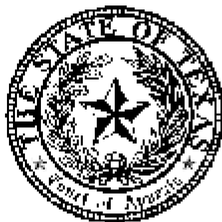
Affirmed and Opinion filed June 15, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-98-01141-CR

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JOHN FITZGERALD KINSEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 754,475

O P I N I O N

John Fitzgerald Kinsey, appellant, was found guilty by the jury of aggravated assault and sentenced to thirty-three years in the Texas Department of Criminal Justice, Institutional Division. The jury further made an affirmative finding on the use of a deadly weapon. Appellant presents four points of error. We affirm.

Complainant was attacked and robbed of his cigarettes and beer late in the evening of May 17, 1997 as he walked home from a neighborhood convenience store. One witness, Michael Jones, was alerted by complainant's loud screams and ran outside and saw three men kicking and beating complainant on the ground. Jones identified the complainant as a homeless

handyman who did small jobs around the neighborhood, and identified one of the attackers as appellant, who also lived in the neighborhood. He testified to seeing appellant punch and kick the complainant, and that appellant appeared to be the main aggressor. After the attackers ran off, Jones helped complainant home.

Hubert Collins testified that he had taken complainant into his home sometime prior to the attack, as complainant had been living under a bridge. He testified that early in the evening of May 17, 1997, he had driven complainant to a local convenience store so he could buy beer and cigarettes, then dropped complainant off two blocks from home. He did not see complainant again until the following day, when he noticed something was wrong with complainant's jaw, and that he was refusing to eat or get out of bed. Complainant was admitted into the hospital a few days later, where he died a week after the assault. His medical records reflected complainant as having told his doctors he had been "assaulted last Saturday." Medical and autopsy experts attributed his death to fractured cartilage of the trachea from trauma, which caused breathing difficulties, massive infection and other injuries of a progressively worsening, and ultimately fatal, nature.

By his first point of error, appellant alleges that the evidence is legally insufficient to show that he caused serious bodily injury to complainant or that he caused bodily injury with a deadly weapon, such that the trial court erred in overruling his motion for instructed verdict. The standard of review for testing legal sufficiency on appeal is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). This standard applies to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154, 159 n.6 (Tex. Crim. App. 1991).

The evidence is legally sufficient to support the verdict. Appellant was seen hitting and kicking complainant on the ground during the assault. According to Hubert Collins, complainant had a sagging jaw the next day and refused to eat or get out of bed. Emergency room physicians diagnosed a critical trauma fracture to his trachea, which eventually resulted

in his death. Medical records reflected complainant as telling hospital staff he had been assaulted. The State presented expert medical testimony that the fractured trachea was a serious bodily injury, and that complainant died from blunt force trauma to the neck, consistent with having been struck or kicked with someone's hand or foot. Appellant's first point of error is overruled.

Under his second point of error, appellant alleges the trial court erred in entering a deadly weapon finding, as the combination of the deadly weapon issue with the trial court's response to a jury note allowed the jury to violate TEX. CODE CRIM. PROC. ANN. Art. 42.12, Sec. 3g(a)(2). The special issue submitted to the jury asked "Do you the Jury find beyond a reasonable doubt that the defendant used or exhibited a deadly weapon, namely, his hand or his foot, during the commission of this offense for which he has been convicted or during the immediate flight therefrom?" Shortly after it retired to deliberate, the jury sent a note asking whether the law of parties applied, or whether they had to find it was specifically appellant who used a deadly weapon. The court instructed the jury that the law of parties applied. The jury later sent a second note, asking whether it had to be appellant's hand or foot used. The trial court responded that they had to find beyond a reasonable doubt that the hand or foot was a deadly weapon as defined in the charge. The jury subsequently returned an affirmative finding on the deadly weapon issue.

Appellant contends that these instructions effectively allowed the jury to apply the law of parties to the deadly weapon issue without the required specific finding that appellant either used his own hand or foot as a deadly weapon, or knew that one of the other parties would be using a deadly weapon during the offense. We disagree, as the special issue did require the jury to find that appellant used or exhibited a deadly weapon, namely his hand or foot. While appellant argues that the court erred in subsequently instructing the jury that the law of parties applied to the special issue, his objection at trial did not raise the argument he now presents on appeal. Appellant's point of error alleges violation of Article 42.12; his trial objection simply stated that "the jury has heard all the evidence from the course of the trial, they have been explained the law of parties, they have been explained what a deadly weapon is, they have

enough information to make a decision." His complaint has been waived and nothing is presented for review. Appellant's second point of error is overruled.

Appellant's third point of error complains that the trial court violated TEX. CODE CRIM. PROC. ANN. Art. 36.27 in responding to the jury's second note. Article 36.27 provides that the court is to answer any communication with the jury in writing and read the instruction or answer in open court unless expressly waived by the defendant. It further provides that the court must use reasonable diligence to secure the presence of defendant and counsel and shall submit the question and answer to defendant for objections, but if the court cannot locate defendant and counsel, it has the discretion to proceed in answering the question as it deems proper.

A trial court commits reversible error if it gives additional instructions to the jury without complying with Article 36.27. *Rodriguez v. State*, 625 S.W.2d 101, 102 (Tex. App.–San Antonio 1981, pet.ref'd). However, a communication between the court and the jury, although not made in compliance with the article, does not constitute reversible error when it does not amount to an additional instruction by the court on the law or some phase of the case. *McFarland v. State*, 928 S.W.2d 482, 517-18 (Tex. Crim. App. 1996), cert. denied, 519 U.S. 1119 (1997). Furthermore, in absence of harm, a point of error complaining of the trial court's communications with the jury should be overruled. *See McGowan v. State*, 664 S.W.2d 355, 358 (Tex. Crim. App. 1984).

The complained-of second jury communication did nothing more than reiterate the original charge, and did not amount to additional instructions. *See Reidweg v. State*, 981 S.W.2d 399, 402-3 (Tex. App.–San Antonio 1998, rehearing on pet. denied). Even assuming the court's second communication could be construed as an additional instruction to the jury in this case, appellant has failed to demonstrate that he was harmed by the court's actions. *Id*. at 403. To the extent that appellant's point of error is also complaining of the substance of the trial court's first jury communication, we find that this sub-point has not been briefed and is waived. Appellant's third point of error is overruled.

Appellant's fourth and final point of error alleges ineffectiveness of counsel regarding his trial counsel's cross-examination of a medical witness and his failure to request a charge on a lesser included offense of simple assault. Under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984), appellant must conclusively show that (1) trial counsel's performance fell below an objective standard of reasonableness by identifying acts or omissions showing that the performance was deficient, and (2) that the deficient performance harmed appellant. It is presumed that counsel's performance falls within the range of professional assistance and that the complained-of action constituted sound trial strategy, and this court should not engage in speculation determining whether appellant has met his burden in overcoming this presumption. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Under the second prong of the test, appellant must affirmatively prove harm, i.e. that there is a reasonable probability that the jury would have had a reasonable doubt as to guilt, but for counsel's errors. *Garcia v. State*, 887 S.W.2d 862, 880 (Tex. Crim. App. 1994).

Appellant contends that trial counsel's cross-examination of the State's medical expert provided the only clear link between complainant's injuries and his assault by appellant. We disagree. This same evidence was brought out by the State during direct examination of the witness and is also cumulative of testimony given by other witnesses such as Michael Jones and Hubert Collins. As to his second alleged deficiency, appellant did not file a motion for new trial, and there is nothing in the record establishing that trial counsel's decision not to request a lesser included offense was not sound trial strategy. *See Riddick v. State*, 624 S.W.2d 709, 712 (Tex. App. – Houston [14th Dist.] 1981, no pet.). Appellant's fourth point of error is overruled.

The judgment is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed June 15, 2000.

Panel consists of Justices Robertson, Sears and Lee.*

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