Affirmed and Majority and Dissenting Opinions filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01307-CR

PATRICK TERUYOSHI WHITE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 793942

M A J O R I T Y O P I N I O N

Appellant was charged by indictment with murder. Following a jury trial, appellant was convicted and sentenced to life imprisonment. Because we find no evidence to justify a sudden-passion instruction, we affirm.

I. Background

Appellant was accused of killing his ex-wife, Laura Thibideaux. Trial evidence showed that appellant and Thibideaux had a long tempestuous relationship. Appellant, twenty-eight years old at the time of the slaying, had first gone to live with Thibideaux and her then-husband, neighbors of his family, when appellant was about twelve. Thibideaux

and appellant began a sexual relationship when appellant was about fifteen and the victim in her thirties. Thibideaux and her husband subsequently divorced, in part because of the relationship between the victim and appellant. Appellant and Thibideaux subsequently married and divorced. At the time of the slaying, appellant was living with his mother.

Although appellant did not testify at the guilt-innocence phase of the trial, he had given a statement to police and did testify at the punishment phase. On the night of the incident, appellant called Thibideaux from his mother's house, and the victim asked appellant to come to her house. Appellant testified that because the victim had taken his truck earlier in the week, he had to walk most of the distance to her house, at one point catching a ride. After appellant arrived, the victim told him that she had to get up early the next morning and that she wanted appellant to help her with something. The victim then went to her bedroom and locked the door. Appellant lay down on a sofa to sleep, but because he had a headache, he arose to get some pain relievers. Because the pain relievers were in the victim's bathroom, appellant got two knives from the kitchen, a butter knife and a steak knife, and picked the lock to the victim's bedroom door. Although appellant tried not to disturb the victim, she awoke, became "very upset," and they started arguing. Appellant returned to the sofa. About thirty minutes later, the victim came out of the bedroom and resumed the argument. The argument then moved back to the bedroom, where the victim picked up the steak knife that appellant had left. The victim told appellant that she did not need him and that she would get someone to take him home in the morning. Appellant testified that he became angry because he had "walked for over three hours to get to her house and see her." He grabbed the knife from the victim and stabbed her to death. Appellant testified that he told the victim before she died that he loved her and that he was "coming right behind her."

Appellant changed into some of the victim's clothes and left the house in her car. He told police in his statement that he drove to his mother's house and tried to kill himself by using a length of garden hose to carry exhaust fumes from the tailpipe of the victim's car into the passenger compartment. This suicide attempt failed, he said, because "it

became daylight and people came around." He told police that he made a second similar attempt, but this too failed when "this guy came up, then the police."

II. Discussion

In a single point of error, appellant complains that the trial court erred when, during the punishment phase, it did not give the jurors an instruction on "sudden passion."

An accused is entitled to an instruction on every defensive issue raised by the evidence whether the evidence is strong, weak, contradicted, unimpeached, or unbelievable. *Saldivar v. State*, 980 S.W.2d 475, 505 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). When evidence from any source raises a defensive issue, and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993). The issue may be raised by a defendant's testimony alone. *Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987).

At the punishment phase of a trial, the defendant may raise the issue of whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. TEX. PEN. CODE ANN. § 19.02(d) (Vernon 1994). If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a second-degree felony. *Id.* For the accused to be entitled to an instruction on "sudden passion," there must be some evidence of (1) adequate cause and (2) sudden passion. *Merchant v. State*, 810 S.W.2d 305, 309 (Tex. App.—Dallas 1991, pet. ref'd). "Sudden passion" is passion directly caused by and arising out of provocation by the victim that arises at the time of the offense and is not solely the result of former provocation. Sec. 19.02(a)(2). "Adequate cause" is cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Sec. 19.02(a)(1).

The statutory definitions are substantially similar to the definitions found in the

former section 19.04 of the Penal Code[1] defining the now-repealed second-degree felony offense of voluntary manslaughter. *Merchant*, 810 S.W.2d at 309. Courts may look to decisions under the voluntary manslaughter law for guidance. *See Roberts v. State*, 590 S.W.2d 498, 501 (Tex. Crim. App. 1979).

The objective inquiry into adequate cause has two parts. *Merchant*, 810 S.W.2d at 310. First, the record must contain some evidence of legally adequate cause. Second, the adequate cause must be the kind that would produce anger, rage, resentment or terror in a person of ordinary temper so the person is incapable of cool reflection. *Id.* Evidence of a cause that produces one of the listed responses in the accused because of the accused's susceptibilities is not enough unless the cause also would produce the response in an ordinary person. *Daniels v. State*, 645 S.W.2d 459, 460 (Tex. Crim. App. 1983).

By citing *Ray v. State*, 515 S.W.2d 664, 667 (Tex. Crim. App. 1974), appellant seems to argue that he was entitled to an instruction because there was evidence that the victim and appellant were arguing and that the victim attacked him or threatened him with a knife. Appellant suggests that he acted after his passions were justifiably inflamed by the argument and the purported attack.

In *Ray*, however, the accused testified that before he shot the victim, the victim had struck the accused with a metal bar, inflicting injury to the arm of the accused. Here, on the other hand, we find no evidence of adequate cause. There is no evidence that the victim attacked appellant, or threatened to attack appellant, with a knife. Appellant testified that the victim, "got mad because I had woke her back up and started arguing; and, um, she had picked up the knife." Later appellant testified, "She picked the knife up off the bed stand and was, like — you know, we were arguing and thought [sic] maybe she would — she was going to throw it at me or something." Although, appellant testified that he thought the victim was going to throw the knife, he does not testify as to the basis of his belief. He did not testify as to the victim's actions or statements that would have led him

[1] *See* Act of May 28, 1973, 63rd Leg., R.S., ch. 426, art. 2, § 1, 1973 Tex. Gen. Laws 1122, 1124.

to believe justifiably that the victim was going to throw the knife. Nor is the evidence that appellant walked a long distance at the victim's request or evidence that the two had been arguing sufficient to constitute adequate cause. There being no "adequate cause," there could be no justifiable response on the part of appellant. Moreover, in connection with the objective prong of the adequate-cause test, a person of ordinary temper in appellant's situation, that is, seeing the victim pick up a steak knife, would not experience "anger, rage, resentment, or terror" sufficient to render the person's mind incapable of cool reflection. The lack of any evidence of adequate cause is sufficient to negate the requirement of a sudden-passion instruction. The trial court did not err by refusing the requested instruction. We overrule appellant's single point of error.

III. Conclusion

Having overruled appellant's single point of error, we affirm the trial court's judgment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Yates, Fowler, and Wittig. (Wittig, J., dissenting.)

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