Reversed and Remanded and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00414-CR

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JOHN ANDRE MARQUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 815,254

O P I N I O N

Appellant, John Andre Marquez, appeals his conviction for assaulting a police officer. In four points of error, he complains that (1) he was denied effective assistance of counsel; and (2) he suffered egregious harm because of the trial court's failure to instruct the jury on mistake of fact and on the lesser included offenses of assault and resisting arrest and detention. We reverse and remand.

I.

Appellant was found guilty of assaulting a Houston Police officer following a traffic altercation. The testimony in the underlying trial was in sharp conflict. The State offered the testimony of Houston Police Office Sean Edward Palin, who was directing traffic for a construction crew at a busy Houston intersection. Officer Palin testified that he saw appellant's vehicle approaching the intersection at a high rate of speed, that he signaled to appellant to stop, but that appellant did not do so. Officer Palin testified that he struck appellant's vehicle with his hand as it entered the intersection and prepared to make a right-hand turn. Several other witnesses, in addition to the officer, testified that Officer Palin was wearing a uniform, which included a baseball cap designating he was with the Houston Police Department. Officer Palin testified that, when he walked over to the car to issue appellant either a ticket or a warning, appellant became belligerent, yelling profanities at Officer Palin for slapping his car. Then, according to the officer's testimony, appellant tried to drive away. When Officer Palin tried to prevent him from doing so, appellant kicked Officer Palin in the face, torso, and groin. Officer Palin further testified that appellant called 9-1-1 and stated, "One of *your officers* is out here . . . killing me." (Emphasis our own.) Eventually, Officer Palin removed the car keys from the ignition, threw them into a nearby parking lot, and called for backup.

Appellant testified that, because of a large object blocking his view, he did not initially notice anyone in the intersection—directing traffic or otherwise. As he went to make his turn, however, he noticed a "pedestrian," wearing an orange jacket, standing in the crosswalk. As he turned sharply to avoid hitting this person, he heard the sound of Officer Palin slapping his vehicle, but thought this was the sound of his car striking the pedestrian. Appellant testified that he immediately stopped his car so he could render aid to the person he just hit. Before he could completely undo his seatbelt, however, appellant testified that the pedestrian grabbed him by the shoulder with both hands and tried to pull appellant from his car. As the attack

progressed, appellant testified that he retreated to the passenger side of his vehicle, and the stranger grabbed his keys and threw them over the car. Appellant reached into his glove box, got his cell phone, and called 9-1-1. He told the 9-1-1 operator that a stranger was attacking him. According to appellant's testimony, at no time did Palin identify himself as a police officer, and appellant further testified that he did not notice that Palin was in uniform.

Appellant filed a motion for new trial, alleging he received ineffective assistance of counsel. At the hearing on appellant's motion, the court admitted into evidence an affidavit filed by appellant's trial counsel stating that his failure to request a jury instruction on mistake of fact, the failure to request instructions on the lesser included offenses of assault and resisting arrest, and his failure to call eight to nine character witnesses was not the product of a reasoned trial strategy. The court denied the motion. Because we agree that trial counsel's failure to request instructions on the lesser included offenses was ineffective, we reverse.

II.

As a threshold matter, appellant must support a claim of ineffective assistance of counsel with evidence. Where appellant's claim of ineffective assistance of counsel is based upon a failure of counsel to request jury instructions, and the evidence consists of an uncontroverted affidavit from the lawyer who represented him at trial that the failure to request those instructions was not the result of a reasoned trial strategy, then appellant received ineffective assistance of counsel *if* it would have been error for the court to have refused a proper request. *Ex parte Varelas*, No. 73-632, 2001 WL 76964, at *4 (Tex. Crim. App. Jan. 31, 2001). In *Ex parte Varelas*, the defendant's trial lawyer gave uncontradicted testimony by affidavit that his failure to request a jury instruction on a defensive issue consistent with the defendant's theory of the case was not the product of reasoned trial strategy. *See id.* at *4, n.4. With regard to counsel's affidavit, the court found that "we now have before us an affidavit from [the defendant's] trial counsel and *can now determine* whether such failure was a product of trial strategy." *Id.* at *4 (emphasis added). Noting that no other evidence in the record

supported the trial court's finding that the attorney's decision was the result of reasoned trial strategy, the Court of Criminal Appeals held:

> Trial counsel's conduct fell below an objective standard of reasonableness by failing to request the jury instructions. The trial court would have been required to give the instructions had counsel requested them, and reasonable counsel would have requested the instructions given the facts of this case. Therefore, we conclude that trial counsel's performance was deficient . . . .

Id. at *4 & n.4. Of course, appellant is entitled to a new trial only if the record further supports a finding that he was harmed by his lawyer's failure request these instructions. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas); *Prejean v. State*, 32 S.W.3d 409, 411 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.). Accordingly, we turn first to whether appellant was entitled to an instruction on the lesser included offenses.

A.

A defendant is entitled to an instruction on a lesser included offense if two conditions are satisfied. *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993). First, the lesser included offense must be included within the proof necessary to establish the offense charged. *Id.* at 672. Second, there must be *some* evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty of only the lesser offense. *Id.* at 673. It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997). Rather, there must be *some* evidence directly germane to a lesser included offense for the fact-finder to consider before an instruction on a lesser included offense is warranted. *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). If evidence from *any* source raises the issue of a lesser included offense, it must be included in the charge. *Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991).

Assault is a lesser included offense of assault of a police officer, the only difference between the two crimes being whether the defendant knew the person he assaulted was a police officer. *Compare* TEX. PEN. CODE ANN. § 22.01(a) (Vernon Supp. 2000) (assault), *with* § 22.01(b) (assault of a public servant). Accordingly, the first prong of *Rousseau* has been satisfied. 855 S.W.2d at 672. The evidence in this case also satisfies the second prong. The jury rationally could have believed Officer Palin's testimony that appellant assaulted him, but believed appellant's testimony that he did not know Palin was a police officer. Because it would have been error for the court to have refused a request from appellant for an instruction on simple assault, appellant has demonstrated that he received ineffective assistance of counsel.

B.

Under the second prong of *Strickland*, a new trial is required if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687; *Stephens v. State*, 15 S.W.3d 278, 279 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). A "reasonable probability" is merely one that is "sufficient to undermine confidence in the outcome of proceedings." *Strickland*, 466 U.S. at 694; *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (quoting *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998)). A probability may be reasonable even though it does not constitute a preponderance of the evidence. *Id. Snow v. State*, 697 S.W.2d 663, 668 (Tex. App.—Houston [1st Dist]. 1985), *pet. dism'd, improvidently granted*, 794 S.W.2d 371 (Tex. Crim. App. 1987) (citing *Strickland*, 466 U.S. at 694).

In support of his motion for new trial, appellant attached the affidavit of one of the jurors from the trial which stated, in pertinent part:

> The critical issue that caused us as jurors to deliberate as long as we did was whether [appellant] knew that Officer Palin was, in

> fact, a peace officer at the time he assaulted him. This issue was hotly contested by those jurors who were holding out for a verdict of not guilty.
>
> I have also learned that [appellant] may have been entitled to jury instructions that would have given us the option of finding him guilty of the lesser crimes of resisting arrest or misdemeanor assault. Had either of these instructions been given, there is a reasonable probability that I would have elected to find [appellant] guilty of one of these two lesser offenses.

The State did not object to this evidence. Nor did it attempt to introduce any evidence to the contrary, either by cross-examining the juror-affiant or by securing the affidavit or testimony of another juror.

In addition, as noted by the juror, whether appellant knew the complainant was a peace officer was hotly contested during trial. By not requesting a charge on assault, trial counsel foreclosed the possibility that the jury could have found appellant guilty of only the lesser included offense. Accordingly, we conclude that appellant has demonstrated that counsel's performance at trial prejudiced his defense. We sustain appellant's first point of error. In light of our disposition of this point of error, we need not address appellant's remaining points of error or arguments.

The judgment of the trial court is reversed and remanded for a new trial.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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