Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00441-CR

HURMAN LUVELL WILLIAMS, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 729,672

O P I N I O N

A jury convicted Hurman Luvell Williams of aggravated robbery; enhanced by one prior felony conviction, he was sentenced to forty years in prison and fined $5,000. In two points of error appellant complains that his trial counsel rendered ineffective assistance and that the trial court erroneously entered a deadly weapon finding. We will affirm the judgment as reformed.

Appellant was a temporary worker at a computer warehouse. Two men, at least one of whom was armed, held up the warehouse after a large shipment of notebook computers arrived. Police later determined that appellant was involved and had tipped the robbers to the shipment. Appellant was convicted as a party to the offense.

In his second point of error appellant argues his trial counsel was ineffective for not objecting to the State's jury argument in the punishment phase of the trial. A defendant in a Texas criminal case is entitled to reasonably effective assistance of counsel. *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App.1986). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court held that in order to show ineffective assistance of counsel, a convicted defendant must (1) show that his trial counsel's performance was deficient, in that counsel made such serious errors he was not functioning effectively as counsel; and (2) show that the deficient performance prejudiced the defense to such a degree that the defendant was deprived of a fair trial. In this connection, a strong presumption exists that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. at 689, 104 S.Ct. at 2065.

During his summation, the prosecutor said that one of the co-conspirators "was ready, was willing and with the gun that he had he was able to blow somebody away. We were a trigger pull away from a capital murder." Defendant argues his counsel's failure to object to this argument constituted ineffective assistance. We disagree.

Appellant must first show that this jury argument was improper. If the argument was proper, appellant's counsel was not required to object; we do not require counsel to perform futile acts in order to avoid a showing of ineffective assistance of counsel. *Mooney v. State*, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991).

Broadly speaking, there are four general areas of permissible jury argument: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) plea for law enforcement. *Kinnamon v. State*, 791 S.W.2d 84, 89 (Tex.Crim.App. 1990). Here the evidence was undisputed that one of appellants' co-conspirators wielded a handgun during the robbery. We think the prosecutor's argument was therefore a reasonable deduction from the evidence. In light of this, any objection would have been futile; therefore this single instance does not constitute ineffective assistance of counsel. Appellant's second point of error is overruled.

In his first point of error appellant contends the trial court erroneously entered a deadly weapon finding when the jury did not make a finding that he was aware that a deadly weapon would be exhibited.

As a general rule, the trial court may enter an affirmative finding on use of a deadly weapon when the indictment alleges use of a deadly weapon, the weapon is deadly per se, or the fact finder affirmatively answers a special issue on the use of a deadly weapon. *Davis v. State*, 897 S.W.2d 791, 793 (Tex.Crim.App.1995); *Polk v. State*, 693 S.W.2d 391, 394-95 (Tex.Crim.App.1985). However, when the jury charge authorizes the jury to convict the defendant as either a principal or a party, "the affirmative finding must show that the appellant used or exhibited the deadly weapon." *Flores v. State*, 690 S.W.2d 281 (Tex.Crim.App.1985) (emphasis in original). This line of authority was established at a time when the statute allowed an affirmative deadly weapon finding only when the defendant used or exhibited a deadly weapon during the commission of the offense, and did not address culpability under the theory of parties. See *Polk*, 693 S.W.2d at 394 n. 2.

The statute was amended in 1991 to allow an affirmative deadly weapon finding where the defendant was a party to the offense and knew that a deadly weapon would be used or exhibited. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3g(a)(2) (Vernon Supp. 2000). Thus, the amendment allowed for an affirmative finding when the theory of parties was presented. In *Pritchett v. State*, 874 S.W.2d 168, 172 (Tex.App.—Houston [14th Dist.] 1994, pet. ref'd), this court interpreted the amended provision to require an express finding that appellant knew a deadly weapon would be used or exhibited when the law of parties was applied.

Here the trial court made no express findings, instead circling "Yes" on a preprinted form where prompted about a deadly weapon finding. We find that, since the indictment authorized conviction on the law of parties and no special issue was submitted to the jury, the trial court erred in entering an unsupported deadly weapon finding.

This court has previously found that, under these circumstances, the judgment should be reformed to delete the erroneous deadly weapon finding. *Tate*, 939 S.W.2d at 754. We therefore reform this judgment to delete this finding and, as reformed, affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Justices Robertson, Sears, and Lee.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.