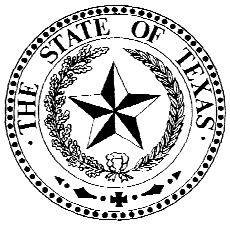
Affirmed and Opinion filed October 18, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00930-CR

RONDEL RAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court At Law No. 13
Harris County, Texas
Trial Court Cause No. 98-28729

O P I N I O N

Rondel Ray appeals a conviction for assault on the ground that his counsel's failure to request a jury instruction on self-defense denied him effective assistance of counsel.[1] We affirm.

Appellant argues that his witness's testimony, that the complainant displayed a pistol in her belt and moved toward appellant prior to their struggle, shows that appellant was reasonable in believing that his use of non-deadly force was immediately necessary to protect himself from the complainant's display of deadly force. Additionally, appellant points out

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[1] A jury found appellant guilty and assessed punishment of 60 days confinement and a $2000 fine.

that counsel argued self-defense in his opening and closing statement, which would obviously require him to request an instruction on the defense alleged.

To prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). In reviewing ineffectiveness claims, scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A court must indulge, and a defendant must overcome, a strong presumption that the challenged action might be considered sound trial strategy under the circumstances. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Thus, the presumption that an attorney's actions were sound trial strategy ordinarily cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999).

Without a record reflecting counsel's reason for refraining from requesting a self-defense instruction, we lack an adequate basis to conclude it was not trial strategy. In addition, counsel's failure to request a jury instruction can be ineffective assistance only if it would have been error for the trial court to refuse the instruction. *See Rodriguez v. State*, 899 S.W.2d 658, 668 (Tex. Crim. App. 1995). A defendant is entitled to an instruction on any properly requested defensive issue that is raised by the evidence, regardless of whether the evidence is weak or strong, unimpeached or contradicted, credible or not. *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). However, if the evidence, viewed in a favorable light, does not establish a case of self-defense, an instruction is not required. *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). A person is justified in using

force against another (in self-defense) when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. TEX. PEN. CODE ANN. § 9.31 (Vernon 1994).

In this case, the evidence reveals that the complainant, who was married to, but separated from, appellant at the time, stopped by their jointly owned business to pick up her personal bills. As the complainant was leaving, appellant arrived at the office and an argument arose between the two. Appellant took the folder of bills out of the complainant's hand, went into the office, and would not permit the complainant to enter. Appellant's witness testified that the complainant then went to her vehicle, retrieved a gun, placed it in her belt, and returned to enter the office.

Although the witness testified that the complainant was thereafter "trying to show [appellant] that she [had] a gun [by making a] motion toward her pants," he did not say that the complainant ever actually reached for the alleged gun or tried to use it in any manner. To the contrary, the witness's testimony shows that the complainant approached appellant for the sole purpose of entering the business and not to attack or threaten him. A struggle arose only after appellant then grabbed her wrist to prevent her from entering their business. Additionally, the witness testified that both were struggling with the door, but he did not state that appellant tried to disarm the complainant at any time during the struggle. Moreover, the evidence indicates that when appellant grabbed the complainant and struggled with her, she did not attempt to use the alleged gun or otherwise threaten him in any fashion. Rather, the complainant tried to call the police on her cell phone for help while struggling with appellant.

During closing argument, appellant's trial counsel tried to portray the dispute as arising from the parties' divorce and the complainant's desire to make it appear as though appellant had abused her, *i.e.*, because that would benefit her in the divorce. Counsel further argued that when the complainant was attempting to get past appellant and he saw that she had a gun in her belt, he had the right to disarm her to protect himself from the threat of the

gun. Lastly, counsel argued that no assault had occurred because the complainant had not been injured and appellant had not intended to hurt her in the struggle.

The record thus reflects that counsel had a plausible trial strategy even without requesting a self-defense instruction. More importantly, however, the evidence does not show that appellant had an immediate need to protect himself from any use or attempted use of unlawful force because there is no evidence that the complainant spoke or behaved in any manner to convey an immediate threat toward appellant with regard to the gun or otherwise.[2] It could thus have been counsel's strategy to deliberately not request a self-defense instruction in the hope of persuading the jury that appellant's actions were intuitively justified where those actions did not satisfy the legal requirements that would have been set forth in a self-defense instruction.

Because appellant was therefore not entitled to an instruction on the issue of self-defense, trial counsel's failure to request such an instruction did not render his assistance ineffective. Accordingly, appellant's sole point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 18, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.[3]

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

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[2] *See Preston v. State*, 756 S.W.2d 22 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (explaining that a defendant is entitled to a self-defense instruction only if the evidence shows that the complainant, either by words or acts, caused the defendant to reasonably, *i.e.*, objectively, believe he was in danger, not merely where the accused subjectively believes that the complainant *might* attack).

[3] Senior Justice Don Wittig sitting by assignment.