

**NO. 12-08-00256-CR**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*JOHN HARTSFIELD, JR.,  
APPELLANT*

§

*APPEAL FROM THE 241ST*

*V.*

§

*JUDICIAL DISTRICT COURT OF*

*THE STATE OF TEXAS,  
APPELLEE*

§

*SMITH COUNTY, TEXAS*

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***MEMORANDUM OPINION***

Appellant John Hartsfield, Jr. appeals his conviction for sexual assault of a child, for which he was sentenced to imprisonment for life. In one issue, Appellant contends that he received ineffective assistance of counsel during his trial on punishment. We affirm.

**BACKGROUND**

Appellant was charged by indictment with sexual assault of a child. Appellant pleaded “not guilty,” and the matter proceeded to a jury trial. At trial, the evidence indicated that Appellant inserted his fingers into the then fourteen year old victim’s vagina and, subsequently, ejaculated on her stomach.<sup>1</sup> Ultimately, the jury found Appellant “guilty” as charged, and the matter proceeded to a trial on punishment.

During the trial on punishment, Tyler Police Department Detective Paul Robeson testified on the State’s behalf as an expert witness on recidivism and child psychology. Robeson stated that victims of sexual abuse generally have lasting psychological effects for the rest of their lives. Robeson further stated that a person who commits a sexual offense against a child is more likely to

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<sup>1</sup> Appellant does not raise the issue of evidentiary sufficiency on appeal.

reoffend than other criminals. Robeson testified that the best way to ensure that such a sexual offender does not reoffend is to have that person locked up for as long as possible so that he will not have access to the victim pool any longer.

At the conclusion of the trial on punishment, the jury assessed Appellant's punishment at imprisonment for life. The trial court sentenced Appellant accordingly, and this appeal followed.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

In his sole issue, Appellant contends that he received ineffective assistance of counsel at his trial on punishment. Specifically, Appellant argues that his trial counsel was ineffective for his failure to object to Robeson's qualifications as an expert witness.

Claims of ineffective assistance of counsel are evaluated under the two step analysis articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). The first step requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065. To satisfy this step, the appellant must identify the acts or omissions of counsel alleged to be ineffective assistance and affirmatively prove that they fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069.

To satisfy the *Strickland* standard, the appellant is also required to show prejudice from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, an appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

In any case considering the issue of ineffective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by

presenting evidence illustrating why his trial counsel did what he did. *See id.* Appellant cannot meet this burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998) (inadequate record on direct appeal to evaluate whether trial counsel provided ineffective assistance); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.–Corpus Christi 1992, pet. ref’d, untimely filed) (inadequate record to evaluate ineffective assistance claim); *see also Beck v. State*, 976 S.W.2d 265, 266 (Tex. App.–Amarillo 1998, pet. ref’d) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim). A record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet. ref’d).

Appellant’s burden on appeal is well established. *See Saenzpardo v. State*, No. 05-03-01518-CR, 2005 WL 941339, at \*1 (Tex. App.–Dallas 2005, no pet.) (op., not designated for publication). Before being condemned as unprofessional and incompetent, defense counsel should be given an opportunity to explain his or her actions. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). Thus, absent a properly developed record, an ineffective assistance claim must usually be denied as speculative, and, further, such a claim cannot be built upon retrospective speculation. *Id.* at 835.

Here, Appellant sets forth in his brief that his attorney’s performance at trial fell below the professional norm because he failed to object to Robeson’s qualifications as an expert on the subject of recidivism and child psychology. Yet, the record before us is silent about trial counsel’s strategy or why he did not object to Robeson’s qualifications. Normally, a silent record cannot defeat the strong presumption of effective assistance of counsel. *See Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999); *but see Andrews v. State*, 159 S.W.3d 98, 102–03 (Tex. Crim. App. 2005) (reversing a conviction “in a rare case” on the basis of ineffective assistance of counsel when trial counsel did not object to a misstatement of law by the prosecutor during argument).

In *Andrews*, the same prosecutor who filed a motion to cumulate the sentences in four counts of sexual abuse later argued to the jury, “You give him 20 years in each case, it’s still just 20 years. It’s still not 80. You can give different amounts if you want. You can give 20, 10, 10, five, it’s still just 20.” *Id.* at 100. The appellant’s trial counsel did not object to the prosecutor’s misstatement of

the law. *Id.* The trial court ultimately granted the State’s motion to cumulate the sentences and imposed a combined prison sentence of seventy-eight years. *Id.* The court concluded that the argument left the jury with the incorrect impression that the appellant’s sentences could not be stacked and that the appellant would serve no more than twenty years in prison for all four counts. *Id.* at 103. Therefore, the court held that, under the “extremely unusual circumstances of [the] case,” the record contained all of the information it needed to conclude that there could be “no reasonable trial strategy for failing to object” to the prosecutor’s misstatement of the law. *Id.*

The “extremely unusual circumstances” present in *Andrews* are not present in the case at hand. Failing to object to a misstatement of the law that is detrimental to one’s client when the harm is so clearly presented by the record on appeal is quite different from failing to object to the admission of witness testimony or that witness’s qualifications as a matter of trial strategy. *Cf. Saenzpardo*, 2005 WL 941339, at \*2. Counsel’s reasons in *Andrews*, if any, were unnecessary to resolve the ineffective assistance of counsel claim. *See Berry v. State*, No. 05-04-01161-CR, 2005 WL 1515512, at \*3 (Tex. App.–Dallas 2005, no pet.). Having reviewed the record in the instant case, we conclude that the facts before us are distinguishable from the facts in *Andrews*. Thus, we decline to hold that the record in the instant case contains all of the information needed for us to conclude that there could be no reasonable trial strategy for not objecting to an expert witness’s qualifications during a trial on punishment. Therefore, we hold that Appellant has not met the first prong of *Strickland* because the record does not contain evidence concerning Appellant’s trial counsel’s reasons for choosing the course he did. As a result, Appellant cannot overcome the strong presumption that his counsel performed effectively. Appellant’s sole issue is overruled.

**DISPOSITION**

Having overruled Appellant’s sole issue, we *affirm* the trial court’s judgment.

**BRIAN HOYLE**

Justice

Opinion delivered September 2, 2009.

*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(DO NOT PUBLISH)