

**NO. 12-13-00098-CR**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

***RALPH WAYNE TILLMAN, JR.,  
APPELLANT***

§ ***APPEAL FROM THE 2ND***

***V.***

§ ***JUDICIAL DISTRICT COURT***

***THE STATE OF TEXAS,  
APPELLEE***

§ ***CHEROKEE COUNTY, TEXAS***

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***MEMORANDUM OPINION***

Ralph Wayne Tillman, Jr. appeals his conviction for felony driving while intoxicated, for which he was sentenced to imprisonment for twenty years. In one issue, Appellant argues that he received ineffective assistance of counsel. We affirm.

**BACKGROUND**

Appellant was charged by indictment with felony<sup>1</sup> driving while intoxicated (DWI) and pleaded “not guilty.” The indictment further alleged that Appellant was previously convicted of injury to a child. Following a bench trial, the trial court found Appellant “guilty” as charged. The matter proceeded to a trial on punishment, at which Appellant pleaded “true” to the enhancement allegation. Ultimately, the trial court sentenced Appellant to imprisonment for twenty years, and this appeal followed.

**INEFFECTIVE ASSISTANCE OF COUNSEL**

In his sole issue, Appellant argues that he received ineffective assistance of counsel. Specifically, Appellant argues that his trial counsel was ineffective because he (1) stipulated to Appellant’s intoxication, (2) offered no objection to the blood test evidence indicating that

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<sup>1</sup> See TEX. PENAL CODE ANN. §§ 49.04, 49.09(b)(2) (West Supp. 2013).

Appellant's blood-alcohol level was in excess of the legal limit, (3) stipulated and offered no objections to Appellant's two prior DWI convictions, and (4) failed to object to the enhancement paragraph at Appellant's trial on punishment.

### **Governing Law**

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 *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012); *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.

#### **Evaluation of Trial Counsel’s Representation**

Here, Appellant sets forth in his brief that his attorney’s performance at trial fell below the professional norm because he stipulated to Appellant’s intoxication and two prior DWI convictions and offered no objection to evidence of Appellant’s blood-alcohol level and the enhancement paragraph. Yet, the record before us is silent about trial counsel’s strategy or why he chose the course he did. 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); *but see Menefield*, 363 S.W.3d at 593 (holding if trial counsel is not given opportunity to explain allegedly deficient actions, appellate court should not find deficient performance absent challenged conduct “so outrageous that no competent attorney would have engaged in it”); *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 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.” *Id.* 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” in *Andrews* are not present in the case at hand. 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 Jun. 28, 2005, no pet.) (op., not designated for publication). But 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 stipulate to facts of consequence or offer no objection to certain evidence or allegations as a matter of trial strategy. Cf. *Garza*, 213 S.W.3d at 348; *Saenzpardo*, 2005 WL 941339, at \*2; see *Kelley v. State*, No. 12-07-00063-CR, 2008 WL 2571831, at \*3–4 (Tex. App.—Tyler June 30, 2008) (mem. op., not designated for publication) (failure of trial counsel to object to testimony at trial not ineffective assistance because counsel’s underlying reasons for decision not demonstrated by record); *Bush v. State*, No. 02-01-00399-CR, 2003 WL 3600954, at \*2 (Tex. App.—Fort Worth Feb. 20, 2003, pet. ref’d) (mem. op., not designated for publication) (decision of trial counsel to not offer to stipulate to appellant’s prior DWI convictions for jurisdictional purposes not ineffective assistance because counsel’s underlying reasons for decision not demonstrated by record).

Having reviewed the record in the instant case, we conclude that the facts before us are distinguishable from the facts in *Andrews* and Appellant’s trial counsel’s alleged deficient conduct is not “so outrageous that no competent attorney would have engaged in it.” See *Menefield*, 363 S.W.3d at 593. 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 for Appellant’s trial counsel’s alleged unprofessional acts. Therefore, we hold that Appellant has not met the first prong of *Strickland* because the record does not contain evidence concerning Appellant’s trial counsel’s reasons for choosing the course he did. As a result, Appellant cannot

overcome the strong presumption that his counsel performed effectively. Appellant's sole issue is overruled.

**DISPOSITION**

Having overruled Appellant's sole issue, we *affirm* the trial court's judgment.

**SAM GRIFFITH**

Justice

Opinion delivered December 20, 2013.

*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(DO NOT PUBLISH)



**COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT OF TEXAS**

**JUDGMENT**

**DECEMBER 20, 2013**

**NO. 12-13-00098-CR**

**RALPH WAYNE TILLMAN, JR.,**  
Appellant  
V.  
**THE STATE OF TEXAS,**  
Appellee

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Appeal from the 2nd District Court  
of Cherokee County, Texas (Tr.Ct.No. 18554)

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THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*