Affirmed and Opinion filed March 29, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00533-CR

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SEAN PATRICK HAYNES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 30,305

O P I N I O N

Sean Patrick Haynes appeals a conviction for murder[1] on the grounds of: (1) ineffective assistance of counsel; (2) exclusion of exculpatory evidence; (3) jury charge error; and (4) improper jury argument. We affirm.

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[1] Appellant was charged by indictment with murder, found guilty by a jury, and sentenced by the jury to life imprisonment.

Fingerprint Evidence

Appellant's first issue contends that the trial court denied him effective assistance of counsel[2] and due process[3] when it allowed the admission of fingerprint evidence not timely produced in compliance with a pre-trial discovery order requiring disclosure of, among other things, fingerprint analysis. In response to that discovery order, the State represented to defense counsel that appellant's prints did not match any of the prints found at the murder scene. However, during trial, an additional print comparison found two matching palm prints, and the court granted the State's request to admit the matching prints. Appellant claims that admitting this evidence, after defense counsel stated in his opening statement that there were no prints or physical evidence linking appellant to the scene, denied him effective assistance of counsel because defense counsel's credibility was thereby damaged. According to appellant, the conflicting information could have given the jury the impression that defense counsel did not know, or was misstating, the facts of the case, or that appellant had misled defense counsel as to the facts.

According to the record, the jury was told that the State had not previously known of the evidence and that the evidence was given to defense counsel after his opening statement. Additionally, there is nothing in the record to indicate that defense counsel knew or could have known of the evidence or that the admission of the evidence otherwise reflected on defense counsel's credibility. If anything, the failure to disclose this evidence in violation of a discovery order undermined the credibility of the prosecutor, not defense

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[2] Ineffective assistance of counsel generally pertains to errors by counsel in handling the defense of the criminally accused and is reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). However, in this case, appellant is not complaining about the manner in which his counsel handled the defense, but instead that the trial court undermined the effectiveness of appellant's counsel by admitting the fingerprint evidence.

[3] As to appellant's due process claim regarding the fingerprint evidence, he fails to cite any relevant authority to support any constitutional complaint independent of his claim for ineffective assistance of counsel. Therefore, his due process contention presents nothing beyond that for our review. *See* TEX. R. APP. P. 38.1(h); *see also Tong v. State*, 25 S.W.3d 707, 710 (Tex. Crim. App. 2000).

counsel. More importantly, however, appellant cites no authority providing that an otherwise correct ruling by a trial court can nevertheless render defense counsel ineffective and thus result in reversible error. *See Ruiz v. State*, 891 S.W2d 302, 305-06 (Tex. App.—San Antonio 1994, pet. ref'd) (holding that the trial court's denial of cross-examination to establish bias was not ineffective assistance of counsel because it was not reversible error). Because appellant does not challenge the propriety of the trial court's admission of the fingerprint evidence other than for its alleged effect on the credibility of defense counsel,[4] this point of error affords no basis for relief. Accordingly, it is overruled.

Exclusion of Exculpatory Guilt Evidence

In his second issue, appellant complains that he was denied due process because the trial court excluded exculpatory evidence in the guilt-innocense phase of trial, which supported appellant's defense theory that someone else killed the complainant over drug dealings. The excluded evidence consisted of: (1) testimony from Houston Police Department Homicide Sergeant Ladd that Steve Eduok was previously arrested with the complainant for drug possession and was angry at the complainant for refusing to take responsibility for the charges; (2) testimony from Kavona Robinson, the complainant's girlfriend, that Eduok was angry at the complainant for refusing to take responsibility for a previous marijuana possession charge; (3) evidence that Eduok had a criminal history of drug offenses; (4) the circumstances regarding the murder of Eduok; (5) testimony from homicide detective James Bonaby that Eduok was killed in a dark colored four-wheel drive vehicle, and that he was killed over a drug or music industry related dispute; (6) testimony that the complainant sold drugs as a middleman for Alex Earl, and that a dispute arose over

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[4] Evidence unintentionally withheld should not be excluded if the State reveals requested information in time for the defendant to examine it and cross-examine the State's witness with it. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000). Here, appellant was afforded ample time to have an expert review the evidence, and counsel was able to cross-examine the State's witness regarding the results.

a sale; and (7) testimony from complainant's mother[5] that she thought he was killed over drugs.[6]

Evidence must be relevant to a contested fact or issue to be admissible. *Werner v. State*, 711 S.W.2d 639, 643 (Tex. Crim. App. 1986). Trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

In this case, the excluded evidence tended to show only a *reason* someone else may have had to kill the complainant, but provided no direct or circumstantial evidence that anyone else actually did kill the complainant. Rather, appellant signed a written confession to the murder, his palm print was found at the scene, and witnesses testified that he confessed the murder to them. Under these circumstances, it was within the trial court's discretion to exclude the evidence. Accordingly, appellant's second issue is overruled.

Charge Error

Appellant's third, fourth, fifth, eighth, and ninth issues complain that the trial court failed to charge the jury on: (1) the right to arm; (2) the lesser included offenses of criminally negligent homicide and manslaughter; (3) the conditions of probation; and (4) sudden passion.

Standard of Review

In addressing an appellant's claim that the jury charge was erroneous, an appellate court must determine: (1) whether error exists in the charge; and (2) whether sufficient harm was caused by the error to require reversal. *Ovalle v. State*, 13 S.W.3d 774, 786 (Tex. Crim. App. 2000). The degree of harm necessary for reversal depends upon whether the

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[5] However, a motion in limine was granted as to the testimony from complainant's mother, and it was never offered at trial. Therefore, no complaint was preserved on its exclusion. *See Wilson v. State*, 7 S.W.3d 136, 144 (Tex. Crim. App. 1999).

[6] The State filed and was granted a pre-trial motion in limine to exclude all of the foregoing evidence for lack of relevance. At trial, the excluded evidence was read into the record by way of a bill of exception, and the court maintained its previous ruling. Additionally, the court conducted an in-camera examination of the Eduok police file and found no connection between the two cases.

appellant properly preserved error. *Id*. If error in the charge was preserved, then reversal is required if the error caused some harm to the appellant. *Id*. If the charging error is not preserved, the standard of harm required is "egregious harm." *Id*.

Right to Arm

Appellant contends that the trial court was required to charge on his right to carry arms to the scene of a difficulty and seek an explanation because it was supported by the evidence. However, a charge on the right to carry arms is not necessary unless a jury charge not only charges on self-defense, but places some limitation upon the accused's right of self-defense, such as provoking the difficulty or otherwise. *Williams v. State*, 580 S.W.2d 361, 362 (Tex. Crim. App. 1979). In this case, because the trial court did not give or limit a self-defense instruction, and appellant assigns no error to its failure to do so, it did not err in refusing a right to arm charge. Accordingly, appellant's third issue is overruled.

Lesser Included Offenses

Appellant's fourth and fifth issues complain of the trial court's failure to instruct the jury in the guilt/innocence phase of trial on the lesser included offenses of criminally negligent homicide and manslaughter. A defendant is entitled to an instruction on a lesser included offense where: (1) the proof for the charged offense includes the proof necessary to establish the lesser included offense; and (2) there is some evidence in the record that would permit a rational jury to find that if the defendant is guilty, he is guilty of only the lesser-included offense. *Wesbrook v. State*, 29 S.W.3d 103, 113 (Tex. Crim. App. 2000).

In determining whether there is evidence in the record to satisfy the second prong, anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). It does not matter whether the evidence was admitted by the State or the defense or was weak or contradicted. *Id*. Instead, the controlling issue is whether there is evidence, within or without the

defendant's testimony, which raised the lesser included offense. *Id*. Further, if the evidence is within a defendant's testimony, it is not dispositive that this evidence does not fit in with the larger theme of that defendant's testimony. *Id*. In addition, a lesser included offense may be raised if evidence either affirmatively refutes or negates an element establishing the greater offense. *Id*. However, a charge on a lesser included offense is not required if a defendant either presents evidence that he committed no offense or presents no evidence, and there is no evidence otherwise showing that he is guilty only of the lesser included offense. *Id*.

In this case, the first prong of the test is satisfied in that manslaughter and criminally negligent homicide are lesser-included offenses of murder. *See Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000). These lesser included offenses differ from murder in requiring a lesser culpable mental state to commit the offense. *Compare* TEX. PEN. CODE ANN. § 19.02(b) (A person commits murder if he *intentionally or knowingly* causes the death of an individual), *with id*. at § 19.04(a) (Vernon 1994) (A person commits manslaughter if he *recklessly* causes the death of an individual), *and id*. at § 19.05(a) (A person commits criminally negligent homicide if he causes the death of an individual by *criminal negligence*.); *see also id*. §6.03.

As to the second prong, according to appellant, the evidence that showed a lesser culpable mental state consisted of: (1) testimony from LaKendra Denmon and his confession, which both indicated that appellant did not mean to shoot the complainant or that appellant shot the complainant in response to provocation; and (2) testimony from Tommy Brown, the forensic pathologist, that at the time of the incident the complainant had in his system marijuana and PCP, which are the type of drugs which could have caused him to act bizarrely and hallucinate. However, evidence that appellant shot the complainant in response to provocation is evidence that he committed *no* offense, not that he is guilty only of a lesser offense.

Regarding the evidence that appellant did not mean to shoot the complainant, according to the forensic pathologist, the complainant was shot twice. The first shot to the

chest would not have killed the complainant if he had received timely medical attention; rather, the cause of death was the second shot, a close range shot to the head. Additionally, Denmon testified that appellant stated to her that he shot the complainant a second time, in the head, because the complainant looked at him as if he would come after him if he lived. Under these circumstances, the evidence that appellant did not mean to kill the complainant, he just clicked, and the gun just popped was not evidence from which a jury could *rationally* conclude that appellant did not have an intent to kill.[7] Thus, appellant was not entitled to instructions on the lesser included offenses, and his fourth and fifth issues are overruled.

Probation Conditions

Appellant's eighth issue contends that the court erred by failing to instruct the jury in the punishment phase on the conditions of probation. While it is considered good practice to enumerate in the court's charge the probationary conditions which the court may impose if probation is recommended by the jury, the failure to do so is not harmful to the accused or restrictive of the court's authority under the statute. *Murphy v. State*, 777 S.W.2d 44, 66-67 (Tex. Crim. App. 1988). In addition, probation was only available if the jury assessed punishment at ten or less years. TEX. CODE CRIM. PROC. Ann. art. 42.12 § 3(e)(1) (Vernon Supp. 2000). Because the jury sentenced appellant to life imprisonment, the court's failure to include the requested probationary terms was clearly harmless. *See Higginbotham v. State*, 769 S.W.2d 265, 276 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 807 S.W.2d 732 (Tex. Crim. App. 1991). Accordingly, appellant's eighth issue is overruled.

Sudden Passion

Appellant's ninth issue contends that the trial court erred in failing to instruct the jury on sudden passion. Appellant claims that the evidence raising this issue consisted

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[7] *See Cardenas*, 30 S.W.3d at 393 (holding that an appellant's statement that he did not intend to hit the victim so hard did not show an intent not to kill in light of the evidence showing a clear intent to kill); *Wesbrook*, 29 S.W.3d at 113-14 (same).

of the State's evidence showing that he just clicked after the complainant threatened him and his friends with a pistol, taunted them, and appeared ready to kill them. Appellant contends that if the jury had been permitted to consider this issue and find favorably to appellant, the punishment would have been reduced to a second degree felony. According to appellant, his requested instruction on manslaughter preserved this error for review. However, even if this complaint was not preserved, appellant contends the error is egregious.

When evidence from any source raises a defensive issue and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury. *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999); *see* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 1981). The evidence which raises the issue may be strong, weak, contradicted, unimpeached, or unbelievable. *Granger*, 3 S.W.3d at 38. However, there is no duty on a trial court to *sua sponte* instruct a jury on unrequested defensive issues even though the issues are raised by the evidence. *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). Moreover, the egregious harm standard only applies if a court first finds error in the jury charge. *Id.* at 60.

Where, as here, the defendant neither requested an instruction on the issue of sudden passion, nor objected to the absence of such instruction, the trial court did not err in failing to *sua sponte* instruct the jury on the unrequested defensive issue. *Id*. at 62. Consequently, there is no error in the charge to which the egregious harm standard could apply. Accordingly, appellant's ninth issue is overruled.

Improper Jury Argument

Appellant's sixth issue asserts that he was denied effective assistance of counsel and due process by the following portion of the State's jury argument:

> Mr. White is not happy with the level of the evidence that the State has brought you in this case today. And I submit to you, with all due respect to Mr. White . . ., that's not unusual. Defense attorneys are paid to be dissatisfied with the evidence.

Appellant objected to this argument that it was an outside-the-record criticism of defense

counsel's motives and ethics, but the objection was overruled. Taken in context, we conclude that the State's remarks were a permissible adversarial comment and a statement of matters within the realm of common knowledge.[8] Accordingly, the arguments were not improper references to matters outside the record, and appellant's sixth issue is overruled.

Exclusion of Exculpatory Punishment Evidence

In his seventh issue, appellant contends that the trial court erred by excluding his exculpatory evidence pertaining to an extraneous offense. In the punishment phase of the trial, the State introduced evidence that, while incarcerated, appellant was disciplined and removed from his cell for disorderly conduct. Appellant attempted to introduce the testimony of Quinton Giles, a fellow inmate, to prove that he was not guilty of the extraneous offense alleged by the State. According to appellant, Giles would have testified that he, not appellant, was the one kicking the cell door at the time. The trial court excluded the testimony of Giles on the grounds that defense counsel Gordon White had a conflict of interest.

A trial court's ruling admitting or excluding evidence is reviewed for abuse of discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). Although relevant, evidence may be excluded if it is cumulative. TEX. R. EVID. 403.

In the punishment phase of this case, appellant testified that he was not the person kicking on the cell door, but he was one of the individuals cursing at the officers and that he did spit in an officer's face. Appellant also introduced the testimony of Francisco Ayala, who testified that appellant was not the person kicking on the cell door. Because the jury heard the testimony of appellant and Ayala, the above testimony appellant sought to introduce from Giles was cumulative, and it was not an abuse of discretion for the trial court to exclude it. Accordingly, appellant's seventh issue is overruled, and the judgment

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[8] *See Nenno v. State*, 970 S.W.2d 549, 559 (Tex. Crim. App. 1998) (holding that common knowledge is an exception to the prohibition against arguing facts outside the record), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999); *Shipp v. State*, 482 S.W.2d 870, 871 (Tex. Crim. App. 1972) (holding that similar remarks made by the State were a permissible adversary comment).

of the trial court is affirmed.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 29, 2001.

Panel consists of Acting Chief Justice Fowler and Justices Anderson and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).