Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00493-CR

DAVID V. ELIZONDO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 772,343

O P I N I O N

Appellant, David Elizondo, was convicted of capital murder and sentenced to life imprisonment. On appeal, he contends the trial court erred when it excluded certain testimony that impeached a State's witness and when it admitted testimony that was irrelevant and impermissibly prejudicial.

Stephen Condon left his job at a fast-food restaurant, and came home to work on his car with his father. It was after midnight when they finished. Condon took the car to a nearby gas-station to put air in the tires while his father prepared dinner. Meanwhile, appellant had been riding around in a car with some friends. When appellant saw Condon

at the gas station, he ordered the driver, Jose "Pee Wee" Ramirez, to turn back and park behind a nearby building. Appellant got out and told Bryan Allen Powers, who was in the back seat, to come with him. Both covered their faces and approached Condon. Appellant then pointed a pistol at Condon and demanded money. Condon complied. Although Condon fully cooperated with appellant's demands, appellant shot him.

Bryan Powers was a witness for the State. He testified that appellant demanded Condon's money at gunpoint. Condon placed the money in appellant's hand and backed away. Appellant began to leave, but then turned and shot Condon in the neck. Appellant claimed that he only intended to frighten Stephen, and that the firearm accidently discharged when Powers, who was trying to hurry him, pulled on his arm.

Powers' Prior Silence

In an attempt to impeach Bryan Powers, appellant proffered the testimony of Joanna Flores Aguirre, who would have testified that she was in a motel room with appellant, his girlfriend Allison, and Bryan Allen Powers the day after the shooting. According to Aguirre appellant said he had only meant to frighten the victim and that the gun discharged when Powers pulled on his arm. Powers allegedly did not deny or correct this statement. Powers admitted that he may have been in a motel room after the murder, but he flatly denied any such conversation. The trial court did not admit Aguirre's testimony.

Appellant argues that Aguirre's testimony should have been admissible because Power's silence was a tacit admission that he caused the firearm to discharge by pulling on appellant's arm. It is a general rule of evidence that the prior silence of a witness as to a fact to which he has testified, where such silence occurred under circumstances in which he would be expected to speak out, may be used to impeach the witness during cross-examination. *See Franklin v. State*, 606 S.W.2d 818, 825 (Tex. Crim. App. 1978) (citing 3A WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1970)). The common law rationale for the rule is based upon the theory that silence is, in some circumstances, an adoptive admission. *See* 4 WIGMORE, EVIDENCE § 1071 (Chadbourn rev. 1972).

To give silence the effect of an admission, the statement must be one which a normal person would be moved to deny if untrue. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2(B0[01], at 801-262 (1991). Thus, the rule has no application where the statement made in his presence is not an accusation of a crime or does not show some criminality. *See Gamboa v. State*, 481 S.W.2d 423, 426 (Tex. Crim. App. 1972). Here, it was undisputed that Powers was a willing participant in the robbery; although unarmed, he never denied his participation. The question, therefore, is whether pulling on the appellant in an attempt to separate him from the victim and end the confrontation is a criminal act. We find the statement is not an accusation.[1] *See Alvarado v. State*, 912 S.W.2d 199, 214 (Tex. Crim. App. 1995, en banc) (holding that a statement accusing someone of murder "clearly called for a response"). Nor is the statement the type that would necessarily compel a reasonable person to deny it if it were untrue.

Further, the rule has no application where the party's silence or acquiescence was not voluntary; the party must have been free to speak. *See* TEX. JUR. 3d, *Evidence* § 242. If the party's silence was compelled by intimidation, it cannot logically be deemed an adoptive admission. For example, in a case where two parties were engaged in "a very animated and angry" conversation, a bystander's silence was not an adoptive admission because to deem it so would have "called for a course of conduct which prudent and quiet men do not generally adopt." *Bass v. Tolbert*, 51 Tex. Civ. App. 437, 112 S.W. 1077, 1080 (1908, no writ). Here, Powers had ample reason to fear appellant. Appellant was armed and had just killed a young man for no apparent reason. Under the facts presented here, prudence would suggest a quiet acquiescence to appellant's assertion.

When reviewing the trial court's decision, we must determine whether the trial court abused its discretion. *See Montgomery v. State*, 810 S.W.2d 372, at 390-93 (Tex. Crim. App.

[1] For example, if appellant had said that Powers was holding the gun it would be expected that he would respond.

1991) (on rehearing). After reviewing the record, we cannot say the trial court abused its discretion in refusing to admit the evidence. Appellant's first point of error is overruled.

Relevance of the Deputy's Testimony

Deputy Neil Hines, who served as the court bailiff during appellant's trial, testified that during a recess, appellant was sitting handcuffed on a bench talking to other inmates. Deputy Hines overheard appellant say "I'm going to get out today. If they let me out, I'm going to do the same things. I ain't going to change nothing I do. I didn't listen to my mom. What makes you think I'm going to listen to anyone else?" Deputy Hines admonished appellant that such a statement could be used against him. Appellant responded, "I don't give a s--t what you do." Appellant contends the deputy's testimony should not have been admitted because it was irrelevant.

"All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible." TEX. R. EVID. 402. Relevant evidence is "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401 (emphasis added). This is a low threshold; questions of admissibility under Rule 402 are assigned to the trial court and are reviewable only for abuse of discretion. *See Brimage v. State*, 918 S.W.2d 466, 506 (Tex. Crim. App.1996).

We find that the trial judge could have reasonably concluded that appellant's statement had some tendency to make his alleged remorse, and thus his truthfulness, more probable or less probable than it would be without the evidence. Appellant's second point of error is overruled.

Prejudice of the Deputy's Testimony

Appellant further contends the deputy's testimony was inadmissible because its probative value was outweighed by its prejudicial effect. This misstates the rule. Relevant evidence may be excluded only if its probative value is *substantially* outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403 (emphasis added). Moreover, in making decisions regarding the relevance of proffered evidence, the trial court does not abuse its discretion if its decision falls within the zone of reasonable disagreement and is reasonable in view of all relevant facts. *See Santellan* v. State, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997); *Rachal v. State*, 917 S.W.2d 799, 808 (Tex. Crim. App. 1996).

Virtually all evidence proffered by a party will be prejudicial to the opposing party, that is the central point of offering evidence. Only "unfair" prejudice provides a basis for exclusion of relevant evidence. *See Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App.1990). "Unfair prejudice" refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *See Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999). Unfair prejudice will substantially outweigh probative value only if there is "a clear disparity between the degree of prejudice of the offered evidence and its probative value." *Jones v. State*, 944 S.W.2d 642, 653 (Tex. Crim. App.1996). There is a presumption that relevant evidence will be more probative than prejudicial. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App.1997).

On cross-examination, the deputy freely admitted that he had heard only a fragment of the conversation and could not be certain of the context in which it was made. However, when the deputy admonished appellant that the statement could be used against him, the appellant made no attempt to correct the context in which the remark had been made. Rather, by his vulgar response, appellant seemed to confirm the deputy's understanding that the remark was in reference to his criminal conduct.

In light of the general presumption of admissibility which prevails under our rules of evidence, we cannot say the trial judge abused his discretion by finding that the testimony's

probative value was not substantially outweighed by the danger of unfair prejudice. Appellant's third point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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