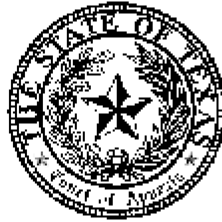
**Affirmed and Opinion filed April 5, 2001.**



**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-01301-CR**

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**KENNETH WEST, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 176th District Court**
**Harris County, Texas**
**Trial Court Cause No. 768,322**

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## O P I N I O N

Kenneth Wests appeals his jury conviction for murder. The trial court assessed his punishment at 60 years' imprisonment to begin when his 60-years' sentence in trial court case number 77,1595 (appeal pending in this court in case no. 14-98-01303-CR) ceases to operate. In three issues, appellant contends: (1) the trial court erred in failing to grant a mistrial after a homicide detective testified that he received no information at the scene relevant to a claim of self-defense; (2) the trial court erred in refusing to instruct the jury on the lesser-included offense of aggravated assault; and (3) appellant received ineffective assistance of trial counsel.

We affirm.

## FACTS

On November 9, 1996, at about 2:00 a.m., Efrem Breaux, Jokaric Alexander, Jacobe Smith, and D'Edric Carney left the Carrington Club after it closed. Smith drove the group to an Exxon station across the street from the club in Alexander's green Elantra. Smith stopped the car by the gas pumps, and Carney went to the restroom while the others stayed in the car listening to music. Smith was sitting in the driver's seat, Alexander was sitting in the passenger seat, and Breaux was sitting in the rear seat of the car behind Alexander. After using the restroom, Carney returned to the car and got in the back seat. Appellant and Chris White started shooting at the rear of the car, and the four men in the car ducked down. When the shooting stopped, Alexander drove away. After driving a short distance, Alexander, Smith, and Carney realized Breaux had been shot. They flagged down police officers, and the officers immediately called for an ambulance. Breaux died from two of the four gunshot wounds he received to his back.

Christopher St. Romaine was called by the State as a witness. St. Romaine stated he was high on codeine cough syrup and marijuana when he left Carrington's Club at closing time and met with appellant and White. St. Romaine stated that appellant indicated a group of men were after him and had been following him. White drove appellant, St. Romaine, and another man, Winfrey, from the club to the Exxon station. The Exxon parking lot was full of cars, and White parked alongside the Exxon building. Appellant, White, and St. Romaine got out of White's car and walked around the Exxon lot. Winfrey stayed in the car and slept through the entire incident. White saw the green Elantra and said, "those were the guys at Carrington." White walked up to the green Elantra and asked someone in the car if they had any problems with him. St. Romaine stated he observed Breaux bend forward and reach for something. White said, "he's got a gun," and ran away. St. Romaine ran away, and heard gunshots. He turned and saw appellant and White shooting at the rear of the green Elantra.

## REFUSAL TO GRANT A MISTRIAL

In his first issue, appellant contends the trial court erred by refusing to grant a mistrial after Detective Roy Swainson improperly answered the prosecutor after the trial court had sustained appellant's hearsay objection to the prosecutor's question. The record shows the following question and answer exchange that appellant contends is objectionable:

> PROSECUTOR: Did you ever have any information from any source at the scene that day you started the investigation relevant to a claim of self-defense?
>
> APPELLANT'S COUNSEL: Objection, Your Honor, hearsay.
>
> THE COURT: That's sustained.
>
> DETECTIVE SWAINSON: No.

Appellant's trial counsel did not object to Detective Swainson's answering "No" after the trial court sustained his hearsay objection. Thereafter, appellant's trial counsel asked that the jury be instructed to disregard, and the trial court instructed the jury not to consider the last answer for any purpose. Appellant's trial counsel then moved for a mistrial, and the trial court denied the motion.

By answering "no" to the prosecutor's question, appellant asserts that Detective Swainson informed the jury that his investigation at the scene revealed no evidence of self-defense. Appellant contends that the trial court's instruction to disregard cannot cure the error. Appellant asserts he has been harmed because the "back door" hearsay rises to the level of constitutional error by denying appellant the right to confront and cross-examine the witnesses whose information caused Swainson to conclude that there was no indication of self-defense.

### Discussion

Appellant cites *Schaffer v. State,* 777 S.W.2d 111, 113 (Tex.Crim.App.1989) as authority for his proposition that Swainson's answer after the trial court sustained his objection was harmful error. *Schaffer* involved an objection to an officer's answer to the prosecutor's

question: "Without telling us what [Officer Seals] told you . . . would you ask the State to drop the charges." The officer answered: "No, sir." *Id.* at 113. The court of criminal appeals held:

> There is no doubt that the State's sole intent in pursuing this line of questioning was to convey to the jury that Seals had told Segovia that appellant was not an informant. There is no other reason to question Segovia (who had already testified at trial on other matters) other than to destroy appellant's defense that he was working with authorities.

*Id.* at 114.

In *Schaffer*, the appellant objected *after* the officer answered the prosecutor's question on the grounds of hearsay. *Id.* at 113. The trial court overruled appellant's objection, and the court of criminal appeals affirmed the reversal of the case by the court of appeals. In this case, the trial court *sustained* appellant's hearsay objection, but Detective Swainson answered "no" after the trial court ruled on the prosecutor's question. Instead of objecting to Swainson's answer, appellant's counsel asked the trial court for an instruction to disregard. The trial court granted appellant's motion, and instructed the jury not to consider Swainson's answer for any purpose.

In *Head v. State,* 4 S.W.3d 258, 262-263 (Tex. Crim. App. 1999), the court of criminal appeals held that under *Schaffer*, "the question is whether the strength of the inference produces an 'inescapable conclusion' that the evidence is being offered to prove the substance of an out-of-court statement." *Id.* at 262. The court further held under the facts of the case that the "trial court could have reasonably determined that this sort of inferential leap did not provide the requisite degree of certainty 'that the State's *sole intent* in pursuing this line of questioning was to convey to the jury' the contents of the out-of-court statements." *Id.*

In this case, the trial court sustained the objection, but Swainson inadvertently answered the question. From the record before us, we are not inescapably drawn to the conclusion that the sole intent of the State was to convey to the jury the contents of some out-of-court

statements. Swainson's answers merely described his investigation of the facts at the Exxon station. *See also Thornton v. State*, 994 S.W.2d 845, 854 (Tex. App.—Fort Worth 1999, pet. ref'd).

"Ordinarily, a prompt instruction to disregard will cure error associated with an improper question and answer." *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App.2000). We see nothing in the record before us to suggest that the questions and answers provided here were of such a nature that they could not be cured by an instruction to disregard. *See also Martinez v. State*, 17 S.W.3d 677, 689-690 (Tex. Crim. App. 2000). We overrule appellant's contentions in issue one that the trial court erred in denying a mistrial.

**THE LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT**

In his second issue, appellant contends the trial court erroneously refused his request for an instruction on the lesser-included offense of aggravated assault.

A defendant is entitled to an instruction on a lesser-included offense where the proof for the offense charged includes the proof necessary to establish the lesser-included offense and there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Forest v. State*, 989 S.W.2d 365, 367-368 (Tex. Crim. App. 1999). Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Id.* In other words, the evidence must establish the lesser-included offense as "a valid, rational alternative to the charged offense." *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App.1997). When the evidence raising the lesser-included offense also casts doubt upon the greater offense, it provides the fact finder with a rational alternative by voting for the lesser-included offense. *Id.*

Aggravated assault can be a lesser-included offense of murder. *Forest,* 989 S.W.2d at 367-368. The elements of aggravated assault are set down in Texas Penal Code § 22.02(a). That statute provides that a person commits aggravated assault if he "commits assault as defined in Section 22.01 and the person (1) causes serious bodily injury to another; or (2) uses

or exhibits a deadly weapon during the commission of the assault. Texas Penal Code § 19.02(b) provides that a person commits murder if he "(1) intentionally or knowingly causes the death of an individual; and (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual."

In the instant case, appellant was charged with intentional murder under Texas Penal Code § 19.02(b)(1) & (2). Appellant did not testify and he does not contest that his act caused the victim's death. Firing a gun in the direction of an individual is an act clearly dangerous to human life. *Forest,* 989 S.W.2d at 367-368. The evidence showed that appellant and White fired twenty-five rounds at the rear of the Elantra, blowing out the rear window, and leaving numerous bullet holes in the body of the car. Four bullets hit Breaux in the upper part of his back, and two of the wounds were fatal. Therefore, the evidence shows that appellant, at the least, to be guilty of murder under Texas Penal Code § 19.02(b)(2). *Id.* However, there was no evidence that appellant was guilty only of anything less than some form of murder. Appellant was not entitled to an instruction on aggravated assault. *Id.* We overrule appellant's contention in issue two that he was entitled to a jury instruction on aggravated assault.

**INEFFECTIVE ASSISTANCE OF COUNSEL**

Appellant contends that his trial counsel was ineffective: (1) for failing to object to Detective Swainson's opinion testimony that there was no evidence of self-defense; (2) for failing to object to St. Romaine's testimony that he had been threatened by people in the neighborhood if he testified; and (3) for failing to object to the testimony of Alexander, Smith, and Carney that they had never been convicted of any felonies or crimes involving moral turpitude.

When handed the task of determining the validity of a defendant's claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Thompson v. State*, 9 S.W.3d 808, 813-814 (Tex. Crim. App. 1999). There is a strong presumption that counsel's conduct fell within the wide range

of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994).

In this case, the record fails to rebut this strong presumption of reasonable counsel. A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. *Thompson,* 9 S.W.3d at 813-814. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. *Id.* In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel. *Id.* To defeat the presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id.* "Indeed in a case such as this, where the alleged derelictions primarily are errors of omission de hors the record rather than commission revealed in the trial record, collateral attack may be the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record." *Id.*

Appellant did not file a motion for new trial and request a hearing to question his trial counsel, and the record is silent as to why appellant's trial counsel failed to object to the evidence. Therefore, appellant has failed to rebut the presumption this was a reasonable decision. "Failure to make the required showing of . . . deficient performance . . . defeats the ineffectiveness claim." *Strickland v. Washington*, 104 S.Ct. at 2071. The record provides no reference to explain why counsel chose not to object, or failed to object, when the evidence was presented. Appellant has not demonstrated that his trial counsel was ineffective. We overrule appellant's contentions in issue three that his trial counsel was ineffective for failing to object to evidence.

We affirm the judgment of the trial court.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Robertson, Sears, and Hutson-Dunn.*

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

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* Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.