

Affirmed and Memorandum Opinion filed February 15, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-01037-CR

SHANE O'GRADY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 58,863**

MEMORANDUM OPINION

A jury found appellant Shane O'Grady guilty of aggravated assault with a deadly weapon and sentenced him to thirty years' imprisonment and a \$10,000 fine. O'Grady appeals his conviction on the ground that he received ineffective assistance of counsel at trial. We affirm.

I

Shane O'Grady was convicted of aggravated assault with a deadly weapon for locking his then-wife in a hotel room and threatening to shoot her. Shane and Amye O'Grady were married in 2004, but had separated by December 2007. A divorce action was pending when the incident giving rise to this case occurred on September 28, 2008. On that day, Shane contacted Amye and asked her to pick him up at his brother's house and take him to have a check cashed so that he could make a child-support payment. Amye picked Shane up and began to drive him to a check-cashing business in Lake Jackson. On the way, Shane asked Amye to stop at a motel where he had been staying so he could get his wallet. Upon arriving at the motel, Shane asked Amye to come inside the room with him to collect some items he had bought for their daughter.

Once inside, Shane locked the door and told Amye to sit down. Amye testified Shane said he wanted closure and that holding her in the room was the only way to get it. When Amye objected, Shane opened the door and told her she could leave, but before she could do so he again shut and locked the door. Amye testified Shane then pulled out a handgun and told her she was "not going anywhere." Amye testified that she and Shane sat down across from each other at a table and that Shane said he was going to kill himself and she would have to watch so it "would be imprinted on [her] brain forever." Amye further testified Shane said he considered killing her but did not want to leave their daughter without both parents. When Amye denied Shane's accusation that she had cheated on him, Amye testified Shane threatened to shoot her in the shoulder. Amye testified Shane held her captive for approximately four hours, during which he made repeated threats to shoot her.

During the exchange, Amye was able to surreptitiously dial 911 on her cell phone. Although she could not speak, she kept the line open for about 40 minutes until Shane discovered the cell phone and took it from her. A recording of the call was played for the jury. Amye testified Shane told her he would shoot her and himself when police arrived.

The police, however, were dispatched to Shane's brother's home under the mistaken belief that the incident was taking place between Shawn O'Grady, Shane's brother, and his wife, Dorothy.

Amye and Shane eventually left the motel room after Amye defused the situation by agreeing to reconcile their relationship. They returned to Shawn O'Grady's home, where they learned police had responded to that location. Amye whispered in Dorothy O'Grady's ear that she needed to speak with her. Amye testified that the next day Dorothy told her that Shane admitted everything that had happened. Dorothy testified that conversation took place over a phone call in which Amye asked if Shane told Dorothy about what happened, to which Dorothy answered "yeah." The jury found Shane guilty of aggravated assault with a deadly weapon and sentenced him to 30 years' imprisonment and a \$10,000 fine.

II

A

Shane's sole complaint on appeal is that he received ineffective assistance of counsel at trial. Shane contends his counsel made an "unsound strategic decision" by introducing evidence that he was arrested for violation of a protective order issued as a result of the incident giving rise to this case. Shane also argues that his counsel's reference in closing argument to the protective order as "a piece of paper, not very bullet proof" could only inflame a jury concerned for Amye's safety. Shane further complains that counsel's decision to introduce evidence of Shane's threat to kill her or himself if she talked to Dorothy about the incident was "unreasonable and can have no strategic value." Counsel's "unsound strategic decisions" also include eliciting evidence from Dorothy that Shane admitted to the incident and to having a gun. Lastly, Shane complains his counsel admitted Shane's guilt during closing argument by conceding Shane was in the motel room and that the 911 tape is trustworthy.

B

An accused is entitled to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). In reviewing claims of ineffective assistance of counsel, we apply a two-prong test. See *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687). To establish ineffective assistance, an appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Strickland*, 466 U.S. at 687; *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). If a criminal defendant can prove that trial counsel's performance was deficient, he must still affirmatively prove that counsel's actions prejudiced him. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To demonstrate prejudice, a defendant must establish a reasonable probability that the result of the proceeding would have been different if trial counsel had acted professionally. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett*, 65 S.W.3d at 63.

When evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of each case. *Thompson*, 9 S.W.3d at 813. In making such an evaluation, any judicial review must be highly deferential to trial counsel and avoid the distorting effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (citing *Strickland*, 466 U.S. at 689). As such, there is a strong presumption that counsel's conduct fell within a wide range of reasonable representation. *Salinas*, 163 S.W.3d at 740. The appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson*, 9 S.W.3d at 813 (citing *Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984)). 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. *Thompson*, 9 S.W.3d at 814. Direct appeal is usually an inadequate vehicle for raising such a claim because the record is generally undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). When the record is silent as to trial counsel’s strategy, we will not conclude that defense counsel’s assistance was ineffective unless the challenged conduct was “so outrageous that no competent attorney would have engaged in it.” *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

C

The record in this case is silent as to the reasons for counsel’s actions. Shane has therefore failed to rebut the presumption that counsel’s conduct fell within the range of reasonable representation. *See Salinas*, 163 S.W.3d at 740. As such, we do not judge counsel’s strategic decisions in hindsight; rather, the review of counsel’s representation is highly deferential and presumes that his actions were reasonable. *See Thompson*, 9 S.W.3d at 812–13; *see also Lane v. State*, 257 S.W.3d 22, 26 (Tex. App.—Houston [14th Dist.] 2008, pet. ref’d).

Nor was counsel’s conduct “so outrageous that no competent attorney would have engaged in it.” *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). It was not in dispute that Shane was in the motel room with Amye and produced a handgun. As such, it was not unreasonable for counsel to concede these points, nor was it unreasonable to adopt a strategy in which counsel attempted to negate the element of intent required for aggravated assault and undermine Amye’s credibility. Counsel also attempted to show that the charges against Shane were motivated by their child-custody dispute and that Amye never acted fearful of violence from Shane. This strategy was manifested in part by counsel introducing evidence of Shane’s arrest and further establishing Amye did not immediately report to police Shane’s violation of the protective order. During closing argument, counsel referenced the protective order as “a piece of paper, not very

bulletproof” when suggesting to the jury that Amye did not fear Shane because she did not check to see whether he was in jail. While counsel’s strategy was ultimately unsuccessful in avoiding a conviction, we cannot say it was unreasonable, and it certainly was not outrageous to the extent that no competent attorney would have pursued similar tactics. Shane’s sole issue is overruled.

* * *

For the foregoing reasons, we affirm the trial court’s judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown

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