Affirmed and Opinion filed September 28, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00902-CR

———————————

DARRELL THOMPKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 762,944

O P I N I O N

A jury convicted appellant, Darrell Thompkins, of murder and assessed punishment at forty years' confinement and $10,000. In three points of error, appellant argues that the evidence is factually insufficient and he was denied the effective assistance of counsel. We affirm.

BACKGROUND

Holmes, appellant, and appellant's best friend, Haaq, were watching television in the upstairs room of a townhome. Holmes witnessed appellant and Haaq in a heated argument. Holmes walked to the next room and heard a shot from the room he had just left. Appellant had shot Haaq in the head. When Holmes came back to the room, he saw appellant excitedly jumping and heard him say, "I can't believe I did it. I didn't mean to do it. What am I going to do?" Holmes also noticed a gun on the floor.

Appellant remained in the townhouse for about five to ten minutes before leaving. As he left, Holmes called 911 and Haaq's mother. On his way out, appellant picked up the gun and ran to his mother's nearby townhome. On the way to his mother's, appellant threw the gun into a parking lot. It has never been recovered.

The police apprehended appellant at his defense counsel's office after an anonymous tip to Crime Stoppers.

Factual Sufficiency

In his first point of error, appellant argues that the evidence is factually insufficient to support the jury's verdict. The Court of Criminal Appeals has recently rearticulated its' *Clewis* factual sufficiency standard of review and requires courts of appeal to ask the question: Whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *See Johnson v. State*, —S.W.3d —, 2000 WL 140257 *8 (Tex. Crim. App. Feb. 9, 2000). If we determine a manifest injustice has occurred, we may not defer to the jury's findings, but rather provide a "clearly detailed explanation of that determination that takes all of the relevant evidence into consideration." *See Johnson*, at *9; *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). In answering whether the evidence is factually sufficient, we presume the evidence supporting the jury's verdict is legally sufficient. *See Johnson*, at *9; *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996).

Jurors are the exclusive judge of the facts, the credibility of witnesses, and the weight to be given their testimony. *See* TEX. CODE CRIM. PRO. ANN. art. 38.04; *Cain v. State*, 958 S.W.2d 404, 48-09 (Tex. Crim. App. 1997); *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Thus, a jury may accept one version of facts and reject another or reject any or all of a witness' testimony. *See id*.

To be convicted of murder, a person must act intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result. *See* TEX. PENAL CODE ANN. § 6.03(a). Relative to the offense of murder, a person acts knowingly or with knowledge, with respect to a result of his conduct, when he is aware that his conduct is reasonably certain to cause the result. *See id* at 6.03(b).

Intent to kill may be inferred from the use of a deadly weapon in a deadly manner. *See Adanandus v. State*, 866 S.W.2d 210, 215 (Tex. Crim. App. 1993); *Godsey v. State*, 719 S.W.2d 578, 580-81 (Tex. Crim. App. 1986); *Mouton v. State*, 923 S.W.2d 219, 223 (Tex. App.—Houston [14th Dist.] 1996, no pet.). A firearm is a deadly weapon per se. *See* TEX. PENAL CODE ANN. § 1.07(a)(17)(a). If a deadly weapon is used in a deadly manner, the inference is almost conclusive that the defendant intended to kill. *See Adanandus*, 866 S.W.2d at 215.

Proof of a mental state almost always depends upon circumstantial evidence. *See Mouton*, 923 S.W.2d at 223. An accused's intent may be inferred from his acts, words, and conduct and the surrounding circumstances. *See id*. To determine culpability for an offense, the jury is entitled to consider events occurring before, during and after the commission of the offense. *See id*.

The jury could have inferred appellant's intent from the circumstantial evidence. Specifically, the jury could infer appellant's intent from his acts, words, and conduct and the circumstances surrounding the shooting. The jury was entitled to consider the events that occurred before, during, and after the commission of the offense. *See Mouton*, 923 S.W.2d at 223. From the circumstantial evidence, the jury could have found beyond a reasonable doubt

that appellant argued with Haaq, and intentionally or knowingly caused Haaq's death by shooting him with a firearm after their heated argument.

Appellant testified he did not intentionally shoot his best friend. Rather, while unwittingly holding the gun pointed toward Haaq's head, who was in front of him in a recliner, he had his finger on the trigger. He pulled back and wrestled with something on the gun that got stuck. Appellant testified he was shocked when the gun went off and did not previously notice that the gun was pointed at Haaq's head. In fact, he dropped the gun, presumably on gun's recoil after discharging the bullet. Appellant further notes that after the shooting, he became hysterical and was screaming that he could not believe he had done it and that he did not mean to do it. Appellant did not contact police after the shooting because his attorney advised him several days after the shooting to not call police.

Even considering appellant's testimony that the shooting was an accident, the jurors, as the factfinders, evaluated the credibility and demeanor of the witnesses and were entitled to disbelieve all or parts of appellant's testimony.

After reviewing the evidence, the proof of appellant's guilt is not "greatly outweighed by contrary proof." *See Johnson*, —S.W.3d —, 2000 WL 140257 *8. Accordingly, we overrule appellant's first issue.

Ineffective Assistance of Counsel

In his final two issues, appellant argues he was denied effective assistance of counsel because his attorney put on a case after the state rested. We disagree.

Instead of resting and letting the case go to the jury, appellant's attorney presented a defense, which opened the door to extraneous offense evidence about appellant's prior possession of a handgun. Appellant's theory of the case was that he was so unfamiliar with guns that he did not know whether the gun he bought was loaded or unloaded, and he did not know that placing your finger on the trigger of the gun and moving other parts of the gun would cause the gun to discharge. To rebut appellant's unfamiliarity with firearms defense, the State

presented evidence that appellant had been seen with a gun before this incident. Additionally, a police officer testified that in July of 1996, he searched a car in front of which appellant was standing and found a fully loaded .357 magnum revolver under the floormat of the car. Appellant admitted to the officer that it was his gun.

Appellant testified during his case-in-chief that he never owned a gun, never took classes on how to use a gun, never fired a gun, did not know anything about guns, and did not know how to load and unload a gun. On cross-examination, the State asked, "And you're testifying here today that you have never owned a handgun before August 6, 1997?" Appellant claims once his testimony was impeached, his defensive theory was worthless. He also claims that his attorney's failure to realize she could have raised the lesser-included offenses through witnesses put on in the State's case undermined the reliability of the verdict.

Both the federal and state constitutions guarantee an accused the right to have assistance from counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. Art. I, § 10; TEX. CODE CRIM. PROC. ANN. Art. 1.05 (Vernon 1994). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The first prong requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts or omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). We will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id*. In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption. *See id*. The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.-Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.-Houston [14th Dist.] 1994, pet. ref'd). When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.-Houston [1st Dist.] 1996, no pet.) (citing *Jackson*, 877 S.W.2d at 771). We will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court.

Appellant did not file a motion for new trial alleging ineffective assistance of counsel. When there is no motion for new trial and the record is silent as to counsel's reasons for his actions, we will not speculate as to counsel's trial strategy. *See Gamble, Jackson*. This is particularly true when that strategy concerns the defendant's decision to testify. *See, e.g.*, *Hubbard v. State*, 770 S.W.2d 31, 43 (Tex. App.—Dallas 1989, pet. ref'd) (record made of discussion between a defendant and his attorney regarding trial strategy). The record in this case is silent as to trial counsel's strategy and we will not speculate as to such. Accordingly,

appellant has not overcome the presumption that his counsel's actions were sound trial strategy.

Because there is no showing of the reasons for the conduct of appellant's trial counsel and any finding of ineffectiveness would require us to speculate for reasons for his counsel's actions, we overrule his final two issues.

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed September 28, 2000.

Panel consists of Justices Roberston, Sears, and Lee.*

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

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