Affirmed and Opinion filed April 4, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00127-CR

JORGE MONTERO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 846,183

O P I N I O N

Appealing his conviction of aggravated assault and sentence of twenty years' confinement, appellant Jorge Montero contends he was denied effective assistance of counsel and the trial court erred in refusing jury instructions on self-defense and misdemeanor assault. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was the live-in boyfriend of the complainant, Consuelo Trejo. Consuelo told appellant that she was leaving him and enlisted the help of her adult and teenage children to help her move. Appellant claims that he agreed with this decision, but when Conseulo attempted to leave, appellant physically blocked Consuelo and refused to let her leave the house. Appellant grabbed Consuelo and, with great force, threw her onto the sofa. In an attempt to aid her mother, Consuelo's oldest daughter struck appellant with a fireplace poker, an action which seemed to have no deterrent effect on appellant.

Consuelo's children watched in horror as appellant picked up a knife and plunged it into their mother's chest. Consuelo's daughter testified that, while looking directly at their mother, appellant stated he was not finished and intended to kill her. Petrified, the children grabbed their mother and carried her to their car. In an effort to stop them, appellant threw a metal fan blade at the car. The glass shattered and hit one of the children. Appellant then got into his car and chased them.

Consuelo's oldest daughter, who was driving the car, flagged down an ambulance on the freeway feeder road. The paramedics stopped and immediately took Consuelo to the hospital, where she remained for six weeks, undergoing several surgeries and treatment.

The morning after the stabbing, the police found appellant hiding under a bed at his mother's house. Appellant was indicted with the offense of aggravated assault. Appellant pleaded not guilty. A jury found appellant guilty as charged and assessed punishment at twenty years' confinement in the state penitentiary and a $10,000 fine.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, appellant contends he was denied effective assistance of counsel. Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. AMEND. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to reasonably effective

assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92. Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). 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 to rebut this presumption by presenting evidence illustrating why trial counsel did what she did. *See id.* An appellant cannot meet this burden if the record does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). When, as here, there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective assistance claim. *Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.—Beaumont 1995, pet. ref'd.).

Appellant alleges his trial counsel was ineffective because: (1) he substituted himself as attorney seven days before trial and failed to properly investigate and prepare for his case; (2) failed to object to allegedly inadmissible extraneous acts of violence; (3) failed to object to an allegedly inadmissible photograph of Consuelo's injured face;(4) failed to timely

request an instruction of the lesser-included offense of class A misdemeanor assault;[1] and (5) failed to object to allegedly improper jury argument during the punishment phase.

Because no motion for new trial was filed, no hearing was conducted to develop counsel's trial strategy. Counsel's alleged ineffectiveness is not firmly established in the record. *See Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). The record is silent as to the reasoning and strategy behind trial counsel's actions. Appellant has not rebutted the presumption that his trial counsel made all significant decisions in the exercise of reasonable professional judgment, and appellant has not demonstrated in the record that counsel rendered ineffective assistance. *See id*. at 814. We will not speculate about counsel's strategic decisions and thus, we cannot find counsel ineffective based on the asserted grounds. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Furthermore, even if trial counsel were ineffective, we find that, after reviewing the ineffective assistance claims under the totality of the circumstances, appellant failed to establish prejudice. *See Garcia*, 887 S.W.2d at 880. Accordingly, we overrule appellant's first issue.

III. JURY INSTRUCTIONS

In his second issue, appellant alleges the trial court erred by failing to instruct the jury on the issue of self-defense and on the lesser-included offense of misdemeanor assault.

Self-Defense Instruction

One is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. TEX. PEN. CODE ANN. § 9.31(a). A person is justified in

[1] We note, for the purposes of our analysis of appellant's second issue, that his counsel was timely in requesting an instruction on misdemeanor assault. Appellant's counsel requested the instruction before the jury charge was read and the trial court denied the instruction—not because it was not timely, but because the evidence did not support the lesser-included offense of misdemeanor assault. *See Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985) (holding that charge error is preserved so long as the error is brought to the trial court's attention before the charge is read to the jury).

using deadly force against another: (1) if he would be justified in using force against the other under section 9.31, (2) if a reasonable person in the actor's situation would not have retreated, and (3) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. TEX. PEN. CODE ANN. § 9.32(a). The defendant has the initial burden of producing some evidence to justify submission of a self-defense instruction. *Tidmore v. State*, 976 S.W.2d 724, 729 (Tex. App.—Tyler 1998, pet. ref'd). A trial court must give a jury instruction on a defensive theory raised by the evidence regardless of whether such evidence is strong, feeble, impeached, or contradicted, and even if the trial court is of the opinion that the testimony is not entitled to belief. *Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). In order to be entitled to an instruction on the use of deadly force in self-defense, the defendant must produce some evidence on each of the three elements of section 9.32. *Henderson v. State*, 906 S.W.2d 589, 594–95 (Tex. App.—El Paso 1995, pet. ref'd). If the issue is raised by any party, refusal to submit the requested instruction is an abuse of discretion. *Id.* However, if the evidence fails to raise a defensive issue, the trial court commits no error in refusing such a request. *Id.*

Appellant argues that his testimony alone was sufficient to support the submission of a jury charge on self-defense. We disagree. Even when viewed in appellant's favor, the evidence is insufficient to raise self-defense. Although appellant testified that he attempted to grab the knife from Consuelo to defend himself, he unequivocally denied stabbing Consuelo. Appellant claimed he struggled with Consuelo, but was unsure of how the knife ended up in Consuelo's chest. During the State's cross-examination, appellant repeatedly stated, "I didn't do it" and insisted that he "was unconscious of his surroundings and was not sure how Consuelo got stabbed in the chest."

To be entitled to an instruction on self-defense, appellant was required first to admit the conduct charged in the indictment and then to offer evidence justifying the conduct. *See Anderson v. State*, 11 S.W.3d 369, 372 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); *see*

also Young v. State, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999). Appellant did not present any evidence admitting the conduct charged or justifying his use of a deadly weapon. Because appellant did not admit to using the knife or stabbing Consuelo in self-defense, the trial court did not err in refusing appellant's request for a self-defense instruction in the jury charge.

Lesser-Included Offense Instruction

Appellant, charged with aggravated assault, contends the evidence was sufficient to support a lesser-included offense of misdemeanor assault. A person commits the offense of misdemeanor assault if the person intentionally or knowingly threatens another with imminent bodily injury. TEX. PEN. CODE ANN. § 22.01(a)(2). A person commits the offense of aggravated assault if he commits misdemeanor assault and either: (1) causes serious bodily injury to another, *or* (2) uses or exhibits a deadly weapon during the commission of the assault. TEX. PEN. CODE ANN. § 22.02. Therefore, in order to be entitled to an instruction on the lesser-included offense of misdemeanor assault, there must have been some evidence permitting a jury to find appellant did not cause serious bodily injury *and* that appellant did not use or exhibit a deadly weapon.

To determine whether appellant was entitled to a jury charge on the lesser-included offense, we apply a traditional two-prong test. *See Ramirez v. State*, 976 S.W.2d 219, 226–27 (Tex. App.—El Paso 1998, pet. ref'd); *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993); *Bartholomew v. State*, 882 S.W.2d 53, 54–55 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). First, the lesser-included offense must be included within the proof necessary to establish the offense charged. *Bignall*, 887 S.W.2d at 23. Second, some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Ramirez*, 976 S.W.2d at 227. The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in making the determination of whether the lesser-included offense should be

given. *Gadsden v. State*, 915 S.W.2d 620, 622 (Tex. App.—El Paso 1996, no pet.); *Barrera v. State*, 914 S.W.2d 211, 212 (Tex. App.—El Paso 1996, pet. ref'd). Regardless of its strength or weakness, if any evidence raises the issue that the defendant was guilty only of the lesser offense, then the charge must be given. *Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992). An accused is guilty only of a lesser-included offense if there is evidence that affirmatively rebuts or negates an element of the greater offense, or if the evidence is subject to different interpretations, one of which rebuts or negates the crucial element. *Ramirez*, 976 S.W.2d at 227. It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *See Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997). There must be some evidence directly germane to the lesser-included offense for the jury to consider before an instruction on the lesser-included offense is warranted. *Ramirez*, 976 S.W.2d at 227.

The State does not contest that the first prong of the test was satisfied. As for the second prong, the State claims that appellant's own testimony that he committed no offense using a deadly weapon inadequate to raise the issue of a lesser-included offense of misdemeanor assault. We agree.

The evidence presented at trial showed that appellant intentionally plunged a knife into Consuelo's chest after Consuelo attempted to leave appellant. Consuelo and her daughters stated that appellant grabbed Consuelo, threw her on the sofa, struggled with her, and stabbed her with a knife. The daughters further testified that they feared their mother was going to die so they grabbed her and carried her to the car. Appellant chased after them and threw a fan blade at the window of the car, causing glass to shatter everywhere. Consuelo's and her daughters' testimony established that Consuelo suffered bodily injury from being stabbed with a knife by appellant. Appellant testified that he committed no offense because he defended himself. Contradicting himself, appellant also stated that because everything happened so quickly, he was unsure of what exactly happened or how the knife went into Consuelo's chest. Appellant never admitted to intentionally or knowingly

causing bodily injury to Consuelo, which is necessary for the offense of misdemeanor assault. *See* TEX. PEN. CODE ANN. § 22.01(a)(2). Appellant only stated that he attempted to grab Consuelo's hand and fought for the knife. These facts are not enough to implicate the lesser-included offense of misdemeanor assault. A defendant's own testimony that he committed no offense, or testimony which otherwise shows that no offense occurred at all, is not adequate to raise the issue of a lesser-included offense. *Lofton v. State,* 45 S.W.2d 649, 652 (Tex. Crim. App. 2001); *Bignall*, 887 S.W.2d at 23.

We conclude there was not more than a scintilla of evidence raised that, if appellant was guilty, he was only guilty of misdemeanor assault. *See Arevalo v. State*, 943 S.W.2d 887, 889–90 (Tex. Crim. App. 1997). Therefore, the trial court was not required to charge the jury on the lesser-included offense of misdemeanor assault. Finding no error, we overrule appellant's second issue.

We affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed April 4, 2002.
Panel consists of Chief Justice Brister and Justices Anderson and Frost.
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