Affirmed and Memorandum Opinion filed December 16, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00880-CR

HUDSON MARVIN HOLMES, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 3
Brazoria County, Texas
Trial Court Cause No. 166709

MEMORANDUM OPINION

A jury convicted appellant Hudson Marvin Holmes, Jr. of one count of misdemeanor assault. The trial court sentenced him to one year imprisonment, probated for one year, and assessed a fine and restitution. Appellant challenges his conviction on the single ground that his trial counsel provided ineffective assistance. We affirm.

BACKGROUND

The underlying facts of appellant's conviction are irrelevant to the disposition of this case. The issue on appeal centers on the alleged bias or prejudice of Juror No. 19, A. Phillips, and trial counsel's failure to strike her from the venire or challenge her for cause.

Phillips spoke several times during voir dire. First, the prosecutor asked about the criminal backgrounds of the jurors. Phillips responded that she had a drug possession charge. The prosecutor asked whether Phillips would feel any bias in this case, and Phillips responded that she would not. Later, defense counsel asked the jurors to rate the defendant's guilt on a scale of one to ten. One juror said, "[F]ive because we don't know one way or the other." Counsel then asked the venire if anyone agreed, and Phillips responded affirmatively: "Well, obviously he did something or he wouldn't be here; but we don't know if what he's been charged with is really the way it went or if that's just one story, you know. We don't have his side of the story yet, but obviously he did something."

Then counsel asked if anyone else agreed with Phillips, and another juror gave an affirmative response. The next juror said that appellant was 100% innocent because "we don't know any facts and we're supposed to presume he's innocent." Counsel continued questioning the jurors, most of whom agreed that appellant was 100% innocent. When counsel reached Phillips after eight consecutive "100% innocent" answers from other jurors, the following exchange occurred:

[Defense Counsel]: Ms. Phillips —

[Phillips]: Well, I mean —

[Defense Counsel]: — we're back to you.

[Phillips]: I guess — well, can I explain it?

[Defense Counsel]: Absolutely. That's what we're here for.

[Phillips]: I mean, I guess, by the way the law is, yes, he's innocent. But I want to — okay. Yes. Without hearing any facts, yeah, he's innocent.

[Defense Counsel]: Okay.

Later, Phillips acknowledged that she could consider the whole range of punishment. At the conclusion of voir dire, appellant's trial counsel challenged one juror for cause, and the court sustained the challenge. Counsel then used peremptory strikes on three other jurors. Phillips was the sixth and final juror selected from the venire.

Appellant was convicted by the jury and ultimately sentenced by the court. Trial counsel moved for a new trial but did not allege ineffective assistance. The trial court made no findings regarding the effectiveness of counsel's assistance to appellant. This appeal followed.

ANALYSIS

A. Legal Standard

Appellant argues that he received ineffective assistance during voir dire. Specifically, appellant argues that his trial counsel should have (1) challenged Phillips for cause or (2) used a peremptory strike on Phillips instead of one of the other three venire members.

To analyze an appellant's claim of ineffective assistance, we apply the familiar two-prong test announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, an appellant must show that counsel's performance was deficient—namely, that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687–88. A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Second, an appellant must show that counsel's deficiency caused prejudice—namely, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. There must exist a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. An appellant must satisfy both of these prongs by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). If an appellant fails to prove one of the prongs, we must affirm the conviction. *Id.*

Trial counsel's explanation for the allegedly deficient conduct is usually a crucial issue of fact that must be elicited in a trial court. *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). If an appellant cannot show in the record that counsel's conduct was not the product of a strategic decision, "a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*, 253 S.W.3d 686, 696–97 (Tex. Crim. App. 2008) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

B. Counsel's Performance Was Not Deficient

The record in this case is devoid of any explanation for why appellant's trial counsel did not challenge or strike Phillips. The record contains no motion for new trial based on ineffective assistance or an accompanying hearing. Appellant argues that no competent attorney would refuse to challenge or strike a biased juror. But the Court of Criminal Appeals has repeatedly held otherwise. *See, e.g.*, *Jackson v. State*, 877 S.W.2d 768 (Tex. Crim. App. 1994) (holding there was no deficient performance on silent record when counsel did not challenge or strike a juror who said his prior experience of being a victim of a burglary would probably impact his impartiality in the trial of the defendant for robbery); *Delrio v. State*, 840 S.W.2d 443 (Tex. Crim. App. 1992) (per curiam) (holding no deficient performance on silent record when counsel did not challenge or strike a juror who was an ex-narcotics officer and admitted during voir dire that he could not be impartial); *see also Morales*, 253 S.W.3d at 698 ("[T]rial counsel must be permitted to make a strategic or tactical decision to retain a juror who is only presumably biased." (emphasis omitted)).

Moreover, challenging Phillips for cause would have been futile. To establish that a challenge is proper, the proponent of the challenge must show that the juror understood the requirements of the law and could not overcome his or her bias well enough to follow the law. *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009), *cert. denied*, No. 09-10732, 2010 WL 1922774 (U.S. Oct. 4, 2010). We would reverse a trial court's overruling of counsel's challenge only if the court clearly abused its discretion. *Id.* at 296.

Here, even if we assume that Phillips's initial comments show bias (e.g., "obviously he did something"),[1] the record shows that Phillips was rehabilitated. When Phillips was questioned later during voir dire, she acknowledged that her prior understanding of the question was erroneous: "I mean, I guess, by the way the law is, yes, he's innocent. But I want to—okay. Yes. Without hearing any facts, yeah, he's innocent." The record before us shows Phillips understood the law and overcame any prior bias she may have had. A trial court's overruling of a challenge on these facts would not be a clear abuse of discretion. Accordingly, challenging Phillips would have been futile, and "trial counsel was under no obligation to do what would amount to a futile act." *Holland v. State*, 761 S.W.2d 307, 319 (Tex. Crim. App. 1988).

Finally, appellant's argument regarding peremptory strikes is even less persuasive because the decision to use peremptory strikes, and on whom to use them, is almost entirely a matter of discretion that involves strategic decision-making. Here, counsel in fact used all three peremptory strikes. These strikes were used on jurors lower in number than Phillips and thus more likely to be selected for the jury than her. Phillips also acknowledged that she had a criminal record. Much like trial counsel in *Delrio* may have wanted an ex-narcotics officer on the jury, appellant's trial counsel may have wanted someone with a criminal record. Even if we assume Phillips was biased against

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[1] The State apparently concedes that such initial thoughts (shared by an "overwhelming number of jurors who sit on a panel") would need to be set aside to allow a juror to follow the law regarding the

appellant, we cannot say on a silent record that the failure to strike her shows a lack of strategic decision-making.

Appellant has failed to show that his trial counsel's performance was deficient. Accordingly, we do not need to address the prejudice prong of the *Strickland* test. *See My Thi Tieu v. State*, 299 S.W.3d 216, 225 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *Strickland*, 466 U.S. at 697).

We overrule appellant's sole issue and affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Mirabal.*

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presumption of innocence. (*See* State's Br. 9.) We render no opinion today on whether Phillips's initial comments, standing alone, show that she was actually biased.

* Senior Justice Margaret Garner Mirabal sitting by assignment.