Affirmed and Opinion filed March 29, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00194-CR
NO.14-00-00195-CR

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EARNEST LUECK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 19,860 and 19,859

O P I N I O N

A jury found appellant, Earnest Lueck, guilty of aggravated kidnapping and murder. The court assessed punishment for kidnapping at ten years and for murder at thirty years' confinement in the Institutional Division of the Texas Department of Criminal Justice and assessed a fine of five thousand dollars in the murder case.

Appellant's appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which he concludes that the appeal is wholly frivolous

and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. Appellant has filed a response alleging five points of error: (1) the evidence is legally insufficient to prove murder; (2) the evidence is factually insufficient to prove murder; (3) the evidence is legally insufficient to prove aggravated kidnaping; (4) his attorney rendered ineffective assistance of counsel at trial; and (5) the prosecutor committed misconduct by arguing a fact not in evidence.

Background

Complainant in the kidnapping case is appellant's ex-wife, Mary. The victim in the murder case was Mary's new boyfriend, Sonny. Mary and appellant had been divorced for several years, but continued to reside in the same house until about a week before the offenses occurred, when appellant moved out. Mary testified that a few days before the offense, she procured a restraining order against appellant to prevent him from stalking her. The justice of the peace for the city of Trinity, Joe Chandler, testified that in April of 1998, Mary filed a stalking charge against appellant. Chandler testified that he issued a thirty-one day protective order at Mary's request requiring appellant to stay away from Mary. Two days prior to the murder, on April 28, 1998, appellant voluntarily surrendered on the stalking charge. Chandler testified that he read appellant his rights and prior to releasing appellant on a personal recognizance bond, explained the protective order to appellant and warned him to stay away from Mary.

The State's evidence showed that on the morning of April 30, 1998, appellant entered Sonny's nightclub, Desperado, where Mary and Sonny were present, and said he wanted to speak to Sonny. Mary walked into Sonny's apartment, which was attached to the club, appellant

entered behind Mary, and Sonny walked in between them. Sonny had a derringer in his back pocket. Mary did not see appellant with a weapon. When Sonny asked appellant what he was going to do, appellant stated, "I'm going to see that you don't taint another white woman, you black m_____ f_____." Sonny's hands were down at his side, he was not holding a weapon, and made no motion to retrieve the gun from his back pocket. Mary heard a gunshot and saw Sonny turn and fall to the floor. When Sonny's body was examined by police, his two shot derringer was still in his back pocket, was uncocked and was loaded with two live rounds.

Immediately after the shooting, Mary observed appellant holding a gun in his hand pointed at her. He stated, "You b____, get away from him, you're going to be next." Appellant demanded Mary go with him and kept threatening to "blow her brains out." Upon exiting the building, appellant told his nephews, who were sitting in a parked car outside the club, to get five gallons of gas and torch the club. Mary appeared shaken up and was crying when appellant, holding the pistol, forced her into the car. Appellant drove Mary's car with Mary sitting in the passenger seat. They made several stops during the course of the afternoon. Most of the time, when Mary and appellant left the car, appellant had the gun in his possession. When he did not, Mary testified she did not feel she had an opportunity to escape because appellant had threatened that if she tried to get away, many other people would be hurt. After several hours of driving around and several stops in which phone calls were made, Mary was released in a convenience store parking lot to her son, who had arranged to meet her and appellant there during one of appellant's several phone calls. When appellant was arrested eleven days after the murder, a gun similar to the murder weapon was discovered by police in appellant's luggage and appellant admitted it was his gun.

The medical examiner testified that Sonny died of brain injury as the result of a gunshot wound to the top of the head. The bullet traveled from front to back of the head and appeared to have been fired from more that three feet away. No gunshot residue or defensive wounds were discovered on Sonny.

Appellant testified in his own defense. He stated that while he was free on a personal recognizance bond, after being told by the judge to stay away from Mary, he got a ride with his nephews and asked them to stop at Desperado when he saw Mary's car in the parking lot. Appellant stated he was not armed. He testified that he entered the building, introduced himself to Sonny and said, "we have some things we really need to get sorted out." After entering Sonny's apartment, appellant testified Sonny retrieved a gun from the cabinet and had another gun in his back pocket. Appellant testified Sonny approached him holding a Smith and Wesson .357 in his hand. Appellant stated he grabbed the gun and Sonny's hand, and when he freed the gun from Sonny, the gun discharged. Appellant stated that he did not know whether or not he pulled the trigger, but admitted he did have possession of the gun when it discharged. Appellant agreed that he must have pulled the trigger but stated it was not intentional. He testified that he grabbed the gun in self-defense, but the gun accidentally fired. Appellant claimed that after the shooting, Mary left with him voluntarily.

Sufficiency of Evidence-Murder

Legal Sufficiency

Consistent with the Fourteenth Amendment's guarantee of due process, no criminal defendant may be convicted and punished except upon proof sufficient to persuade a rational fact-finder of the defendant's guilt beyond a reasonable doubt. *See Tibbs v. Florida,* 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652 (1982). In assessing the legal sufficiency of the evidence to support a conviction, we consider all of the record evidence, whether admitted properly or improperly, in the light most favorable to the State and determine whether, based on that evidence and reasonable inferences therefrom, a rational jury could have found the defendant guilty of all of the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Miles v. State,* 918 S.W.2d 511, 512 (Tex. Crim. App. 1996). The standard of review is the same in both direct and circumstantial evidence cases. *See Kutzner v. State,* 994 S.W.2d 180, 184 (Tex.

Crim. App. 1999). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given testimony, and it is also the exclusive province of the jury to reconcile conflicts in the evidence. *See Wesbrook v. State*, 29 S.W.3d 103,111 (Tex. Crim. App. 2000). A claim of legal insufficiency is, in effect, an argument that the case should never have even been presented to the jury. *See id.* By claiming legal insufficiency, appellant is arguing that the evidence of justification to kill Sonny in self-defense was so compelling that the issue of his guilt should have never been presented to the jury for its consideration. *See id.* We disagree.

Applying these principles to the case at bar, we conclude that the evidence is legally sufficient to support appellant's conviction. In resolving legal sufficiency of the evidence in cases in which self-defense is raised, we look not to whether the State presented evidence that refuted appellant's defensive testimony, but instead determine whether there was legally sufficient evidence to allow the jury to find the essential elements of the offense beyond a reasonable doubt and also to find against appellant on the defensive theories beyond a reasonable doubt. *See Benavides v. State*, 992 S.W.2d 511, 518 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). Although the trial court decided that enough evidence existed to warrant a jury instruction on self-defense, after a thorough examination of the trial record viewed in the light most favorable to the verdict, we find this evidence of justification was not so strong that it greatly preponderated against the jury's finding of murder to the point of completely overwhelming it and rendering that evidence legally insufficient.

Viewed in the light most favorable to the verdict, a rational jury could have (1) believed appellant's testimony that he was devastated when he learned Mary was dating a black man; (2) disbelieved appellant's testimony that he entered the victim's premises unarmed; (3) disbelieved appellant's testimony that Sonny retrieved a gun from the cabinet and brandished it at appellant; (4) believed Mary's testimony that appellant threatened that he was going to see that Sonny did not "taint another white woman"; 5) believed Mary's testimony that Sonny's weapon never left his back pocket during the altercation; (6) disbelieved appellant that the gun

was fired at close range during a struggle; (7) believed the medical examiner that the gun was fired from at least three feet away; and (8) believed appellant's testimony that he ordered his nephews to torch the building in which Sonny's body lay. The evidence detailed above, when viewed in the light most favorable to the verdict, is sufficient for a rational trier of fact to disbelieve appellant's self-defense testimony and to find beyond a reasonable doubt appellant committed murder. No arguable ground of error is presented for review.

Factual Sufficiency

The general standard for reviewing the factual sufficiency of the evidence to support a criminal conviction was announced by the Texas Court of Criminal Appeals in *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Under the general standard, we first assume that the evidence is legally sufficient. *See Clewis*, 922 S.W.2d at 129. Then, we must view all the evidence in a neutral light favoring neither side, without the prism of "in the light most favorable to the prosecution," and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. We review all the evidence weighed by the jury which tends to prove the existence of an elemental fact in dispute, and compare it to the evidence which tends to disprove that fact. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). In conducting this analysis, we may disagree with the jury's determination, even if probative evidence supports the verdict, but must avoid substituting our judgment for that of the fact finder. *See King v. State*, 29 S.W.3d 556, 563-64 (Tex. Crim. App. 2000).

In the instant case, the only element of the offense appellant disputes is whether he intentionally killed the victim. We must now proceed to review the evidence considered by the jury both supporting and opposing the verdict. Appellant concedes he fired the gun and killed the victim. However, he argues that Mary was not a credible witness and that her version of the events should not be believed. Contrary to Mary's testimony, appellant contends the evidence showed he did not bring a gun to the Desperado Club, that the murder weapon

belonged to Sonny; that Sonny held the murder weapon in his hand prior to a struggle with appellant, and that the killing was in self-defense. While appellant's testimony lends support to his argument that the shooting was in self-defense, that was not the only evidence the jury received.

We have set out the facts extensively above. Viewing them in the light required by *Clewis*, we conclude the evidence is factually sufficient. Due deference must be accorded the jury regarding the weight and credibility of the evidence. While appellant contends the testimony of Mary, the only eyewitness to the shooting, is not credible, we will not judge credibility of witnesses in assessing factual sufficiency. *See Scott v. State*, 934 S.W.2d 396, 399 (Tex. App.—Dallas 1996, no pet.). We are not called upon to serve as a thirteenth juror, and the jury's decision to believe Mary's testimony does not shock the conscience. *See King v. State*, 29 S.W.2d at 563-64. Similarly, although appellant presented conflicting evidence, the jury was entitled to reject his testimony. *See Wesbrook v. State*, 29 S.W.3d at 112. Therefore, we hold that the jury's finding that appellant intentionally killed the victim without justification is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. No arguable ground of error is presented for review.

Sufficiency of Evidence-Aggravated Kidnapping

Appellant argues the evidence is legally insufficient to prove aggravated kidnapping. In support of his argument, appellant contends the following: (1) that because by law, he and Mary were married at the time of the offense, he could not be convicted of her kidnapping; (2) Mary was not a credible witness; and (3) he should not have been convicted because Mary was released in a safe place.

In the application portion of the charge, the trial court submitted two alternative theories as ways of committing aggravated kidnapping. One authorized conviction under Section 20.04(a)(4) and (5): A person commits an offense if he intentionally or knowingly abducts another person with the intent to inflict bodily injury or terrorize him. *See* TEX. PENAL

CODE ANN. § 20.04(a)(4), (a)(5) (Vernon 1994 & Supp. 2000). In the alternative, the court charged the jury under Section 20.04(b) that conviction was authorized if the jury found the defendant used or exhibited a deadly weapon during the commission of the offense. *See* TEX. PENAL CODE ANN. § 20.04(b) (Vernon Supp. 2000). After reviewing the evidence in the light most favorable to the verdict, we hold the evidence is legally sufficient to support the verdict on either theory.

As noted above, complainant in the kidnapping case was appellant's ex-wife, who divorced appellant some four years prior to the offense. In spite of the divorce, complainant and appellant continued to reside together until a few days before the kidnapping. On the date of the kidnapping, appellant was aware that he had been ordered to stay away from complainant because she had filed a stalking complaint against him and procured a protective order.

Complainant testified that after the shooting of her new boyfriend, appellant held a gun on her and demanded that she go with him. Appellant stated that he couldn't leave any witnesses and constantly told complainant he was going to blow her brains out. Appellant's two grown nephews testified they observed appellant holding a gun at his side while he grabbed complainant and demanded she come with him in the car. Complainant was "real shook up and crying." During the course of the next several hours, appellant made several stops. Each time, with one exception, appellant had the gun with him. The only time he did not carry the weapon was when he stopped at a Denny's restaurant, but complainant testified she did not believe she should escape because appellant had threatened that if she made a scene and tried to get away, many other people would be hurt. Complainant was ultimately released at a convenience store. A rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appellant's argument that he could not properly be convicted of aggravated kidnapping because his victim was his wife is without merit. First, complainant was his ex-wife. Second, and more importantly, the statute does not prohibit conviction for aggravated kidnapping just

because the victim is married to the perpetrator. *See* TEX. PENAL CODE ANN. § 20.04 (Vernon 1994 & Supp. 2000). *See also Teer v. State*, 895 S.W.2d 845,846 (Tex. App.—Waco 1995, pet. dism'd); *Polk v. State*, 865 S.W.2d 627, 629 (Tex. App.—Fort Worth 1993, pet. ref'd.).

Regarding appellant's complaint that Mary was not a credible or reliable witness, the jury was in the best position to judge Mary's credibility. The jury is the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given to the testimony. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.04 (Vernon 1979). The jury may believe or disbelieve all or any part of a witness's testimony, even though the witness's testimony has been contradicted. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Reconciliation of conflicts in the evidence is within the exclusive providence of the jury. *See Jones v. State*, 944 S.W.2d at 647.

Appellant's reliance on the fact that complainant was released in a safe place is misplaced in this point of error alleging insufficient evidence. The issue of safe release is properly litigated at the punishment phase of the trial, because it is a factor that mitigates punishment. *See* TEX. PENAL CODE ANN. § 20.04(d) (Vernon 1994 & Supp. 2000); *Posey v. State*, 966 S.W.2d 57, 62-3 (Tex. Crim. App. 1998). No arguable ground of error is presented for review.

Argument of Prosecution

Appellant argues that the prosecutor committed misconduct when he argued a fact not in evidence. He complains of the prosecutor's argument that appellant must have had the gun hidden on his person on the night of the offense to explain why some witnesses did not see appellant holding the weapon. Clearly, this argument was a reasonable deduction from the evidence, and as such, was proper. *See Jackson v. State*, 17 S.W.3d 664, 675 (Tex. Crim. App. 2000); *Corpus v. State*, 30 S.W.3d 35, 40 (Tex. App.—Houston [14th Dist.] 2000, pet. filed). No arguable ground of error is presented for review.

Effective Assistance of Counsel

Appellant argues he was afforded ineffective assistance of counsel at trial as shown by four separate alleged failings: (1) failing to call a witness to testify to impeach complainant; (2) failing to limit by objection complainant's answers which went beyond "yes" or "no" answers; (3) failing to object to hearsay; and (4) failing to object to the State's argument arguing facts not in evidence.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 692 (1984). The prejudice prong requires the defendant to show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.*, 466 U.S. at 694. In analyzing the assistance of counsel, we presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant has the burden of rebutting this presumption by presenting evidence indicating why trial counsel did what he did. *See id.*

In this case, appellant did not file a motion for new trial alleging ineffective assistance of counsel or otherwise develop a record of counsel's reasons for the omissions of which he now complains on appeal. Because the record thus fails to reflect that defense counsel's performance fell below an objective standard, appellant has failed to meet the first prong of *Strickland*. *See id.* Further, none of the incidents presented by appellant prejudiced his defense. To show prejudice, appellant must show a reasonable probability that but for counsel's alleged unprofessional performance, the result of the proceeding would have been different. *See Blondett v. State*, 921 S.W.2d 469, 475 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

In his first complaint, appellant argues counsel was ineffective in failing to call the murder victim's son to testify to impeach Mary. During Mary's testimony on direct examination that when appellant first entered the Desperado Club on the date of the murder,

"Sonny didn't know who it (appellant) was," an outburst occurred in the courtroom. A person later determined to be the murder victim's son, Reginald Irving, spoke out saying, "Yes sir. Yes, he did." A person named Mr. Griffin, possibly a court bailiff, reported to the judge after the outburst, as follows: "I think, he couldn't hear well, he can't hear well and he misunderstood what was said and after talking to him out there (in the hallway), he was ok." From reviewing the cold record, it is impossible to determine which side Reginald Irving supported during the trial, although the fact that he was the murder victim's son makes it likely he supported the State's version of the case. The failure to call a witness may support an ineffective assistance of counsel claim only if it is shown the defendant would have benefitted from the testimony. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). Further, an attorney's strategic decision in failing to call a witness will be reversed only if there was no plausible basis for failing to call the witness to the stand. *See Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd)). From the record before us, it does not appear that Mr. Irving's testimony would have benefitted appellant. Since there may well have been strategic reasons for trial counsel not calling Reginald Irving to testify in appellant's behalf, ineffective assistance of counsel is not shown.

With regard to appellant's second and third complaints, that counsel failed to object to testimony, ineffective assistance of counsel is not shown. Ineffective assistance of counsel is not demonstrated by isolated instances of failure to object by defense counsel. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984); *Moore v. State*, 4 S.W.3d 269, 275 (Tex.App.—Houston [14th Dist.] 1999, no pet.). Counsel's failure to attempt to restrict complainant's answers to "yes" or "no" responses could very well have been deliberate trial strategy. Most trial attorneys realize that allowing certain witnesses to expound upon answers without restriction by way of objection, such that inconsistencies might inadvertently be revealed, often provides a beneficial method of discrediting a witness's testimony. From the record before us, it appears counsel may have made a deliberate decision to allow complainant's unfettered testimony, undisturbed by objection.

Similarly, the record in the case at bar is silent as to why appellant's trial counsel failed to lodge hearsay objections during complainant's testimony. It is possible that counsel determined the statements fit within an exception to the rule against hearsay or otherwise decided not to object based on trial strategy. Appellant has failed to rebut the presumption that this was a reasonable decision. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999).

As discussed above, appellant's fifth complaint about counsel's representation is without merit. Counsel's failure to object to the prosecution's argument theorizing that appellant had the gun hidden on his person does not constitute ineffective assistance of counsel in light of our holding that the argument was a reasonable deduction from the evidence, a proper area of jury argument.

After careful review of the record, counsel's brief and appellant's *pro se* response to the *Anders* brief, we find no arguable grounds of error to support the appeal. We agree with appellant's counsel that the appeal is frivolous and without merit.

Accordingly, we affirm the judgment of the trial court in each case and grant counsel's motions to withdraw.

PER CURIAM

Judgment rendered and Opinion filed March 29, 2001.
Panel consists of Justices Yates, Fowler and Wittig.
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