

## YEAR 2004 CASE SUMMARIES

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***Failure of attorney in criminal trial to object to inadmissible juvenile adjudication was not ineffective assistance because it may have been trial strategy [Bufford v. State] (04-4-01).***

On August 26, 2004, the El Paso Court of Appeals held that failure of defense counsel to object to a question asking about a juvenile adjudication to impeach the testimony of the defendant was not ineffective assistance of counsel since it may have been part of counsel's trial strategy.

04-4-01. Bufford v. State, UNPUBLISHED, No. 08-02-00478-CR, 2004 WL 1903542, 2004 Tex.App.Lexis \_\_\_\_ (Tex.App.-El Paso 8/26/04) Texas Juvenile Law (6th Ed. 2004).

Facts: Ples Jethro Bufford, III appeals his conviction for the offense of robbery. A jury found him guilty of the charged offense, and sentenced Appellant to 14 years' imprisonment. He raises two issues: First, that the evidence is insufficient to sustain his conviction because it did not establish that Appellant caused bodily injury to the complainant by pushing her to the floor as plead in the indictment; and second, Appellant contends that he was denied effective assistance of counsel when his counsel failed to object to inadmissible evidence of a juvenile conviction.

On April 16, 2001, Lezella Armstead and her fourteen-year-old granddaughter, V.M., returned to Mrs. Armstead's house from a physical therapy appointment. When they pulled up to the house, V.M. got out of the car, opened the screen door, and pushed the front door open. Mrs. Armstead thought it was slightly odd that the door was unlocked since she was sure she had locked it that morning, but she assumed she just had not closed it properly. She barely entered the house and saw sitting just to her right a large pile of their belongings including a boombox, some CD's, clothes, and a camcorder. She suspected her granddaughter had left some of her things there, but V.M.. said that she had not. Mrs. Armstead then heard a noise coming from her bedroom and, assuming it was her husband, called out his name. Instead, a person she did not recognize ran down the hall towards her.

The assailant pushed her up against the wall with his arm and began to yell at her to "[g]et in this goddamn house." He then pushed Mrs. Armstead to the floor, dragged her by the arm, threw her over the sofa, and demanded she give him her purse. During this time, V.M. ran out the front door and began screaming for a neighbor to help. The assailant then ran out the same door with Mrs. Armstead's purse, which contained some cash, her driver's license, and her cell phone. Mrs. Armstead testified that when he was pulling her on the floor, he caused her pain in her left side. She identified Appellant as the man who robbed the house in a photo lineup provided by the police, and both she and V.M. identified him in open court.

Appellant testified on his own behalf, stating that he was at home with his nephew all day and that he did not rob Mrs. Armstead's house. Appellant also admitted to his prior criminal record including the fact that he was on probation for two burglaries at the time of the trial and that he had served one and a half years in the Texas Youth Commission for a juvenile conviction of unauthorized use of a motor vehicle.

### Effectiveness of Counsel

Appellant argues in his second issue that he was denied effective assistance of counsel when his attorney failed to object to an inadmissible line of questioning regarding a prior juvenile conviction. In determining whether counsel's representation was so inadequate as to violate Appellant's Sixth Amendment right to counsel, we must adhere to the Strickland test developed by the United States Supreme Court and later adopted by the Texas Court of Criminal Appeals. *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex.Crim.App.1986). To demonstrate actual ineffectiveness, Appellant must (1) show counsel's performance was so deficient as to fall below an objective standard of reasonableness, and (2) affirmatively prove prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex.Crim.App.1999). Appellant must show a reasonable probability that but for counsel's unprofessional errors, the fact finder would have had a reasonable doubt respecting guilt. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex.Crim.App.1996). A reasonable probability is a probability sufficient to

undermine confidence in the outcome. *Id.*

Additionally, Appellant must overcome the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy. *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2064. We must recognize that counsel is strongly presumed to have rendered adequate assistance and made all decisions in the exercise of reasonable professional judgment. *Strickland*, 486 U.S. at 689, 104 S.Ct. at 2064. Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland*, 928 S.W.2d at 500. We must be hesitant in declaring counsel ineffective, based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation and the record is silent as to reasons for counsel's actions. See *Thompson*, 9 S.W.3d at 814. Generally, the record on direct appeal is simply insufficient to demonstrate deficiency in counsel's representation. *Mitchell v. State*, 68 S.W.3d 640, 643 (Tex.Crim.App.2002).

Appellant has failed to prove both that counsel's assistance fell below reasonable standards of professional conduct and that the alleged error prejudiced the jury's decision in any way. Admittedly, the questioning and testimony regarding Appellant's juvenile record was clearly inadmissible. See TEX.R.EVID. 609(d). However, this alone is not sufficient to find counsel's actions ineffective. The little evidence in the record that speaks to counsel's reasons for allowing the inadmissible testimony indicates that it was part of a sound trial strategy. In her closing argument, Appellant's counsel stated, "[t]hat's why the Defendant got on the stand and admitted his criminal record. He admitted, yes, I've been in trouble. Yes, I've done things that are wrong, but I didn't write that letter, and I didn't rob this lady." These statements indicate that counsel failed to object to the questioning about Appellant's criminal record, including his juvenile conviction, in order to demonstrate his willingness to admit past wrongs in contrast to the honest denial he was making in this case. The record offers no evidence to suggest otherwise, and as such, does not affirmatively demonstrate the ineffectiveness alleged by Appellant. See *McFarland*, 928 S.W.2d at 500.

The second prong of the *Strickland* test, whether counsel's alleged errors prejudiced the outcome, is only to be evaluated once the first has been proven. See *Thompson*, 9 S.W.3d at 813. Since Appellant failed to prove that counsel's actions were deficient, analysis of the second prong is unnecessary. Taking into account the strong presumption that counsel performed within the wide range of reasonable standards, we find the record lacks sufficient evidence to declare counsel's assistance ineffective. We therefore overrule Issue Two.

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