ref'd).

failed to rebut the presumption that trial counsel's actions resulted from a reasonable decision. Further, the record is silent as to why counsel requested a lesser included offense instruction for less than one gram of cocaine. Counsel's allegedly improper actions do not amount to an error sufficiently egregious to satisfy the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's third and fourth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Yates, Fowler, and Baird.[3]

Publish — TEX. R. APP. P. 47.3(b).

[3] Former Judge Charles F. Baird sitting by assignment.