Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00019-CR

JOSEPH ANTHONY BOONE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 99CR0702

O P I N I O N

Appellant was charged by indictment with the offense of aggravated assault with a deadly weapon, namely, a handgun *See* TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). The jury found appellant guilty as charged in the indictment and assessed punishment at twelve years in prison. Having found appellant failed to demonstrate that counsel was constitutionally ineffective, we affirm the trial court's judgment.

I. Facts

The shooting at issue resulted from a dispute between appellant and the complainant, Herman Guillory, Jr., over a car. The complainant testified that approximately four to five days before the shooting, appellant loaned him a car to go to the store. When the complainant returned, he could not find the appellant and so continued to drive the car. The complainant testified that later that day, he was advised by Texas City Police that he would be wise not to continue driving the car. The reasons for the advice are not discernable from the record. Appellant testified that he parked the car and abandoned it.

On the day of the shooting, April 5, 1999, appellant, while looking for the complainant to retrieve the car, encountered the complainant's father, Herman Guillory, Sr. The father testified that he told appellant he did not know where his son was and that appellant told him, "If you see him, just tell him I'm looking for him." The father testified that later, as he was driving around town, he encountered his son on the street and that they began a conversation. Subsequently, the two men were approached by appellant, carrying a pistol. The father testified that appellant shot his son in the back. After being wounded, the complainant fled the scene in his father's car.

In a statement given to police, appellant told a somewhat different story. Appellant told police that he had loaned a borrowed car to complainant and that the complainant had not returned it. The day of the incident, appellant said, he encountered the complainant's father, who asked appellant if he had seen his son. Appellant replied that he had not, but that he was looking for the car. Appellant later went to the father's home to see if the father had found his son. At the house, appellant encountered the son, who told appellant that appellant was not to speak to the father. Appellant testified that the complainant told him, "if he saw me that he was going to shoot me in my ass." Appellant recounted that later, when he again saw the complainant, the complainant was "walking towards me and had his hands in his pocket," prompting appellant to retrieve a pistol. When appellant later

encountered the complainant and the father on the street, appellant asked about the missing car. Appellant testified the complainant started reaching under the seat of his father's car. At that point, appellant told complainant to stop reaching under the seat. When the complainant continued, appellant shot him. After being found guilty, appellant did not file a motion for a new trial.

II. Discussion

In a single point of error, appellant complains that he received ineffective assistance of counsel.

A. Standard of Review

To demonstrate lack of effective assistance of counsel guaranteed by the Sixth and Fourteenth amendments, appellant must demonstrate counsel's representation fell below an objective standard of reasonableness under the prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's effectiveness is presumed, and appellant must rebut this presumption by identifying the acts or omissions that are alleged as ineffective and must affirmatively prove that the acts or omissions fell below the professional norm of reasonableness. *McFarland v. State*, 938 S.W.2d 482, 500 (Tex. Crim. App. 1996). An ineffectiveness claim is judged not by isolating a portion of counsel's representation, but on the totality of the representation. *Strickland*, 466 U.S. at 688. Appellant also must establish that counsel's performance was so prejudicial, it deprived appellant of a fair trial. *Id*. Appellant must show that a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.2d 808, 813 (Tex. Crim. App. 1999). Failure to make the required showing of either deficient performance or sufficient prejudice defeats appellant's ineffectiveness claim. *Id.* Absent both showings, we cannot conclude the outcome resulted from a breakdown in

the adversarial process that renders the result unreliable. *Id.*

B. Application of Law to Facts

First, appellant complains counsel was ineffective for failing to investigate and to present self-defense evidence. Appellant alleges that a woman witnessed the complainant's threat to shoot appellant and that counsel was ineffective for failing to find the witness. Appellant has the burden of developing a record showing that counsel's actions were deficient; that is, appellant has the burden to demonstrate the alleged failure to investigate. Nothing in the record demonstrates that counsel, in fact, failed to investigate the shooting and the events leading to the shooting. Without affirmative evidence that counsel neglected to find an exculpatory witness, appellant has failed to demonstrate counsel was deficient for failing to investigate.

Second, appellant complains counsel was constitutionally deficient by failing to effectively cross-examine the complainant in connection with the self-defense justification. Again, we have only the trial record, in which counsel did, in fact, cross-examine the complainant and the complainant's father in connection with the alleged threat. Both denied that the complainant issued a threat. Appellant has failed to develop a record to demonstrate that counsel was ineffective. After-the-fact criticism of counsel's cross-examination technique is not a demonstration of constitutional deficiencies. The Constitution does not guarantee error-free counsel or counsel whose competency or adequacy is to be judged by hindsight. *Ex parte Robinson*, 639 S.W.2d 953, 954 (Tex. Crim. App. 1982).

Third, appellant complains that counsel erred by not requesting a jury instruction on self-defense that took into account not only the complainant's acts but also his threats. When there is trial evidence that a victim verbally threatened the accused and that the accused may have acted in self-defense, the jury charge on self-defense should not be restricted to the acts of the victim, but should also address the victim's verbal threats. *See Ellis v. State*, 811 S.W.2d 99, 101 (Tex. Crim. App. 1991).

In *Ellis* appellant requested the following self-defense instruction regarding the complainant's use of threats:

> You are further instructed that where a defendant accused of murder seeks to justify himself on the grounds of threats against his own life, he is permitted to introduce evidence of the threats made, but the same shall not be regarded as affording justification for the offense unless it be shown at the time of the homicide the person killed by some act then done manifested an intention to execute the threats so made, if any.

811 S.W.2d at 100. *See also* 8 MICHAEL J. MCCORMICK, ET AL., TEXAS PRACTICE: CRIMINAL FORMS AND TRIAL MANUAL §§ 103.13 & 103.14 (1995). The Court of Criminal Appeals determined there was evidence of the complainant's verbal threats and that the trial court erred by not instructing the jury on the law of self-defense in connection with complainant's threats. The Court of Criminal Appeals did not specifically endorse the above-quoted instruction.

Here, the self-defense instruction to the jurors included the following:

> You are instructed that in determining the existence of a real or apparent danger, it is your duty to consider all of the facts and circumstances in the case in evidence before you and consider the *words, acts, and conduct*, if any, of [the complainant] at the time of and prior to the time of the alleged assault and consider whatever *threats*, if any, the said [complainant] may have made to [appellant] and consider any difficulty or difficulties which the said [complainant] had with the [appellant], and in considering such circumstances, you should place yourselves in [appellant's] position at the time and view them from his standpoint alone. [Italics added.]

In *Barkley v. State*, 152 Tex. Crim. 376, 385, 214 S.W.2d 287, 292 (1948), the trial court's jury instructions included paragraphs substantially similar to both paragraphs above quoted. The Court of Criminal Appeals determined that the trial court's instructions were adequate to instruct the jury not only on the law of self-defense generally, but also on the law of self-defense in connection with threats.

Where the trial court gave an instruction substantially similar to the instruction here given but omitted the instruction requested in *Ellis*, one appellate court found no trial court error. *Ramirez v. State*, 873 S.W.2d 757, 761 (Tex. App.—El Paso 1994, pet. ref'd). The court noted that the instruction discussed in *Ellis* had been requested but that the *Ellis* court did not require that the specific instruction be given where there was evidence of verbal threats. *Id.*

The record here does not demonstrate that the defense counsel requested a threat-oriented instruction along the lines of that requested in *Ellis*. Evidence of the complainant's threats directed against appellant was placed before the jury. The jury also was instructed that they were to consider the acts, conduct, and *words* of the complainant, both at the time of the shooting and prior to the shooting. Appellant has failed to demonstrate that counsel was constitutionally deficient for failing to request the instruction requested in *Ellis*. We cannot say that, as a matter of law, trial counsel was ineffective for failing to request the instruction at issue.

III. Conclusion

Because appellant has failed to demonstrate affirmatively that his trial counsel was ineffective, we overrule appellant's single point of error and affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed June 21, 2001.
Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Chief Justice Paul C. Murphy sitting by assignment.