Affirmed and Opinion filed September 28, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01010-CR

———————————

SHARON MCKINNEY COATS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 760,161

O P I N I O N

A jury found appellant, Sharon McKinney Coats, guilty of aggravated robbery and assessed her punishment at five years' imprisonment. In six issues, Coats appeals that her trial counsel was ineffective during the guilt-innocence phase of trial by (1) failing to object to inadmissible character evidence; (2) failing to seek a hearing outside the jury's presence regarding admissibility of her post-arrest statement; (3) failing to object to evidence of an extraneous offense; (4) eliciting testimony that she was a suspect in four additional robberies; (5) withdrawing his request to charge the jury about extraneous offenses; and (6) erring cumulatively throughout trial. We affirm her conviction.

STANDARD OF REVIEW

The standard for appellate review of effectiveness of counsel was set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), and adopted by the Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). *See Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993). The appellant must prove that her counsel's representation so undermined the "proper functioning of the adversarial process that the trial cannot be relied on having produced a just result." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. Appellant's claim that her counsel's assistance was so defective as to require reversal of a conviction has two components. First, she must show that her counsel's performance was deficient; second, she must show the deficient performance prejudiced the defense. *See id.* at 687, 104 S. Ct. at 2064.

The first component of this test is met by showing appellant's trial counsel made errors so significant that he was not functioning as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *See id.* The second prong of *Strickland* requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial, i.e., a trial whose result is reliable. *See id.* at 687, 104 S. Ct. at 2064. This means an appellant must prove by a preponderance of the evidence that her defense attorney's representation fell below the standard of prevailing professional norms, and that there is a reasonable probability that but for counsel's deficiency the result of the trial would have been different. *See id.* at 694, 104 S. Ct. at 2068; *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of her 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 her 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 v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume that counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *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 [1st Dist.] 1994, 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 Kemp*, 892 S.W.2d at 115; *see also Jackson*, 973 S.W.2d at 957.

When the record is silent about 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. Even though the appellant may file a motion for new trial, failing to request a hearing on a motion for new trial may leave the record bare of trial counsel's explanation of his conduct. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective assistance claim. *See Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.–Beaumont 1995, pet. ref'd).

In this case, Coats did not file a motion for new trial and did not obtain an affidavit from her trial counsel delineating the reasons for his alleged failings. We can find no evidence in

the record regarding trial counsel's strategy. Coats argues in her brief that there could be no trial strategy for her counsel's alleged failures. Whatever trial counsel's reasons may have been for pursuing the chosen course, in the absence of a record identifying these reasons, we must presume they were made deliberately as part of sound trial strategy. Because we are unable to conclude that defense counsel's performance fell below an objective standard without evidence in the record, we find that the appellant has failed to meet the first prong of *Strickland*. Accordingly, we overrule all six of Coats's issues and affirm her conviction.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed September 28, 2000.

Panel consists of Justices Cannon, Draughn, and Lee.*

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

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.