

Affirmed and Opinion filed August 3, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00219-CR

MARY ANN HORTON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 791,895**

OPINION

Mary Ann Horton appeals her conviction by jury for the felony offense of aggravated assault, enhanced by two prior felony convictions. After finding the enhancement paragraphs to be true, the trial court assessed punishment at twenty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In her sole point of error, appellant contends that she received ineffective assistance of counsel.

BACKGROUND

The complainant, 19-year-old Jennifer Horton, was living with her grandparents, her child, and her mother, appellant. On the morning of September 1, 1998, appellant confronted Jennifer about a statement Jennifer supposedly made to appellant's boyfriend. When Jennifer denied knowledge of this allegation, appellant called her a liar, grabbed a knife, held it to Jennifer's throat, and stated, "I'm going to kill you before the day's over with." Jennifer left the house and filed a report against appellant. Appellant was arrested the following day.

DISCUSSION

In her sole point of error, appellant asserts that she was denied the effective assistance of counsel. 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. *See Strickland v. Washington*, 466 U.S. 668 (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. *See id.*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *See id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *See id.*

Appellant claims that defense counsel made the following errors: (1) asking appellant to sign and swear to a Motion for Probation when she was ineligible for probation, (2) allowing into evidence

unadjudicated extraneous offenses, (3) allowing into evidence irrelevant evidence of appellant's lifestyle and instability, (4) allowing hearsay into evidence, (5) opening the door to evidence of appellant's prior convictions, (6) failing to argue at the end of the guilt phase and then making a guilt argument at the end of the punishment phase of the trial. The State points out that nothing in the record establishes that appellant's trial attorney counseled appellant to sign the Motion for Probation. Furthermore, the signing of the motion was not unreasonable because the trial court could have found appellant guilty of a lesser offense for which probation would have been available. The State then argues that trial counsel's failure to object to extraneous evidence of appellant's drug use and prior assaults against Jennifer do not amount to ineffective assistance of counsel. According to the State, the introduction of such trial testimony would be consistent with a strategy of showing that Jennifer harbored a grudge against appellant because of appellant's past conduct. It would follow then that Jennifer lied about appellant committing the instant offense in an attempt to have appellant removed from their home. Finally, the State contends that failing to argue at the end of the guilt phase was not ineffective because neither the State nor the defense presented any argument at that stage. Defense counsel could have believed that argument was unnecessary since the trial was to the court.

While both sides make plausible arguments as to trial counsel's strategy, or lack thereof, the record is silent as to why trial counsel engaged in the conduct of which appellant complains. Appellant did not file a motion for new trial raising the issue of ineffective assistance that would have helped to develop the record. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving the allegation of ineffective assistance of counsel.¹ When there is a lack of evidence in the record as to counsel's trial strategy, an appellate court may not speculate about why counsel acted as he did. *See Jackson v. State*, 877 S.W.2d at 771. Without testimony from trial counsel, an appellate court must presume that counsel had a plausible reason for his actions. *See Safari v. State*, 961 S.W.2d 437, 445 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd, untimely filed). In the absence of such testimony, an appellate court cannot

¹ “The record in a direct appeal may well contain a less than adequate inquiry into possible tactical reasons for various actions or omissions by counsel and may lack completely trial counsel's own explanations for his actions or inactions.” George E. Dix and Robert O. Dawson, 41 Texas Practice: Criminal Practice and Procedure § 24.94 (1995).

meaningfully address claims of ineffectiveness. *See Davis v. State*, 930 S.W.2d 765, 769 (Tex. App.–Houston [1st Dist.] 1996, pet. ref’d). Accordingly, since there is no evidence in the record concerning trial counsel’s explanation for his manner of representation, it is impossible to conclude that counsel’s performance was deficient. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.–Houston[1st Dist.] 1996, no pet.).

The record in the case at bar is silent as to why appellant’s trial counsel failed to object to the State’s persistent attempts to elicit evidence appellant claims was inadmissible. Therefore, appellant has failed to rebut the presumption this was a reasonable decision. “Failure to make the required showing of ... deficient performance ... defeats the ineffectiveness claim.” *See Strickland v. Washington*, 466 U.S. at 699. However, recourse for appellant’s claim is still available. The Court of Criminal Appeals has held that the general doctrine that forbids an application for writ of habeas corpus after direct appeal has addressed the issue does not apply in these situations, and appellant can resubmit his claim via an application for writ of habeas corpus. *See Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App.1998); *Ex Parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App.1997). This would provide an opportunity to conduct a dedicated hearing to consider the facts, circumstances, and rationale behind counsel’s actions. Specifically, a hearing would allow trial counsel himself to explain what motivated his actions during the proceedings.

Appellant has not rebutted the strong presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. We overrule appellant’s sole point of error and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed August 3, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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