

Affirmed and Memorandum Opinion filed February 8, 2011



In The

Fourteenth Court of Appeals

NO. 14-09-00518-CR

TERESA AKHTER MORENO, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1133049**

MEMORANDUM OPINION

A jury convicted appellant, Teresa Akhter Moreno, of theft of cash of over two hundred thousand dollars and assessed punishment at twenty-five years' confinement. In three issues, appellant claims that her trial counsel rendered ineffective assistance of counsel. We affirm.

BACKGROUND

Michael Bruce is the owner of Bruce Plumbing. Appellant worked as a bookkeeper for Bruce Plumbing from 1991 to 2006. Appellant was responsible for the accounts payable, accounts receivable, and payroll. In early June 2006, appellant was

hospitalized for injuries sustained in an automobile accident. As a result of appellant's absence, Bruce contacted his CPA about getting the bills paid and payroll done. As a result of the CPA's involvement and an ensuing investigation, Bruce discovered that (1) the general ledger information for payee and the bank statement information for payee did not match and (2) many Bruce Plumbing checks contained forgeries of his signature. As Bruce and his foreman were the only authorized signers on the accounts, Bruce contacted the Houston Police Department with the information.

The investigation by David Pliant, a fraud examiner for the Harris County District Attorney's Office, revealed 601 checks signed by appellant from December 1, 1998, to May 2006, as far back as records existed, which totaled \$482,375. The State's theory of the case was that appellant stole the money to pay appellant's gambling debts.

Appellant did not dispute signing Bruce's name to checks or to having significant gambling debts. Instead, appellant, herself, testified that Bruce authorized her to sign the checks to make payments for her truck note and her credit card. Appellant testified that Bruce gave her this authority because she knew he was having an affair with another employee. Appellant also testified extensively about her income from multiple jobs and short-term loans taken to pay the gambling debts.

INEFFECTIVE ASSISTANCE OF COUNSEL

In three issues, appellant claims her trial counsel was ineffective for failure to call witnesses who had information relevant to her defense and for failure to present documentary evidence of her financial resources. Specifically, appellant contends that a receptionist, Angela Martinez, also knew of, and would have been able to testify about, Bruce's affair; however, appellant does not assert that Martinez was aware of any compensation arrangement in connection with appellant's knowledge of the affair. Appellant also complains of trial counsel's failure to call another receptionist, Allie Aldrocron, but does not suggest what knowledge Aldrocron had that would have

supported her defense. Appellant further contends that documentary evidence regarding additional jobs she worked, while employed by Bruce Plumbing, and loans taken out by her would have supported her testimony where the State posited that she was stealing money to support a gambling habit.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *see also* TEX. CODE CRIM. PROC ANN. art. 1.051 (West Supp. 2009). This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on an effective assistance claim, the appellant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness and (2) there is a probability, sufficient to undermine the confidence in the outcome, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cannon v. State*, 252 S.W.3d 342, 348–49 (Tex. Crim. App. 2008). To succeed on an ineffectiveness claim, a defendant must satisfy both prongs; failure to demonstrate either deficient performance or prejudice will defeat a claim of ineffectiveness. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). The defendant must prove ineffectiveness by a preponderance of the evidence. *Id.*

Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). In the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (“[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.” (quoting *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003))). To overcome 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. *Salinas*, 163 S.W.3d at 740. When the record is silent as to trial counsel’s strategies, we will not conclude that counsel’s performance was deficient “unless the challenged conduct was ‘so outrageous that no competent attorney would have engaged in it.’” *Goodspeed*, 187 S.W.3d at 392 (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

No motion for new trial was filed in this case. Because there was no motion for new trial hearing, the record is silent regarding: (1) appellant’s trial counsel’s reasons for failing to call Martinez and Aldrocron; (2) whether the witnesses were available; or (3) what the witnesses’ testimony would have been. A counsel’s failure to call witnesses is irrelevant absent a showing that such witnesses were available and that appellant could benefit from their testimony. *See Perez*, 310 S.W.3d at 894. Appellant makes no such showing here. The record is also silent as to appellant’s trial counsel’s reason for failing to present testimonial and documentary evidence regarding appellant’s part-time jobs and loans. However, the record does contain documentary evidence in support of some of appellant’s part-time jobs such as her Ford Motor Credit Application. The record also contains corroboration of the loans such as Bruce’s testimony that he was aware of the loans.

To find that trial counsel was ineffective based on any of appellant’s assertions would call for speculation about why counsel failed to bring additional support for the matters about which appellant had already testified. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *see also Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000) (“[W]ithout some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic plan.”).¹ On the record before this

¹ The Texas Court of Criminal Appeals has held there are “rare ineffective-assistance cases” in which the record on direct appeal is sufficient for an appellate court to make a decision on the merits. *See Cannon*, 252 S.W.3d at 350 (finding prejudice was presumed where “[d]efense counsel, although physically present in the courtroom at all the requisite times, effectively boycotted the trial proceedings

court, appellant has failed to rebut the strong presumption in favor of effectiveness of counsel, and we cannot conclude that counsel's performance was deficient. Appellant's issues are overruled.

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Justices Anderson, Seymore, and McCally.

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and entirely failed to subject the prosecution's case to meaningful adversarial testing"); *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005) (holding, "[u]nder the extremely unusual circumstances of this case," record contained all information needed to determine that failure to object to prosecutor's misstatement of law was deficient). This is not one of those cases.