

Affirmed and Opinion filed March 2, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00804-CR

LEYLAND ZIRIAX, Appellant

V.

STATE OF TEXAS, Appellee

**On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 759,679**

OPINION

Appellant, Leyland Ziriix, was convicted by a jury of sexual assault of a child (his fifteen-year-old granddaughter) and sentenced to fourteen years confinement and assessed a \$5,000 fine. On this appeal, he contends he was denied effective assistance of counsel under the Texas and U.S. Constitutions. We affirm.

Appellant asks us to find he was denied effective assistance of counsel because of trial counsel's alleged deficiencies in performance. They are:

1. Failure to properly request notice of the State's intent to use inadmissible extraneous offenses regarding sexual assaults by the appellant against his two daughters some twenty years prior.
2. Failure to properly object and preserve error in admitting this extraneous offense testimony at trial.
3. Failure to properly object to several incidences of inadmissible hearsay pertaining to extraneous offenses.
4. Failure to object and request redaction of inadmissible portions of medical records pertaining to extraneous offenses.
5. Failure to object to improper jury argument.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. 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. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (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).

Judicial scrutiny of counsel's performance must be highly deferential and we are bound to indulge the strong 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. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). In *Jackson*, despite the fact that counsel did not attempt to strike three veniremen who affirmatively stated they could not be fair or impartial toward the defendant in that case, the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons

for choosing the course he did. *Jackson*, 877 S.W.2d at 770-772; *See also Delrio v. State*, 840 S.W.2d 443 (Tex. Crim. App. 1992).

In this case, appellant did not file a motion for a new trial, and therefore failed to develop evidence of trial counsel's strategy. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial). As the court of criminal appeals recently pointed out:

A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. 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 such a serious allegation. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.

Thompson v. State, No. 1532-88-CR 1999 WL 812394*9, *10 (Tex. Crim. App. October 13, 1999).

Here, the record is silent as to the reasons appellant's trial counsel chose the course he did. For us to find that trial counsel was ineffective based on any of the alleged grounds on a silent record would require us to engage in speculation, which, by ever-mounting authority of the court of criminal appeals, we are not at liberty to do. *See Thompson* at *9; We cannot superimpose our subjective judgment as to what trial strategy trial counsel should have employed. *Jackson*, 877 S.W.2d at 771. To do so, we would have to ignore superior court precedent and engage in speculation as to the reasoning behind trial counsel's strategy. *See Gamble v. State*, 916 S.W.2d 92 (Tex. App.–Houston [1st Dist.] 1996, no pet.). Due to lack of evidence in the record concerning trial counsel's reasons for his alleged shortfalls, we are therefore unable to conclude that trial counsel's performance was deficient.

Further, we cannot say no plausible basis exists in strategy or tactics for trial counsel's actions or omissions. Though the extraneous offense testimony may have been inadmissible, given the trial court's earlier refusal to keep it out, counsel may have foregone further objections and decided the best strategy would be to appear open and honest before the jury in hopes of gaining sympathy or mitigating punishment. *See Turner v. State*, 932 S.W.2d 622, 626 (Tex. App.–Houston [14th Dist.] 1996, no pet.).

We also note that the daughters of the appellant who testified to the extraneous offenses also testified in corroboration of complainant's story. Throughout trial, counsel challenged the credibility of these witnesses and attempted to show they had an axe to grind with appellant. During cross examination, he elicited testimony from both daughters that neither ever reported the alleged assaults against them to police. In another instance, he brought out an admission from one of appellant's daughters that despite her claim that appellant had sexually assaulted her, she nonetheless allowed her daughter, the complainant, to stay at appellant's house. In view of this, it may have been counsel's reasonable belief at the time that the extraneous offense testimony was not credible and that by acquiescing into letting it in, the jury might find those State's witnesses' entire testimony not to be credible, thus increasing chances for an acquittal. In this light, appellant has not rebutted the presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment.

Appellant's points of error are overruled. The judgment of the trial court is affirmed.

Joe L. Draughn
Justice

Judgment rendered and Opinion filed March 2, 2000.
Panel consists of Justices Draughn, Edelman, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

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