Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00168-CR
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TROY DONEL SCOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 759,687 & 759,688

O P I N I O N

Appellant, Troy Donel Scott, was convicted by a jury of two counts of aggravated assault. The jury also found two enhancement paragraphs true and assessed punishment of thirty-five years confinement. He presents three issues for review: (1) the evidence was factually insufficient to prove he was the perpetrator; (2) the court erred in denying his motion for mistrial when the State's witness injected prejudicial non-responsive testimony; (3) he was denied effective assistance of counsel by counsel's failure to object to improper jury argument. Affirmed.

In the small hours of the still-dark morning, after a night at Club Equal Justice, complainants, Aaron Mitchell and Nelson Lair, III, and their group walked across the street to the parking lot. Without warning, Mitchell and Lair were suddenly struck by a late 1970's model blue or grey Cadillac estimated by Mitchell to be traveling 35 to 40 miles per hour. Mitchell was dealt a glancing blow by the car and sustained relatively minor injuries. Lair, however, never saw the car and was seriously injured. The car sped away. No witness could identify the driver.

Earlier that evening, complainants had been involved in multiple altercations with appellant.

At trial, Harvey Williams, Jr., identified appellant and testified that, less than a minute before the collision, he saw appellant get behind the wheel of a light blue Cadillac. He testified that he heard an unidentified person sitting next to appellant in the Cadillac ask appellant, "What are you going to do?", to which appellant replied, "I don't know, but I'm going to do something." Williams also witnessed the collision and identified photographs of appellant's car as the one that struck complainants. Williams admitted at trial he had been convicted of felony burglary of an automobile in 1987.

Mitchell's nephew, Isaac Harrison, also identified appellant, Troy Scott, as being involved in one of the altercations with Mitchell.

The defense called George Wilson. Wilson, who had known appellant for "18 or 19 years," testified that he saw appellant enter his vehicle and drive off after the altercation. He also stated he later saw a vehicle drive through the parking lot and hit complainants.

James Hall, the defense's next witness, likewise knew appellant. He testified he saw appellant get into his car alone and drive away. About a minute later, as he was walking to his car, Hall stated he heard a screeching noise. He then ran up the street and saw one of the complainants lying on the ground.

Appellant argues that this evidence was factually insufficient to prove appellant operated the vehicle at the time of the collision. Because Williams's testimony had been impeached by his felony conviction, therefore, it should have been weighed less favorably by the jury than the testimony of Hall and Wilson, who were not impeached with a felony conviction. The jury's failure to find appellant was not operating the vehicle, appellant contends, was manifestly unjust and clearly demonstrative of bias.

In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.[1] We review the fact finder's weighing of the evidence and are authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury.[2] If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient.[3]

This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony.[4] The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust."[5]

In this case, Williams' eyewitness testimony was well supported by other testimony and circumstances. It was established by both State and defense witnesses that appellant was in an

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[1] *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996)

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

altercation with members of complainant's group, that he was angry about it, and he drove off shortly before complainants were run over by a car of the same description as appellant's. Wilson, a longtime acquaintance of appellant's, did not positively state the car that he saw hit complainants was not appellant's. In fact, he admitted that complainants were hit by an "older-model, light-blue or gray big car," which matched the description of appellant's car. Hall admitted he knew both Wilson and appellant. His testimony, if believed, by no means controverted Williams' testimony. Because he testified he saw appellant drive off after the altercation and shortly before the collision, but didn't see the car hit complainants, the jury could have construed his testimony as consistent with Williams'. The jury was entitled to believe Williams' testimony, despite his 12-year-old conviction. The jury was also entitled to discount, if it chose, the testimony of the Wilson and Hall. Their testimony was improbable under the circumstances of the case[6] and, as acquaintances of appellant, were prone to bias themselves. This issue is therefore overruled.

Appellant next complains that the court erred in refusing to grant a mistrial due to prejudicial and inflammatory non-responsive testimony of Officer R.J. Horowitz, a 29-year veteran of the Houston Police Department assigned to investigate the case.

At trial, after Horowitz testified appellant had become a suspect, the following exchange took place:

> Q: Now at some point after you got a name and address did you create what's known as a photo spread?
>
> A: Yes, I did. I requested the name. I came up with an H.P.D. record.
>
> [APPELLANT'S COUNSEL]: I object to this, and I move for a mistrial.

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[6] Witness, for example, the cross-examination of Wilson:

> Q. So it's your belief it's just a real big coincidence that the two guys — or the guy that had this fight with Mr. Scott just happened to get run down by someone else driving a big, older-model, light-blue or gray big car?
>
> A. True.

> THE COURT: That's sustained, members of the jury. Disregard the comment by the witness. Do not consider it for any purpose whatsoever in this trial.

Appellant failed to make the proper sequence of objections and obtain a ruling on his motion for mistrial.[7] We note, however, the remark was not so inflammatory it was incapable of being cured by the court's immediate instruction to the jury to disregard it.[8] Therefore, this issue is overruled.

Finally, appellant contends he was denied effective assistance of counsel by trial counsel's failure to object to the following jury argument:

> When you go back to do your jobs and your families a couple days from now, *they're going to ask* you where you've been the last two or three days, "Heard you had jury duty. What kind of a case did you hear?" *You're going to tell them* a story about how you came in here and heard a story about two guys at a club getting into a fight about who knows what.. . . You're going to tell them one of the witnesses actually saw the defendant get in his car and say, "I'm going to do something." And 15 seconds later that something happens and these people get run down by this car. . . . *And they're going to say*, "Well, based on everything that I've heard and all the evidence you told me about, *I know you found him guilty, didn't you*? *What are you going to tell them*? Thank you.

In *Cortez v, State*[9], the court of criminal appeals discussed the dangers of allowing external influences to be planted in the minds of the jury via closing argument:

> It has long been the law of this State that the law provides for, and presumes, that the accused person will receive a fair trial, and a fair trial cannot be had if it is not free from improper jury argument. Furthermore, an accused person is entitled to have his guilt or punishment determined without reference to any outside influence. . . .
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> [J]ury argument by a prosecuting attorney that is designed to induce the jury to convict the defendant or assess him a particular punishment because "the people" desire such is improper jury argument. This type argument is manifestly improper, harmful and

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[7] *Campos v. State,* 946 S.W.2d 414, 417 (Tex. App.–Houston [14th Dist.] 1997, no pet.)

[8] *Barney v. State,* 698 S.W.2d 114, 125 (Tex. Crim. App. 1985).

[9] 683 S.W.2d 419 (Tex. Crim. App. 1984).

prejudicial to the defendant and will not be countenanced by this Court. Whenever a prosecuting attorney tells a jury that the people of the community where the crime was committed wants an accused person convicted or assessed a particular punishment, he is not only injecting a new and harmful fact into evidence, which had no place there originally, but he is conducting his case along lines never contemplated by the framers of our constitution.[10]

The *Cortez* court noted that in the past, the court of criminal appeals had disapproved the following arguments:

- "There are over a million people that stand between him and the penitentiary. They'd want him to go there if they knew what he did." *Prado v. State*, 626 S.W.2d 775 (Tex.Crim.App.1982).
- "The people of Nueces County expect you to put this man away." *Pennington v. State*, 171 Tex.Cr.R. 130, 345 S.W.2d 527 (1961).
- "The people of De Soto are asking the jury to convict this defendant." *Cox v. State*, 247 S.W.2d 262 (Tex.Crim.App.1952).
- "The people of this community expect you to put this man away, and the only way you can do it is to send Willie Porter to the electric chair." *Porter v. State*, 226 S.W.2d 435 (Tex.Crim.App.1950).
- "I tell you, the people of Matagorda and Jackson counties are expecting you to do your duty in this case and assess the defendant's punishment at death." *Peysen v. State*, 124 S.W.2d 137 (Tex.Crim.App.1939).
- "Look at this courtroom--it is crowded with Polk County people, demanding the death penalty for Bob White." *White v. State*, 117 S.W.2d 450 (Tex.Crim.App.1938).
- "The people are present in this courtroom to see that this defendant gets punished." *Cleveland v. State*, 130 Tex.Cr.R. 357, 94 S.W.2d 746 (Tex.Crim.App.1936).

In this case, though perhaps couched in slightly more discreet terms, we believe this argument was no less damaging than those in the foregoing cases. It was plainly improper. Though the State did not refer to the "community," it nonetheless specified a segment of the community most intimate to members of the jury: its family and co-workers. In its very last

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[10] *Id.* at 420. (Citations omitted.)

comments of the trial, the State drove home to the jury that these intimate members of their neighborhood would be expecting to hear they had found this defendant guilty.

By this, the State discouraged this jury from independently judging the merits the of last two or three days of evidence it had just heard. For all intents and purposes, it told them to take their families and co-workers (along with whatever biases and prejudices they may harbor, not informed by a word of evidence) with them into the "black box" of the jury room and do what, according to the prosecutor, these powerful social influences would have them do.

Despite the improper argument, we recognize that because trial counsel failed to object to it, therefore, any error has been "forfeited" for appeal.[11] We therefore examine the standard of review for an ineffective assistance of counsel claim.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense.[12]

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.[13] An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation.[14] Therefore, in determining whether the *Strickland* test

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[11] *See Cockrell v. State,* 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (Defendant's "right" not to be subjected to incurable erroneous jury arguments is one of those rights that is forfeited by a failure to insist upon it. Therefore, a defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal.)

[12] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

[13] *Id.* at 689.

[14] *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1993).

has been met, counsel's performance must be judged on the totality of the representation.[15]

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective.[16] We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did.[17] In *Jackson,* the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did.[18]

Appellant did not file a motion for a new trial, and therefore failed to develop evidence of trial counsel's strategy. Therefore, the record is silent as to the reasons appellant's trial counsel chose the course taken. Because of this, in most cases, the inquiry must end here, because any discussion about why counsel chose the course of action taken would be speculative.

When the totality of the representation afforded appellant is considered, we find this representation was not ineffective. As described above in the factual sufficiency analysis, the evidence of appellant's guilt was overwhelming. The record shows several witnesses, both defense and State, testified appellant was in an altercation with members of complainant's group, that he was angry, and he drove off shortly before complainants were run over by a car of the same description as appellant's. Further, the record, taken as a whole, shows counsel was not materially deficient in his performance. Counsel filed at least five well-drafted pre-trial motions; he adequately conducted voir dire, thoroughly questioning venirepersons; he

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[15] *Strickland*, 466 U.S. at 670.

[16] *Jackson v. State,* 877 S.W.2d 768, 771 (Tex.Crim.App.1994)(en banc).

[17] *Id.*

[18] *Id.* at 772. *See also Jackson v. State,* 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

effectively cross-examined the State's witnesses, for example, bringing out the felony conviction of one of the State's material witnesses; and he called and effectively examined his own witnesses. We are not persuaded that the one missed objection to the clearly erroneous argument of the government, standing alone, rendered counsel's conduct "not reasonably effective." While counsel's representation of appellant was in some aspects deficient, we do not find the allegations of ineffectiveness to be firmly founded. Appellant's third issue is overruled. The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

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