Affirmed and Memorandum Opinion filed October 5, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00583-CR

KEDRICK WILLIAM WILSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1216715

M E M O R A N D U M O P I N I O N

Appellant, Kedrick William Wilson, appeals from his conviction for robbery. A jury found him guilty and assessed punishment at twelve years' confinement. In his sole issue, appellant contends that he received ineffective assistance of counsel because his counsel failed to request a charge to the jury on the lesser included offense of assault on a public servant. We affirm.

Background

On April 29, 2008, Valencia Fry, a member of the Houston Federal Credit Union, reported her checkbook stolen. Maria Rodriguez, a credit union employee, testified that she received a phone call that morning from Fry, reporting her purse stolen including checkbook and credit cards. Julie Heath, a loan officer, testified that Fry visited the credit union later in the morning and filed a theft report. Heath flagged Fry's account in case someone attempted to cash any of the stolen checks.

According to Rodriguez, shortly after Fry left the credit union, appellant arrived and attempted to cash one of the stolen checks. Rodriguez testified that appellant presented one of Fry's checks payable to himself under a false name. She immediately became suspicious because of the recent robbery report and because Fry's signature looked forged. Rodriguez requested that appellant present his driver's license, signature for endorsement, and thumb print in compliance with standard operating procedure for check cashing by a nonmember. Appellant complied, presenting a driver's license listing a false name. Rodriguez then called her coworker, Heath, to verify that appellant's check was a stolen check as she suspected.

According to Heath, she verified that the check was stolen by the check number and called her manager seeking guidance. She then followed her manager's instructions and pushed the credit union's silent alarm to alert the police. While Heath and Rodriguez attempted to "buy time" and keep appellant in the lobby, a woman entered the lobby and beckoned for appellant to leave. Heath then witnessed appellant and the woman walk out of the credit union toward a parked vehicle.

Houston Police Officer Robert King testified that he responded to the silent alarm at the credit union and was alerted by the dispatcher that there were two suspects, a black man and a woman. Shortly after arriving at the scene, he saw a black man and a woman exiting the credit union. As the two suspects moved towards a parked vehicle, King

asked them to stop. According to King, they ignored his request and entered the vehicle. King then drew his pistol, concerned that there might be a weapon in the vehicle. He approached the driver's side door, which was open, and ordered the suspects to put their hands on the dashboard. He identified appellant as the person in the driver's seat. The two suspects briefly complied with his order but then both engaged in some "antics" by reaching around inside the vehicle. Officer King then caught a glimpse of something in appellant's hand.

King decided to use his Taser; however, as he holstered his pistol and reached for the Taser, appellant jumped out of the vehicle and a struggle ensued. King wrapped his arm around appellant's neck in an attempt to subdue him, but appellant sprayed a shot of chemical mace into King's eyes. Appellant then freed himself of King's grasp, lost his balance, and fell to the ground. Officer King explained that as he charged appellant's position on the ground, the mace took effect, and he was immediately blinded. After that, King recalled that his head hit the pavement. Heath and Rodriguez, the two credit union employees, testified that they witnessed King fall and hit his head. Rodriguez also testified that she witnessed appellant flee after Officer King fell. The jury found appellant guilty of robbery. Appellant's trial counsel did not request a lesser included offense charge for assault on a public servant.

Standards of Review

In his sole issue, appellant contends that he received ineffective assistance of counsel because his trial attorney failed to request that the jury be instructed on the lesser-included offense of assault on a public servant. We apply a two prong test in reviewing claims of ineffective assistance of counsel. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To prove ineffective assistance, an appellant must demonstrate that (1) his or her counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) there was a reasonable probability that, but for counsel's errors,

the result of the proceeding would have been different. *Id.*

When determining the validity of an ineffective-assistance-of-counsel claim, there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We also indulge a strong presumption that counsel's actions were motivated by sound trial strategy, and we will not conclude that the action was deficient unless it was so outrageous that no competent attorney would have engaged in such conduct. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). However, when no reasonable trial strategy could justify trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects trial counsel's subjective reasons for acting as he or she did. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Id.* In the majority of cases, the record on direct appeal is simply undeveloped and cannot adequately reflect the alleged failings of trial counsel. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). This is particularly true when the alleged deficiencies are matters of omission and not of commission revealed in the record. *Id.* A proper record is best developed in a habeas corpus proceeding or in a motion for new trial hearing. *Jensen v. State*, 66 S.W.3d 528, 542 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

To establish counsel's performance was deficient for failing to request a lesser-included offense charge, an appellant must show that he or she would have been legally entitled to an instruction on the lesser included offense had one been requested. *Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000). The appellant still bears the burden of overcoming the presumption that counsel's decision not to request the

instruction could be considered sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771–72 (Tex. Crim. App. 1994); *see also Waddell v. State*, 918 S.W.2d 91, 92 (Tex. App.—Austin 1996, no pet.).

Analysis

Appellant contends that he received ineffective assistance of counsel because counsel failed to request a charge on assault on a public servant, under Penal Code section 22.01, as a lesser included offense of the charged robbery offense, under section 29.02. Tex. Penal Code §§ 22.01(b)(1), 29.02(a). We will assume for the sake of this opinion that appellant would have been entitled to the lesser-included offense charge if it had been requested.

As the Texas Court of Criminal Appeals has noted, a decision to not request a lesser-included offense instruction could be part of a reasonable all-or-nothing trial strategy. *See Ex parte White*, 160 S.W.3d 46, 55 (Tex. Crim. App. 2004). For example, here, defense counsel made a motion for directed verdict on the ground that the State presented evidence only of forgery and not theft, which is a necessary element of robbery. Counsel may not have wanted the jury to consider the lesser-included offense of assault on a public servant because he did not think that there was any evidence of the theft element of robbery. This strategy required the jury to choose only between robbery or acquittal. *See Williams v. State*, No. 02-02-230-CR, 2003 WL 1564307, at *1 (Tex. App.—Fort Worth March 27, 2003, no pet.) (mem. op., not designated for publication) (holding that counsel's decision not to request a lesser-included offense of theft in a burglary prosecution did not constitute ineffective assistance because counsel apparently did not want jury to consider theft since he did not think there was evidence of the entry element of burglary).

This is not an appeal from a habeas corpus proceeding, and there was no motion for new trial hearing at which counsel's motivation, or possible lack thereof, for failing to

request an instruction could have been ascertained. However, after the jury issued its verdict, the following on-the-record discussion occurred regarding the potential lesser-included-offense instruction:

> [Prosecutor]: I wanted to clarify for the record that it was discussed between the State's attorneys and the defense attorney that there was a potential lesser there and that it was not requested as a strategic move on the part of the defense attorney. And I will defer to Mr. Dodier if that is correct?
>
> [Defense Counsel]: I did not think that assault would be a lesser of the robbery in the way it was pled. I understand that the State pled an assault of a public servant as part of the lesser, but I felt that that was not going to be a lesser, especially, since the allegations were robbery and I did not request a lesser.

In the discussion, the prosecutor indicated that defense counsel had earlier represented that the decision was a strategic one. While defense counsel then expressed uncertainty as to whether a lesser-included offense would have been appropriate under the circumstances, he did not directly refute the prosecutor's assertion that the determination was, at least to some degree, strategic. The record, therefore, does not affirmatively demonstrate ineffectiveness, particularly given the strong presumption that counsel was motivated by sound trial strategy. *See Garcia*, 57 S.W.3d at 440. Accordingly, appellant has failed to meet his burden of proving ineffectiveness by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 813. We overrule appellant's sole issue.

The judgment of the trial court is affirmed.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Sullivan.

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