

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-KA-01225 COA**

ROBERT EARL ARMSTRONG

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 08/13/1997
TRIAL JUDGE: HON. HENRY LAFAYETTE LACKEY
COURT FROM WHICH APPEALED: CALHOUN COUNTY CIRCUIT COURT
FOR APPELLANT: HARVEY CHRISTOPHER FREELON
FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: JOLENE M. LOWRY
DISTRICT ATTORNEY: JAMES M. HOOD JR.
NATURE OF THE CASE: CRIMINAL - FELONY
TRIAL COURT DISPOSITION: 08/13/1997: 2 COUNTS OF TOUCHING CHILD FOR
LUSTFUL PURPOSES: SENTENCED TO 10 YRS ON CT I
& 10 YRS ON CT II; SENTENCE IN EACH COUNT TO
RUN CONCURRENT;
DISPOSITION: AFFIRMED - 12/30/98
MOTION FOR REHEARING FILED: 4/29/99
CERTIORARI FILED:
MANDATE ISSUED: August 10, 1999

BEFORE THOMAS, P.J., COLEMAN, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

¶1. Robert Earl Armstrong [hereinafter Armstrong] was convicted in Calhoun County Circuit Court of two counts of touching a child for lustful purposes, pursuant to Miss. Code Ann. § 97-5-23 (Rev. 1994 & Supp. 1998). Following the August 13, 1997 jury verdict, Armstrong was sentenced to ten years on each count in the custody of the Mississippi Department of Corrections. The sentences were to be served concurrently. Armstrong's motion for a new trial was denied October 3, 1997. He appeals to this Court and requests review of the following issue:

I. WHETHER THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF HIS COUNSEL AND AS A RESULT OF NOT RECEIVING EFFECTIVE ASSISTANCE OF COUNSEL WHETHER THE APPELLANT WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

A. THE ATTORNEY FAILURE TO SERVER [SIC] THE TRIAL WAS PREJUDICIAL TO THE DEFENDANT.

B. THE ATTORNEY FAILURE TO REQUEST A COMPETENCE HEARING WAS PREJUDICIAL TO THE DEFENDANT.

C. THE ATTORNEY FAILURE TO FILE A MOTION TO SUPPRESS THE STATEMENT OF RODNEY GILLESPIE WAS PREJUDICIAL TO THE DEFENDANT.

D. THE ATTORNEY MADE SEVERAL STATEMENTS AGAINST THE INTEREST OF THE APPELLANT THAT WAS [SIC] PREJUDICIAL TO THE APPELLANT.

E. THE ATTORNEY FAILURE TO SUBPOENA THE VICTIM'S MEDICAL RECORDS WAS PREJUDICIAL TO THE DEFENDANT.

F. THE ATTORNEY FAILURE TO MAKE TIMELY OBJECTIONS WAS PREJUDICIAL TO THE DEFENDANT.

Holding this assignment of error to be without merit, we affirm the judgment of the circuit court.

FACTS

¶2. During the time period when the offenses in this case transpired, Armstrong was living with his wife, Amy, his two step-daughters, Beth and Cathy, his step-son, Dan, and his and Amy's son, Edward.⁽¹⁾ The family shared a home in Calhoun City, Mississippi. Beth testified that in May of 1995 when she was thirteen years old, Armstrong took her into his bedroom and forced her to have sexual intercourse. She said that this took place with the door closed while the younger children were watching television in another room and her mother was at work. The jury heard her account of how Armstrong beat her with a belt when she tried to resist. She testified that she did not tell her mother of the sexual assault out of fear of Armstrong. Her younger sister, Cathy, also testified to a similar assault in the spring of 1996 when she was twelve years old. She stated that Armstrong told the other children to go to a nearby relative's home and that he had sexual intercourse with her on the floor of the kitchen. Cathy also testified to keeping quiet about the assault out of fear of her stepfather.

¶3. During that same spring of 1996, Beth told an aunt about the sexual assault that had taken place a year earlier. Cathy then told her mother about the more recent assault. Amy then ordered her husband out of the home, and Armstrong went to live at his sister's home. Shortly thereafter a criminal investigation began. On

April 3, 1996, Armstrong responded to a request to speak with a Department of Human Services supervisor who was involved in the investigation. At trial, Rodney Gillespie testified that during the interview, Armstrong admitted to sexually assaulting the girls, but stated that he had been saved and by confessing his sins, he could put them behind him. That same day, Armstrong was read his rights by Calhoun County Sheriff Billy Gore who then questioned Armstrong about the allegations of sexual assault. In the transcript of the interview contained in the record, Armstrong at first refuses to admit sexual intercourse with the two girls and denies admitting it in the earlier interview with Gillespie. Later in the interview, he tells Sheriff Gore that due to alcoholic blackouts, he cannot remember if he fondled and penetrated his stepdaughters, but there was a possibility that he had fondled them. On June 13, 1996, the Grand Jury of Calhoun County handed down a two count indictment against Armstrong pursuant to Miss. Code Ann. § 97-5-23 (Rev. 1994 & Supp. 1998).

¶4. When Armstrong testified at trial, he stated that the two girls had lied about the sexual assault. He testified that in Beth's case, he had been forced to touch her genitalia in order to administer suppositories to treat an infection that his wife had allegedly neglected and ignored. In the case of his younger daughter, he claimed she had simply been coached by his wife and others in order to get him in trouble. During Armstrong's earlier statements to Gillespie and Sheriff Gore, he made no mention of medically treating Beth with suppositories. Armstrong also stated that Gillespie had lied when he testified that Armstrong admitted the sexual assaults. He also accused his wife of mentally and physically abusing the children and infecting Cathy with syphilis at birth. His wife denied all of this in her testimony and reiterated much of what her daughters had testified to earlier. After forty-five minutes deliberation, the jury returned a guilty verdict on both counts of the indictment. The judge sentenced Armstrong to serve ten years on each count in the custody of the Mississippi Department of Corrections. The sentences were to be served concurrently.

DISCUSSION

I. WHETHER THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF HIS COUNSEL AND AS A RESULT OF NOT RECEIVING EFFECTIVE ASSISTANCE OF COUNSEL WHETHER THE APPELLANT WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

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¶5. Armstrong argues that he was denied effective assistance of counsel and refers to a number of purported errors by his trial attorney to support his claim that he was denied a fair trial. The State responds that Armstrong fails to meet the standard necessary to demonstrate ineffectiveness of counsel and is unable to show that but for the alleged errors, there would have been a different outcome in his trial. We agree with the State.

¶6. In order to demonstrate that he was denied effective assistance of counsel, a criminal defendant must show that 1) the counsel's performance was deficient and that the deficient performance prejudiced the defense, and 2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Mohr v. State*, 584 So. 2d 426, 430 (Miss. 1991) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Taylor v. State*, 682 So. 2d 359, 363 (Miss. 1996) (citing *Strickland*, 466 U.S. at 694)). In order to make a successful ineffective assistance of counsel claim a defendant must satisfy both prongs of the *Strickland* test. *Mohr*, 584 So. 2d at 430. The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. *Carney v. State*, 525 So. 2d 776, 780 (Miss. 1988).

¶7. Addressing the first prong of the *Strickland* test, this Court must inquire as to whether Armstrong has demonstrated that his attorney performed in a deficient manner, resulting in prejudice to him. While Armstrong has provided us with a lengthy listing of alleged errors, we feel that the majority of the purported errors were the result of trial strategy, and therefore were at his counsel's discretion. Mississippi law creates a strong, but rebuttable, presumption "that trial counsel's conduct is within the wide range of reasonable conduct and that decisions made by trial counsel are strategic." *Vielee v. State*, 653 So. 2d 920, 992 (Miss. 1995). We are not convinced that Armstrong has effectively shown that his trial counsel acted in a deficient manner. Furthermore, even if Armstrong's counsel had made some of the objections/motions that he argues should have been made, the trial court would almost certainly have been correct in overruling him. However, this Court is a court of appellate review and we can not make factual findings. Therefore, for purposes of our review we will assume, *arguendo*, that Armstrong's trial counsel did act in an inept manner. This leads us to the second prong of *Strickland*.

¶8. Under the second prong of *Strickland*, Armstrong is required to demonstrate that his trial counsel's deficient performance caused him prejudice. *Mohr*, 584 So. 2d at 430. This prejudice requirement mandates that the defendant show that "there is a reasonable probability that but for these errors by counsel, the defendant would have received a different result from the trial court." *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992). After carefully scrutinizing his brief and the record, we are unable to locate any claim by Armstrong, much less any factual evidence in the trial court record, that he would not have been convicted but for the alleged errors of his trial counsel. In an attempt to satisfy his burden of demonstrating prejudice, Armstrong has done little more than present this Court with his personal opinion, based entirely upon speculation, as proof of the prejudice that he supposedly suffered as a result of his attorney's "errors". We are not persuaded by Armstrong's speculations and hold that they fall short of satisfying the prejudice requirement of *Strickland*. Because this Court is unable to conclude from the record that Armstrong's trial counsel was constitutionally ineffective, we hold this assignment of error to be without merit and affirm the

decision of the lower court.

¶9. THE JUDGMENT OF THE CALHOUN COUNTY CIRCUIT COURT OF CONVICTION OF TWO COUNTS OF TOUCHING CHILD FOR LUSTFUL PURPOSES AND SENTENCE OF TEN YEARS ON BOTH COUNTS, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SENTENCE IN EACH COUNT TO RUN CONCURRENT, IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO CALHOUN COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. Since this case involves sexual abuse of minors, pseudonyms are being used in place of the actual names of Armstrong's wife and her children