NO. 12-10-00329-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ROBERT PALLM, APPELLANT	***§***	***APPEAL FROM THE 114TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Robert Pallm appeals his conviction for aggravated sexual assault of a child, for which he was sentenced to imprisonment for life. Appellant raises five issues on appeal.[1] We affirm.

BACKGROUND

Appellant was charged by indictment with three counts of aggravated sexual assault of D.N., a child. Appellant pleaded "not guilty," and the matter proceeded to a jury trial. At trial, D.N. testified in great detail that Appellant had sexually assaulted her.[2] During cross examination and through the admission of other evidence, Appellant sought to challenge the veracity of D.N.'s testimony. Following the presentation of evidence and argument of counsel, the jury found Appellant "guilty" as charged, and the matter proceeded to a bench trial on punishment. During the trial on punishment, the trial court considered, among other things, Appellant's prior

[1] Appellant initially briefed only two issues. After the case was submitted, Appellant requested leave to file a supplemental brief containing three additional issues. We granted Appellant's request for leave to file a supplemental brief. In this opinion, Appellant's issues raised in his supplemental brief will be referred to as issues three, four, and five.

[2] Appellant has not challenged the sufficiency of the evidence supporting his conviction.

conviction in Georgia for sexual exploitation of children. At the conclusion of the trial on punishment, the trial court sentenced Appellant to imprisonment for life. This appeal followed.

CHALLENGE TO THE ADMISSIBILITY OF EVIDENCE UNDER TEXAS RULE OF EVIDENCE 403

In his first issue, Appellant argues that the trial court abused its discretion in admitting sixty-two pornographic photographs and five pornographic videos contained on diskettes and compact discs seized from Appellant's home. Specifically, Appellant argues the admission of this evidence violates Texas Rule of Evidence 403.

We review the trial court's decision to admit evidence for abuse of discretion. *See* ***Prystash v. State***, 3 S.W.3d 522, 527 (Tex. Crim. App. 1999). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. EVID. 401. Evidence that is not relevant is inadmissible. *See* TEX. R. EVID. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. A proper Rule 403 analysis includes, but is not limited to, four factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. ***State v. Mechler***, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005).

Degree of Relevance

Appellant does not argue on appeal that the evidence at issue was not relevant. Moreover, Appellant offers scant analysis concerning the probative value of this evidence so as to aid this court in our determination of whether its relevance might have been outweighed by the danger of unfair prejudice. Nonetheless, we will discuss the probative value of the evidence.

At trial, D.N., who was nineteen years old at that time, testified that when she was eleven years old, Appellant and his wife babysat her and her younger sister while her mother worked nights. D.N. further testified that Appellant showed her pornographic videos and pictures. D.N. stated that Appellant engaged in sexual intercourse with her and had her perform oral sex on him while his wife slept. D.N. further stated that Appellant performed oral sex on her.

On cross examination, Appellant questioned D.N. concerning the fact that she had begun

sexually abusing her younger sister and step-siblings prior to her meeting Appellant. Appellant alluded to this fact in his opening statement when he stated that D.N. was acting out sexually before she had any contact with Appellant. Appellant was further permitted to impeach D.N.'s testimony and call her credibility into question when he cross examined her concerning the fact that she had recanted an allegation of sexual abuse she made against her father. Further still, Appellant cross examined D.N. concerning her testimony that Appellant had put peanut butter and chocolate on her sexual organ and allowed the dog to lick it off while Appellant's wife and brother-in-law were in the house. D.N. explained that she had never told anyone about this event prior to trial other than the prosecuting attorney. Appellant also alluded to the possibility that D.N. had fabricated her allegations against Appellant to shift the blame away from her during the time she was being investigated for sexually abusing her younger sister. Moreover, Appellant questioned D.N. concerning why she did not ask Appellant's wife for help and how she could, after being sexually assaulted repeatedly by Appellant, help Appellant with his early morning paper route. Finally, during his closing argument to the jury, Appellant asked the jury to find him "not guilty" because D.N. was lying about the fact that he sexually assaulted her. Appellant called D.N. a "sexual predator" and a "liar" and argued that she had falsely accused her father as well in order to minimize her own sexual misconduct against her siblings.

Weighing Probative Value Against Danger of Unfair Prejudice

The State offered more than three hundred pornographic pictures and more than fifteen pornographic videos seized from Appellant's home. The trial court admitted sixty-two of these pictures and five of the videos. The trial court limited the admission of this evidence to photos containing pictures of young girls[3] and pictures containing a file creation date that was on or before the date of the offense or within a short time thereafter.

Applying the Rule 403 balancing factors to this case, we first consider how compellingly the photographs served to make a fact of consequence more or less probable. ***Sarabia v. State,*** 227 S.W.3d 320, 324 (Tex. App.–Fort Worth 2007, pet. ref'd). The evidence in question was relevant because it served to (1) demonstrate Appellant's intent, (2) demonstrate Appellant's identity, and (3) bolster D.N.'s testimony, the credibility of which had been attacked. *See* ***Young v. State***, 242 S.W.3d 192, 201 (Tex. App.–Tyler 2007, no pet.) (photographs of pornographic magazines relevant to prove appellant's intent and lack of fabrication by victim). At trial,

[3] Among these pictures were pictures of young girls with adult males.

Appellant challenged D.N.'s credibility. Accordingly, the evidence in question was particularly important to the State to rebut Appellant's well-supported attack on its key witness. Appellant's attack on D.N.'s credibility was extensive. Not only was there evidence that D.N. was acting out sexually prior to any alleged encounter with Appellant, but also there was evidence that she had recanted an allegation of sexual abuse made against her father. Furthermore, because D.N. admitted to sexually assaulting her then eight-year-old younger sister, it is reasonable to conclude that the jury may have been less sympathetic to her allegations even if any of its members believed she was being truthful about her encounter with Appellant. The pornographic pictures and videos depicting young girls possessed by Appellant contemporaneously with the event in question tended to show that D.N's testimony was truthful since it corroborated her testimony that Appellant had shown her this sort of pornographic material in conjunction with his sexually assaulting her. For the State to successfully prosecute its case, it was critical that the jury believe D.N.'s testimony.[4] Thus, evidence tending to defend against an attack on her credibility was highly probative.

While the notion of a person receiving any sort of gratification from pornographic material depicting young girls is repugnant, its potential to impress the jury in some irrational way in the instant case was reduced given the totality of the evidence before the jury. Appellant's possession of this pornographic material was likely to be construed as less heinous by the jury than the detailed evidence it heard concerning Appellant's sexually assaulting then eleven-year-old D.N. while his wife slept in a medicated state in the same room. Moreover, the State did not spend an excessive amount of time developing this evidence.[5] Finally, the State's need for the evidence was significant because the State had little more direct evidence apart from D.N.'s testimony and that offered by her younger sister with which to answer Appellant's prolonged attack on D.N.'s credibility. Therefore, we hold that the especially high probative value of the evidence in

[4] The only other testimony offered concerning Appellant's sexually assaulting D.N. was offered through D.N.'s younger sister.

[5] Appellant notes that "it took the State seventeen pages of testimony just to introduce the exhibits." However, based on our review of the record, the questions relating to each picture or video are very brief and relate primarily to the file creation date and the age of the female subject of the photograph or video. The most time spent on any one picture concerned a picture containing a lengthy caption, which was read into the record. Further still, while the prosecuting attorney made references to the child pornography possessed by Appellant in his jury argument, in conjunction with the initial reference, he told the jury that "you can't say just because of that he's guilty." Rather, the prosecuting attorney explained to the jury that it could rely on that evidence to show intent and lack of fabrication on D.N.'s part. Appellant's attorney also made several references to the evidence in his jury argument, describing it as "filth" and reminding the jury that they could not convict Appellant based on his possessing that evidence.

question is not substantially outweighed by the danger of unfair prejudice. Appellant's first issue is overruled.

SUBSTANTIAL SIMILARITY OF A PRIOR OUT-OF-STATE CONVICTION

In his second issue, Appellant argues that the trial court erred in imposing a mandatory life sentence since Appellant's prior conviction in Georgia does not satisfy the statutory requirements of Texas Penal Code, Section 12.42.

A defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life if the defendant is convicted of an offense under Texas Penal Code, Section 22.021 (aggravated sexual assault) and the defendant has been previously convicted of an offense under Texas Penal Code, Section 43.26 (possession or promotion of child pornography) or under the laws of another state containing elements that are substantially similar to the elements of the offense for which the defendant was previously convicted. *See* TEX. PENAL CODE ANN. § 12.42(c)(2)(A)(i), (B)(v) (West Supp. 2010). While the phrase "substantially similar" has not been defined by statute, the court of criminal appeals has recently provided insight into its meaning. *See* ***Prudholm v. State***, 333 S.W.3d 590, 593-96 (Tex. Crim. App. 2011). In ***Prudholm***, the court discussed at length its decision in ***Ex parte White***, 211 S.W.3d 316 (Tex. Crim. App. 2007). *See* ***Prudholm***, 333 S.W.3d at 593-94.

In ***White***, the defendant had been previously convicted in Delaware of unlawful sexual contact in the second degree, which is committed "when [a person] intentionally has sexual contact with another person who is less than 16 years of age or causes the victim to have sexual contact with him or a third person." *See* ***White***, 211 S.W.3d at 318. The court concluded that the Delaware offense contained elements that were substantially similar to the elements of the Texas offense of indecency with a child, which is committed when, "with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person: . . . engages in sexual contact with the child or causes the child to engage in sexual contact . . . ." ***Id.*** The court held that the statutes were substantially similar despite three differences in the elements of the offenses: (1) the circumstance of the victim's age was different by one year; (2) the Delaware offense did not contain an element that the victim was "not the person's spouse"; and (3) the Delaware offense defined "sexual contact" as a touching which, "under the circumstances as viewed by a reasonable person, is intended to be sexual in nature," whereas the Texas offense

defined "sexual contact" as a touching, if committed "with the intent to arouse or gratify the sexual desire of any person." *See* ***Prudholm***, 333 S.W.3d at 593.

The difference in age requirements set forth in the statutes at issue in ***White*** was noted by the court in ***Prudholm*** as a good example of elements that are substantially similar, but not identical. *See* ***Prudholm***, 333 S.W.3d at 593-94. The court in ***Prudholm*** further noted that the absence of the "spouse element" in the Delaware offense shows that one offense need not have every element of the other. Moreover, the court noted that the difference in the specific intent shows that, while an element of the foreign offense can be proved by a fact that would be insufficient to prove the respective Texas element, the elements may still be substantially similar. *See* ***id.*** at 594. Penultimately, the court noted that its opinion in ***White*** provided helpful examples of how the phrase "substantially similar" is applied, but did not attempt to provide a general interpretation of the phrase. *See* ***Prudholm***, 333 S.W.3d at 594.

The court elaborated on how it would arrive at the general interpretation of the phrase "substantially similar" as follows:

> We may derive such a general interpretation by applying established canons of statutory construction relating to the text. Pursuant to such established canons of construction, we may presume that each word in the statute has a purpose, and that words not defined in the statute are used in their ordinary and common sense. In common usage, "substantial" means "to a large extent" while "similar" means "having a likeness or resemblance." Together with comparative words like "similar," "majority," or "probability," the combination with "substantial" or "substantially" means something significantly greater than the modified word, whereas with absolute words like "complete," "certain," or "all," the combination with "substantially" means something only slightly less than the modified word ("similar"). Based on this common usage, we hold that the elements being compared pursuant to Penal Code Section 12.42(c)(2)(B)(v) must display a high degree of likeness, but may be less than identical.
>
> We are still left, however, with the critical question of the respect in which the elements must display a high degree of likeness. For example, elements could be substantially similar with respect to general characteristics such as terminology, function, and type of element, or with respect to specific characteristics such as the seriousness of violent or sexual aspects. The provisions guiding statutory construction in Penal Code Section 1.02, entitled Objectives of Code, suggest the answer to this question:
>
> > The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of the code are intended, and shall be construed, to achieve the following objectives: . . . (3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders.

Prudholm, 333 S.W.3d at 594-95 (citations omitted).

The court of criminal appeals ultimately held that the elements must be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offenses. *See* ***id.*** at 595. The court further noted that the notion that "a person guilty of the foreign law would also be guilty under the Texas law" is not a dispositive consideration. *See* ***id.*** The court also clarified that it was not holding that the elements of another state's law are "substantially similar" to the elements of an enumerated offense when the elements of the other state's law parallel the elements of a single Texas offense. *See* ***id.*** at 595-96.

The Georgia statute under which Appellant was convicted states that "[i]t is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." O.C.G.A. § 16-12-100(b)(8). In Texas, the relevant statute provides that a person commits an offense if (1) the person knowingly or intentionally possesses visual material that visually depicts a child younger than eighteen years of age at the time the image of the child was made who is engaging in sexual conduct and (2) the person knows that the material depicts the child as described by Subdivision (1). *See* TEX. PENAL CODE ANN. § 43.26(a) (West 2011).

Appellant argues that the two statutes at issue are not substantially similar because the Texas statute contains an additional element that the Georgia statute does not, namely, that the person must know the material depicts a child younger than eighteen years of age who is engaging in sexual conduct. *See* ***id***. We again note the holding of the court of criminal appeals that "the elements being compared . . . must display a high degree of likeness, but may be less than identical" and that the notion that "a person guilty of the foreign law would also be guilty under the Texas law" is not a dispositive consideration. ***Prudholm***, 333 S.W.3d at 594, 595. Ultimately, we must consider whether the elements are substantially similar with respect to (1) the individual or public interests protected and (2) the impact of the elements on the seriousness of the offenses. *See* ***id.*** at 595.

Here, the two statutes punish the same conduct, i.e., possession of material that depicts a child engaged in sexual conduct. *Compare* O.C.G.A. § 16-12-100(b)(8) *with* TEX. PENAL CODE ANN. § 43.26(a). Both of these statutes protect the same individual or public interest—protecting innocent children from sexual exploitation. *See, e.g.,* ***Roise v. State***, 7 S.W.3d 225, 237–38 (Tex. App.–Austin 1999, pet. ref'd) (purpose of Section 43.26(a) is protection of individual child from sexual exploitation); ***Aman v. State***, 261 Ga. App. 669, 409 S.E.2d 645, 646 (1991) (stated

purpose of Georgia statute is to "prohibit sexual exploitation of children"). Despite Appellant's argument to the contrary, the Texas statute and the Georgia statute include a similar scienter requirement. Subsection (a)(2) of the Texas statute requires that the accused know the material depicts the child as described by the first element; the Georgia statute requires that the accused must *knowingly* possess material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct. *Cf.* ***Phagan v. State***, 268 Ga. 272, 486 S.E.2d 876, 881-82 (1997) (under O.C.G.A. § 16-12-100(b)(1) (knowingly inducing minor to engage in sexually explicit conduct for purpose of producing visual medium depicting such conduct), state required to prove defendant had knowledge that victim was a minor as element of offense); *compare* O.G.C.A. § 16-12-100(b)(1) *with* O.G.C.A. § 16-12-100(b)(8). This scienter requirement in either statute has the same impact on the seriousness of the offense; if that element is not proved, there can be no conviction for the offense. Accordingly, we conclude that the two statutes at issue are substantially similar. Therefore, we hold that the trial court did not err in imposing a mandatory life sentence pursuant to Section 12.42. Appellant's second issue is overruled.

ADMISSIBILITY OF OUT-OF-STATE CONVICTION

In his third and fourth issues, Appellant argues that the trial court's admission of the Georgia conviction to enhance his punishment to a mandatory life sentence violated both the ex post facto and due process clauses of the United States and Texas constitutions.

Even constitutional error may be waived by failure to raise the issue at trial. *See* ***Briggs v. State***, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990); ***Thompson v. State***, 537 S.W.2d 732, 735-36 (Tex. Crim. App. 1976) (constitutional ground pertaining to prior conviction offered for enhancement purposes may be waived by failure to object); *see also* TEX. R. APP. P. 33.1(a) (requiring objection to preserve error for appeal).

In the case at hand, during the punishment phase of trial, the State offered as an exhibit Appellant's prior conviction in Georgia. Appellant offered no objection to this exhibit.[6] Accordingly, we hold that Appellant waived the error, if any, associated with the trial court's admission of the Georgia conviction. *See* TEX. R. APP. P. 33.1(a); ***Thompson***, 537 S.W.2d at 735-36. Appellant's third and fourth issues are overruled.

[6] In fact, Appellant's counsel specifically stated that he had "no objection" to the admission of the exhibit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his fifth issue, Appellant argues that he received ineffective assistance of counsel. Specifically, Appellant argues that his trial counsel was ineffective for stating that he had "no objection" to the admission of the Georgia conviction at Appellant's trial on punishment.

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* ***Garza v. State***, 213 S.W.3d 338, 347-48 (Tex. Crim. App. 2007) (where appellant argued ineffective assistance because trial counsel failed to offer any mitigating evidence during punishment phase of trial, without record indicating reasons for a trial counsel's actions or intentions, court presumed trial counsel had reasonable trial strategy); ***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 stated that he had "no objection" to the admission of the Georgia conviction at Appellant's trial on punishment. Yet, the record before us is silent about trial counsel's strategy or why he declined to object to the admission of this evidence. Normally, a silent record cannot defeat the strong presumption of effective assistance of counsel. *See* ***Garza***, 213 S.W.3d at 348; ***Thompson v. State***, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999); ***Kindle v. State***, No. 14-01-00584-CR, 2002 WL 1404711, at *3 (Tex. App.–Houston [14th Dist.] June 27, 2002, no pet.) (op., not designated for publication) (even if evidentiary objections are valid, to prove ineffective assistance of counsel, there must be evidence explaining why counsel did not object);[7] *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

[7] An attorney's "failure to object to admissible testimony does not constitute ineffective assistance." ***Kindle***, 2002 WL 1404711, at *3 (citing ***Cooper v. State***, 707 S.W.2d 686, 689 (Tex. App.–Houston [1st Dist.] 1986, pet. ref'd)). Further, "[i]n regard to making objections, advocates must be free to choose not to make them even if they have a legal basis for doing so.... [J]urors often see lawyers who make [objections] as 'trying to keep the real truth from them.'" ***McKinny v. State***, No. 01–99–00538–CR, 2002 WL 226731, at *7 (Tex. App.–Houston [1st Dist.] Feb. 14, 2002, no pet.) (op, not designated for publication). Thus, even if objections are valid, to prove ineffective assistance of counsel, there must be evidence explaining why counsel did not object. ***Kindle***, 2002 WL 1404711, at *3. Where the record is silent, as here, we must assume a strategic motivation. ***Id.***

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." ***Andrews***, 159 S.W.3d 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 determining whether to object to evidence as a matter of trial strategy. *Cf.* ***Garza***, 213 S.W.3d at 348; ***Saenzpardo***, 2005 WL 941339, at *2; *see* ***Kindle***, 2002 WL 1404711, at *3. 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.). Moreover, the fact that Appellant's counsel stated he had "no objection" rather than remaining silent is not indicative of a trial strategy when Appellant had not previously moved to suppress the evidence.[8]

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 before us contains all of the information needed for us to conclude that there could be no reasonable trial strategy behind counsel's stating that he had "no objection" to the admission of the Georgia conviction at Appellant's 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

[8] *See, e.g.*, ***Lemons v. State***, 135 S.W.3d 878, 883 (Tex. App.–Houston [1st Dist.] 2004, no pet.) (appellant's "no objection" statement undermined trial strategy evidenced by motion to suppress and, therefore, could not have been part of professional reasonable trial strategy). In the instant case, the State makes reference to a motion to suppress hearing. However, based on our review of the voluminous record, we have found no instance where Appellant raised an objection to or sought to suppress the Georgia conviction. Further, Appellant has not made reference either in his brief or supplemental brief to a motion to suppress or any prior objection he made concerning the Georgia conviction. *See* TEX. R. APP. P. 38.1(i).

counsel's reasons for choosing the course he did. As a result, Appellant cannot overcome the strong presumption that his counsel performed effectively.

Furthermore, even assuming arguendo that Appellant satisfied the first prong of the ***Strickland*** test, Appellant must still affirmatively prove prejudice. *See* ***Burruss v. State***, 20 S.W.3d 179, 186 (Tex. App.–Texarkana 2000, pet. ref'd). The appellant must prove that his attorney's errors, judged by the totality of the representation and not by isolated instances of error, denied him a fair trial. ***Id***. It is not enough for the appellant to show that the errors had some conceivable effect on the outcome of the proceedings. ***Id***. He must show that there is a reasonable probability that, but for his attorney's errors, the outcome of these proceedings would have differed. *See* ***id***.

Despite repeated readings of Appellant's brief, we can uncover no argument addressing the second prong of the ***Strickland*** test. We iterate that the burden of proof as to this issue rests squarely upon Appellant. *See* ***Burruss***, 20 S.W.3d at 186. As such, we will neither surmise nor devise our own conclusions absent some cogent argument on Appellant's behalf that but for his counsel's alleged unprofessional errors, there exists a reasonable probability that the result of the proceedings would have been different.[9]

Appellant's fifth issue is overruled.

DISPOSITION

Having overruled Appellant's first, second, third, fourth, and fifth issues, we ***affirm*** the trial court's judgment.

SAM GRIFFITH
Justice

Opinion delivered November 30, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

[9] Even had the Georgia conviction not been admitted, the trial court could have sentenced Appellant to imprisonment for life. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 22.021(e) (West 2011).