Affirmed and Memorandum Opinion on Remand filed March 15, 2011.

In The

Fourteenth Court of Appeals

NO. 14-08-00288-CR

ANDREW WOODARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 53,486

MEMORANDUM OPINION ON REMAND

This case is on remand from the court of criminal appeals. *See Woodard v. State*, 322 S.W.3d 648, 659–60 (Tex. Crim. App. 2010). On appeal from his conviction of conspiracy to commit aggravated robbery, appellant initially raised the following two issues: (1) whether his constitutional rights to notice of the charges against him and presentation of his case to a grand jury were violated when two offenses (conspiracy to

commit aggravated robbery and conspiracy to commit robbery) that were neither indicted nor lesser included offenses of the indicted offense (murder) were presented to the jury; and (2) whether defense counsel was ineffective in failing to object to the submission of jury issues on conspiracy to commit robbery and conspiracy to commit aggravated robbery when neither offense was a lesser included offense of murder as charged in the indictment.

The State conceded error in submission of the unindicted offenses. *See Woodard v. State*, 300 S.W.3d 404, 406 (Tex. App.—Houston [14th Dist.] 2009), *rev'd* 322 S.W.3d 648 (Tex. Crim. App. 2010). This court held appellant was egregiously harmed by the deprivation of his constitutional right to notice of the criminal charges brought against him, reversed appellant's conviction for the unindicted crime of conspiracy to commit aggravated robbery, and remanded this case to the trial court with instructions to enter an order of acquittal for the indicted charge of murder. *Id.* On the State's petition for discretionary review, the court of criminal appeals reversed and remanded, holding appellant could not complain for the first time on appeal that the trial court erred by instructing the jury on an unindicted conspiracy offense, when the record reflected that appellant had helped prepare the jury charge, including instructions relating to the unindicted charge of conspiracy to commit aggravated robbery, to which the State unsuccessfully objected. 322 S.W.3d at 659–60.

We now consider appellant's claim of ineffective assistance of counsel. Concluding appellant has not met his burden of establishing counsel's deficient performance, we affirm.[1]

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. Const. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). In reviewing claims of ineffective assistance of counsel, we apply a two-pronged test. *See Salinas v. State*, 163

[1] The factual and procedural backgrounds of the case are fully discussed in the prior opinions of this court and the court of criminal appeals. We do not repeat them here.

S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). To establish ineffective assistance of counsel, appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation was deficient in that it fell below the standard of prevailing professional norms and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Id.* (citing *Strickland*, 466 U.S. at 687–88).

A court need not address both components of the inquiry if a defendant makes an insufficient showing on one. *Strickland*, 466 U.S. at 697. "Failure to make the required showing of . . . deficient performance . . . defeats the ineffectiveness claim." *Id.* at 700.

In considering the first prong of the *Strickland* test, we indulge a strong presumption that counsel's actions fell within the wide range of reasonable professional behavior and were motivated by sound trial strategy. *Id.* at 689; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To defeat the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In most cases, the record on direct appeal is generally undeveloped and cannot adequately reflect the motives behind trial counsel's actions, making direct appeal an inadequate vehicle for raising a claim of ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. (Tex. Crim. App. 1998) (per curiam). Trial counsel may have had a specific strategy for his conduct, and a reviewing court may not speculate on trial counsel's motives in the face of a silent record. *See Thompson*, 9 S.W.3d at 814. On a silent record, this court may conclude counsel's performance was deficient only if the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

In the present case, the record is silent regarding why counsel did not object to submission of the conspiracy charges. Instead, the record suggests that counsel, at a minimum, actively participated in drafting the language for the charges. As the court of criminal appeals observed, "The record reflects that appellant helped prepare the charge, including the instruction related to the unindicted charge of conspiracy to commit aggravated robbery, to which the State unsuccessfully objected." *Woodard*, 322 S.W.3d at 659.

Both conspiracy charges carry lesser penalties than murder. *See* Tex. Penal Code Ann. §§ 15.02, 19.02 (West 2003).[2] A decision to request instructions on offenses carrying a lesser penalty can reflect sound trial strategy:

> Both sides potentially may benefit from a lesser included offense instruction. The defense interest is in limiting punishment exposure by providing a lesser alternative to the charged offense while the prosecution can obtain a greater likelihood of some type of conviction by giving the jury the option of convicting for an offense with less difficult proof requirements.

George E. Dix & Robert O. Dawson, 43 Texas Practice: Criminal Practice and Procedure § 36.50 (2d ed. Supp. 2009), *quoted in Woodard*, 322 S.W.3d at 660 (Keller, P.J., concurring).

We cannot say that counsel's acquiescence relative to the jury charge was "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392. On the record before this court, appellant has not established counsel's performance was deficient.

---

[2] An offense under the criminal conspiracy "section is one category lower than the most serious felony that is the object of the conspiracy, and if the most serious felony that is the object of the conspiracy is a state jail felony, the offense is a Class A misdemeanor." Tex. Penal Code Ann. §§ 15.02 (West 2003).

Except for a situation not relevant here, murder is a "felony of the first degree." Tex. Penal Code Ann. §§ 19.02 (West 2003).

For the preceding reasons, we overrule appellant's second issue. Given the disposition of the court of criminal appeals of appellant's first issue and our disposition of appellant's second issue, we affirm the judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Seymore, Brown, and Jamison.
Do Not Publish — Tex. R. App. P. 47.2(b).