Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00418-CR

CHRISTOPHER LEE RAMIREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 787,747

O P I N I O N

Appellant, Christopher Lee Ramirez, was convicted of aggravated sexual assault of a child and sentenced to fifteen years imprisonment. On appeal, he brings the following eight points of error: (1) the State failed to prove the offense was committed in Harris County; (2) the trial court improperly admitted evidence of appellant's prior acts; (3) the trial court improperly admitted victim impact evidence during the guilt/innocence phase of the trial; (4) the trial court erred in not allowing appellant to impeach the credibility of the complainant; (5) the prosecutor's argument concerning other rape victims was improper; (6) the trial court erred in not striking an alternate juror; (7) the trial court made an impermissible comment on the appropriate sentence; and (8) appellant's trial counsel was ineffective.

The complainant, who was twelve years old at the time of the offense, testified that she was introduced to appellant by a school mate, L.V., via a three-way phone call. During the subsequent conversation, appellant gave the complainant his phone number. The following day, the complainant called appellant. This led to subsequent phone conversations over the next two months. During this time, the complainant told appellant that she was twelve years old and in the sixth grade. Appellant told the complainant he was seventeen. In addition to a telephone relationship, the two also exchanged letters, some of which were sexually explicit. Finally, they agreed to meet in person.

The complainant took a Metro bus to the Eastwood Transit center where she met appellant in person for the first time. They then boarded another bus and traveled to the home of appellant's friend "Joe." They socialized with Joe and other friends in the front yard and engaged in hugging and kissing. Eventually, appellant led the complainant toward the house. When she resisted, appellant struck the complainant. They then went into a bedroom; appellant removed the complainant's clothing and had sexual intercourse with her. Afterwards they went outside again. Sometime later, he pulled her back inside and attempted to have sex with her again. When she resisted, appellant again attempted to strike the complaint, but missed. Eventually, appellant gave the complainant bus fare, and she returned home.

About a month later, the complainant's mother became concerned due to a perceptible change in her daughter's behavior. She took the complainant to a doctor; whereupon the complainant broke down and told her mother what had happened.

Venue

In his first point of error, appellant contends the State failed to prove the offense was committed in Harris County.

Venue is presumed to have been proven in the trial court. *See* TEX. R. APP. P. 44.2(c)(1). However, where the record affirmatively shows otherwise or venue is made an issue at trial, the failure to prove venue in the county of prosecution is reversible error. *See Black v. State*, 645 S.W.2d 789, 791 (Tex. Crim. App. 1983); *Knabe v. State*, 836 S.W.2d 837, 839 (Tex. App.–Fort Worth 1992, pet. ref'd). Here, appellant moved for a directed verdict on the State's alleged failure to prove venue.

Venue in criminal cases need only be proven by a preponderance of the evidence, which may be either direct or circumstantial. *See* TEX. CODE CRIM. PROC. ANN. art. 13.17 (Vernon 1977); *Banks v. State*, 530 S.W.2d 940 (Tex. Crim. App. App. 1975); *Hignite v. State*, 522 S.W.2d 210 (Tex. Crim. App. 1975). Moreover, the trier of fact may make reasonable inferences from the evidence in deciding the issue. *See Lozano v. State*, 958 S.W.2d 925, 929 (Tex. App.–El Paso 1997, no pet); *Benavides v. State*, 763 S.W.2d 587, 588-89 (Tex. App.–Corpus Christi 1988, pet. ref'd). The evidence is sufficient to establish venue if "from [that] evidence the jury may reasonably conclude that the offense was committed in the county alleged." *Rippee v. State*, 384 S.W.2d 717, 718 (Tex. Crim. App. 1964); *Knabe*, 836 S.W.2d at 839.

While the site of the offense was never precisely located, the complainant testified that the bus ride from the transit center to the house where the offense occurred took only about five minutes. She further testified she believed she was still in Harris County. Police Officer Kelly Wallace testified that the complainant gave a description of the location of where the sexual assault occurred, including a bus number and two landmarks, i.e., Cage elementary school and the transit center. Officer Wallace testified that the bus route and the landmarks were all within Harris county. We find the evidence of venue is sufficient to convince a reasonable trier of fact by a preponderance of the evidence that the offense occurred in Harris County. Appellant's first point of error is overruled.

Prior Bad Acts

In his second point of error, appellant contends the trial court improperly admitted evidence of appellant's prior acts. Specifically, the State elicited testimony that the appellant had a twelve year-old girlfriend. Appellant claims the evidence was prejudicial because a jury would tend to believe that an adult man with a twelve year-old girlfriend would be more likely to commit the charged offense.

During the State's case-in-chief, the following exchange took place between the prosecutor and the complainant:

Q: Did you have a friend there by the name of [L.V.]?

A: Yes.

Q: And how old was [L.]?

A: 12. . .

Q: Did you ever meet one of her boyfriends?

A: Yes. . .

Q: Now, what was that boyfriend's name?

A: Christopher Lee Ramirez.

Appellant then objected, arguing that the State "just got something through the back door." The trial judge overruled the objection, saying "[h]aving a boyfriend is not illegal" and there is "[n]othing wrong with having a boyfriend."

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." TEX. R. EVID. 404(b)[1]. The State contends that any possible error arising from the introduction of the testimony was waived because appellant did not state a basis for his objection. However, it is clear from the trial court's response that the judge knew appellant was objecting under Rule 404(b). *See* TEX. R. APP. P. 33.1.

The State also argues that 404(b) is inapplicable because the trial judge explicitly found that the act of a seventeen year-old dating a twelve year-old is not a "bad act." Relying on *Moreno v. State*, the State claims that because dating a twelve year-old girl is not a "bad act," Rule 404(b) has no application to this case. *See Moreno v. State*, 858 S.W.2d 453 (Tex. Crim. App. 1993).

In *Moreno*, the defendant was on trial for kidnaping and murder. *See id.* The State introduced the defendant's statement that he had *planned* to kidnap, hold for ransom, and kill a different young man but later abandoned the idea. *See id. at 463*. Counsel objected that the evidence constituted proof of an extraneous offense which should have been barred by Rule 404(b). The Court of Criminal Appeals

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[1] Rule 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of 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.

found the admission of this evidence was not covered by Rule 404(b) because it was "inchoate thought" and no act or conduct was involved. *See id*. However, we find the act of being a boyfriend involves at least some conduct.

The plain language of Rule 404(b) speaks to "other crimes, wrongs, or *acts*," there is no requirement that the evidence must be that of another criminal offense, or even misconduct, in order to fall within the purview of Rule 404(b). *See* TEX. R. EVID. 404(b) (emphasis added); *Bishop v. State*, 869 S.W.2d 342, 345 (Tex. Crim. App. 1993). The intent of this rule is to prevent the introduction of evidence to prove the character of a person in order to show that he acted in conformity with that character. *Id*. This prohibition applies as equally to evidence of extraneous acts as it does to evidence of extraneous offenses. *Id*. Having an underage girlfriend is an extraneous "act" that implicates the provisions of Rule 404(b).

The plain language of Rule 404(b), however, permits such evidence to be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. TEX. R. EVID. 404(b). In analyzing whether evidence should have been admitted under Rule 404(b), the court must: (1) determine whether the extraneous offense testimony is relevant to a fact of consequence in the case; (2) if relevant, proceed to an analysis of whether the evidence should have been excluded under the balancing test of Rule 403, and articulate the application of that test to the facts of the case; and (3) if the evidence was inadmissible, proceed to a harm analysis. *See Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App.1994).

Here, appellant's defensive theory was that (1) he broke up with the complainant when he discovered she was only twelve, (2) he refused to have sex with her, and (3) she is lying out of spite. Under these circumstances, the fact that the complainant was introduced to appellant by his then twelve year-old girlfriend is relevant to rebutting at least a portion of his testimony.

Appellant argues that even if the evidence was admissible under Rule 404(b), it should nevertheless have been excluded because it was unfairly prejudicial. We agree that relevant evidence may nevertheless be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. Questions of admissibility of evidence under Rule 403 are assigned to the trial court

and are reviewable only for abuse of discretion. *See Brimage v. State*, 918 S.W.2d 466,506 (Tex. Crim. App. 1994), *cert. denied*, 519 U.S. 838 (1996). The trial court does not abuse its discretion if its decision falls within the zone of reasonable disagreement and is reasonable in view of all relevant facts. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997); *Rachal v. State*, 917 S.W.2d 799, 808 (Tex. Crim. App.), *cert. denied*, 519 U.S. 1043 (1996).

Virtually all relevant evidence proffered by a party will be prejudicial to the opposing party; in fact, in an adversarial system of justice, prejudice to the opponent is the ultimate objective to be achieved by the introduction of evidence. Only "unfair" prejudice provides a basis for exclusion of relevant evidence. *See Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App.1990). "Unfair prejudice" refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *See Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999). Unfair prejudice will substantially outweigh probative value only if there is "a clear disparity between the degree of prejudice of the offered evidence and its probative value." *Jones v. State*, 944 S.W.2d 642, 653 (Tex. Crim. App.1996). Moreover, there is a presumption that relevant evidence will be more probative than prejudicial. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App.1997).

Here, the trial court implicitly found the risk of unfair prejudice was minimal when the judge ruled that "[h]aving a boyfriend is not illegal" and that there is "[n]othing wrong with having a boyfriend." We find the evidence was admissible to rebut a defensive theory under Rule 404(b). Moreover, in light of the presumption of admissibility, we cannot say the trial judge abused her discretion in finding that the testimony's probative value was not substantially outweighed by the danger of unfair prejudice. Appellant's second point of error is overruled.

Victim Impact Evidence

In his third point of error, appellant contends the trial court improperly admitted victim impact evidence in the guilt/innocence phase of the trial.

In the State's case-in-chief, the complainant testified as follows:

> Q: Now, Veronica, after this happened in May, did you ever try to hurt yourself?

A.: Yes.

Q: When was that?

MR. CASTILLO: Judge, I'm going to object to that. That's not relevant at this point.

THE COURT: Overruled.

Q: (BY MS. THORTON) When was that, Veronica?

A: About a couple of weeks after that day.

Q: Okay. And what did you try and do?

A: Slash my wrists.

MR. CASTILLO: Object to that, Judge. Once again, it's not relevant to the issue of guilt or innocence.

THE COURT: Sustained.

Appellant then moved for an instruction to disregard the response. Appellant's request was granted; the jury was instructed to disregard the testimony; and appellant's request for a mistrial was denied.

Proof of the victim's emotional trauma experienced or manifested after the crime, i.e., evidence of so called "victim impact" testimony is generally inadmissible at the guilt/innocence stage of a trial. *See Garrett v. State*, 815 S.W.2d 333, 337 (Tex. App.–Houston[1 Dist.] 1991, pet. ref'd) (citing *Miller-El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App.1990)). However, there is a presumption that an instruction to the jury to disregard improperly admitted evidence was efficacious unless consideration of the facts of the particular case "suggest[s] the impossibility of withdrawing the impression produced on the minds of the jury." *See Waldo v. State*, 746 S.W.2d 750,754 (Tex. Crim. App. 1988) (quoting *Hatcher v. State*, 43 Tex. Cr. R. 237, 65 S.W. 97, 98 (1901)). Here, the complainant made a single statement, immediately corrected by the judge, and the comment was not referred to again by the State. We presume the instruction to disregard cured any error. Appellant's third point of error is overruled.

Credibility of the Complainant

In his fourth point of error, appellant contends the trial court erred in not allowing appellant to impeach the credibility of the complainant. Appellant argues that he should have been allowed to impeach the complaint's testimony that she was, prior to the assault, a virgin.

During the prosecution's case in chief, the following exchange took place between the prosecutor and the complainant:

> Q. What kind of sexual things did you discuss in those letters?
> A. I don't remember.
> Q. At that time had you ever had sex before?
> A. No.
> Q. How did you know what to say?
> A. What?
> Q. How did you know sexual things to talk about?
> A. I went to school.
> Q. You'd hear from other people?

Appellant's attorney then argued he was entitled "to go into her past for impeachment purposes about other boyfriends" she might have had. The Court agreed to hold a hearing outside the presence of the jury.

During that hearing, the complainant testified that she had as many as 30 former boyfriends, but she explicitly and repeatedly denied having had sexual relations with anyone prior to being assaulted by appellant. Appellant then requested permission to ask "particular questions" about each boyfriend. The trial judge refused.

A victim's prior sexual conduct may be admissible in certain situations to impeach the victim's testimony. *See Allen v. State*, 700 S.W.2d 924, 929 (Tex. Crim. App. 1985). For example, specific instances of previous sexual behavior may be relevant to: (1) rebut or explain medical or scientific evidence offered by the State; (2) to establish the complainant's consent; or (3) to show the complainant's motive or bias for fabricating the allegations. *See* TEX. R. EVID. 412(b). Moreover, evidence of promiscuous sexual conduct of a child 14 years or older may be offered as a defense to aggravated sexual assault. *See* TEX. R. EVID. 412(e). Here, however, the complainant's sexual history was not pertinent to rebut or explain medical or scientific evidence. Moreover, the evidence was not offered for establishing a motive

to fabricate. Finally, the complainant was, at the time of the assault, only twelve years-old. Thus, her prior sexual history was not material to consent or admissible as a defense to the charge of aggravated sexual assault. *See id.*; TEX. R. EVID. 412(b)(2). Accordingly, the trial court did not err in terminating the inquiry. Appellant's fourth point of error is overruled.

The Prosecutor's Argument Concerning Other Rape Victims

In his fifth point of error, appellant contends the prosecutor made an impermissible jury argument. In his closing, the State's attorney made the following argument regarding victims of rape:

> Defense counsel said: Well, she didn't cry here. She is angry. She is angry about what he has done to her life. The things, the consequences that have occurred in her life because of this. She is angry. And that makes sense. She was tearful at first, and now she is angry. That is not uncommon in a rape victim.

Appellant objected to the last statement as outside the evidence, and was overruled.

Permissible jury arguments fall within four areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) responses to opposing counsel's argument; and (4) pleas for law enforcement. *See Coble v. State*, 871 S.W.2d 192, 204 (Tex. Crim. App. 1993); *Todd v. State*, 598 S.W.2d 286, 296-97 (Tex. Crim. App. 1980). An argument, although outside the record, may also be based upon matters of common knowledge. *See Carter v. State*, 614 S.W.2d 821, 823 (Tex. Crim. App.1981).

Here, the prosecutor's argument was made in response to defense counsel's argument. Moreover, anger is typically spawned by insult or injury, and it might be logically anticipated that a rape victim would be angry with her assailant. Thus, the prosecutor's argument was consistent with human experience and might be fairly characterized as a matter of common knowledge. Appellant's fifth point of error is overruled.

The Alternate Juror

In his sixth point of error, appellant contends the trial court erred in not striking an alternate juror. The juror, who was male, approached appellant's trial attorney in the washroom and said he could not believe counsel had chosen an all female jury. Counsel reported this contact to the trial judge. In a subsequent examination by the court, the juror said "a man that would argue with 12 – if one's eliminated – that would argue with eleven women, he'd be in trouble." Thereafter, however, the putative juror characterized the statement as a "stupid remark" and said: "I'd take the position which I think is the proper position, as the facts -- however it's presented and the evidence. In my own mind, I'll make up my own mind how I feel about it."

Because the alternate juror indicated a reluctance to deliberate independently, appellant contends the trial court erred in failing to strike the juror. However, the juror in question was an alternate; he never served as a juror or participated in the trial. Accordingly, appellant has failed to demonstrate any reversible error. Appellant's sixth point of error is overruled.

The Trial Court's Use of a Hypothetical Scenario

In his seventh point of error, appellant contends the trial court made an impermissible comment on the weight of the evidence during voir dire. The trial judge, while attempting to illustrate why the legislature has provided a broad range of punishment for certain offenses, presented the venire with two hypothetical situations—suggesting one might merit a lenient sentence while the other would warrant a severe sentence. Appellant claims the judge's comments set the criteria for a minimal sentence and impliedly suggested the jury should impose a harsher penalty under the facts presented here.

A judge should not "at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." TEX. CODE CRIM. PROC. ANN. Art. 38.05 (Vernon 1979). To constitute reversible error, the judge's comment must be such that it is reasonably calculated to prejudice the defendant's rights or benefit the State. *See Marks v. State*, 617 S.W.2d 250, 252 (Tex. Crim. App. [Panel Op.] 1981). In this case, the judge first explained the full range of punishment available for the offence of aggravated sexual assault of a child, saying:

> Now, let me say up front, I'm not trying to suggest in any way that this defendant will be found guilty of this case. I don't know the facts in the

> case. . . So, please do not take the fact that we are discussing punishment as any type of indication as to what I think is going to happen in the case because it's certainly not meant to be that. The problem is, if we don't discuss punishment with y'all right now, then we don't know if you can follow the law on punishment until after you are up there. And then once you've heard the evidence, you are stuck, even if you can't follow the law. So we have to discuss punishment right now. And it's not any kind of suggestion to you as to what the outcome of this case will be.
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> * * *
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> [If the defendant is eligible for probation, then] the minimum is five years probation, the maximum is life. Huge range. The jury, you-all, gets [sic] to say whether he gets five years probation. . . all the way up to life in the penitentiary. A huge range of punishment.
>
> Basically – you can basically do almost anything, between five years probation and life. All right? So why on earth did the Legislature give a jury such a wide range of punishment for this type of offense? Why would they do that? Well, the obvious reason is so the jury's hands wouldn't be tied, so you wouldn't be stuck giving somebody something that you think is wrong, so the jury's hands wouldn't be tied.

The judge then gave two hypothetical situations to illustrate the point she was attempting to make:

> Let's say you have a 13-year-old, somebody who is 13 years old, 11 months and three weeks. A girl. And she is kind [of] promiscuous. She has had sex four or five times with the neighborhood boys that are 14 or 15, 16. She is active sexually. She goes to a party. She gets a fake ID. And she meets a young 18-year-old boy. And I know y'all have seen boys that are 18 years old, they look young, they look 14, 15, they are very, very young looking. An 18-year-old that hasn't had sex before ever. He's a very innocent 18-year-old boy. She meets him at a party and she tells him she is 18. She has a fake ID and says she is 18. And she comes onto him. "Come on, let's go do it." Very sexually active. She is a willing participant. She comes onto the 18-year-old boy. They have sex consensually at her instigation. Her mother finds out. Her mother gets mad. Her mother calls the police. And he is charged with aggravated sexual assault of a child.
>
> Consent is not a defense. It doesn't matter that she came onto him. It doesn't matter that she had a fake ID. It doesn't matter she lied to him and said she was 18. He is 18. She is 13. Under the law he is guilty of aggravated sexual assault of a child. Now, do you understand why the legislature has said that the range of punishment is no less than five

> years probation and no more than life? The same title for the charge could be: A man who has repeatedly raped children ages 3, 4 and 5 his entire life. That's the same title. Aggravated sexual assault of a child. You could have consensual sex between a 13-year-old and an 18-year-old or you can have forceful sex between a repeat child abuser. That is why the legislature said: Let's not tie the hands of juries; let's give the jury the option of listening to all the facts and then let's let the juries decide what the right thing is to do. You should feel thankful the Legislature has passed this law the way they did because it let's jurors do what they think is right.

The aforementioned comments do not appear to have been calculated to benefit the State or prejudice appellant. Rather, it appears the court simply attempted to offer an explanation regarding why the legislature provided a broad range of sentencing options. We do not construe the trial judge's comments as implying that appellant should receive a harsh sentence or should not receive probation. Thus, we do not find the court's comments to have been improper.

Moreover, appellant made no objection to the court's comments. To preserve error, the complaining party must have objected to the judge's comment or the objection is waived. *See Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App.1983); *see also Williams v. State*, 834 S.W.2d 502, 505 (Tex. App.–Fort Worth 1992, pet. ref'd); *Nevarez v. State*, 671 S.W.2d 90, 93 (Tex. App.–El Paso 1984, no pet.) (holding that the defendant's complaint that the trial court improperly commented on the weight of the evidence was not preserved for error because defense counsel did not object). Because the issue has not been preserved for review, appellant's seventh point of error is overruled.

Ineffective Assistance of Counsel

In his final point of error, appellant contends he was deprived of effective assistance of counsel when his attorney failed to object to the trial court's use of the hypothetical scenarios discussed above.

To be successful in a claim for ineffective assistance of counsel, an appellant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ramirez v. State*, 987 S.W.2d 938, 942-43 (Tex. App.–Austin 1999, no pet. h.). In determining whether an appellant satisfied the first element of the

test, we decide whether the record establishes that counsel made errors so serious that the were not functioning as "counsel" guaranteed to a defendant by the Sixth Amendment. *See Strickland* at 687.

We begin our analysis with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* Appellant must demonstrate that counsel's performance was unreasonable under the prevailing professional norms and that the challenged action was not sound trial strategy. *See Strickland*, 466 U.S. at 688; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App.1991). We do not evaluate the effectiveness of counsel in hindsight, but from counsel's perspective at trial. *See Strickland*, 466 U.S. at 689; *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App.1993); *Stafford*, 813 S.W.2d at 506. Further, we assess the totality of counsel's representation, rather than his or her isolated acts or omissions. *See Strickland*, 466 U.S. at 689; *Ramirez*, 987 S.W.2d at 943.

The appellant cannot meet his burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998); *Beck v. State*, 976 S.W.2d 265, 266 (Tex. App.–Amarillo 1998, pet. ref'd); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.–Corpus Christi 1992, pet. ref'd, untimely filed). Generally, a record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd).

In the present case, we have already found the court's comments to be innocuous. Moreover, the record is silent as to the reasons appellant's trial counsel chose the course he did. Appellant did not file a motion for a new trial and, therefore, failed to develop a record on counsel's alleged infectiveness. *See Kemp*, 892 S.W.2d at 115. 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.* The first element of *Strickland* is not met.

Appellant's eighth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig. (Justice Wittig concurs in the result only.)

Do Not Publish — TEX. R. APP. P. 47.3(b).