

Affirmed and Opinion filed November 1, 2001.



In The
Fourteenth Court of Appeals

NO. 14-00-01107-CR

KEVEN ALBERT RIVAS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from 262nd District Court
Harris County, Texas
Trial Court Cause No. 834,870**

OPINION

Keven Albert Rivas appeals a conviction for aggravated robbery¹ on the ground that his trial counsel's failure to secure the testimony of an alibi witness at trial denied him effective assistance of counsel. We affirm.

Appellant argues that trial counsel's defensive theory at trial was to: (1) discredit the victim's testimony, (2) present an alibi defense, and (3) recant appellant's confession. Appellant contends that his counsel's failure to secure the attendance and alibi testimony of

¹ A jury found appellant guilty and sentenced him to life in prison.

his girlfriend, Theresa Villanueva, was deficient performance and harmful because: (1) it would have corroborated the alibi testimony of Beatrice Cantu Gonzalez, a defense witness who was impeached during cross-examination, (2) it would have corroborated the alibi testimony of appellant's parents, whose cross-examination cast doubt on their memories; (3) the victim was never able to identify appellant as one of the robbers; and (4) the only evidence placing appellant at the scene of the crime was the confession that he recanted. Appellant asserts that Villanueva's testimony would have provided the only rational basis to create a reasonable doubt of his guilt.

To prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). To be sustained, an allegation of ineffective assistance of counsel must be affirmatively demonstrated in the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). In reviewing ineffectiveness claims, scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A court must indulge, and a defendant must overcome, a strong presumption that the challenged action might be considered sound trial strategy under the circumstances. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Thus, the presumption that an attorney's actions were sound trial strategy ordinarily cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999), *cert. denied*, 120 S.Ct. 803 (2000).

In this case, appellant failed to develop a record of his trial counsel's reasons for not calling the witness to testify at trial, which is generally a matter of trial strategy. *See Stults v. State*, 23 S.W.3d 198, 208-09 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Therefore, appellant has not overcome the presumption that his counsel's decision was based on sound trial strategy under the circumstances, such as concerns about the witness's credibility or damaging information she could have provided on cross-examination. Accordingly, appellant's sole point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.²

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

² Senior Justice Don Wittig sitting by assignment.