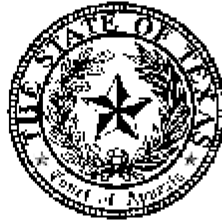
Affirmed and Opinion filed December 14, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-98-01176-CR

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JEFFERY EARL CAIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 771,770

O P I N I O N

Appellant Jeffery Earl Cain was convicted by a jury of the offense of aggravated assault with a deadly weapon. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). After accepting his plea of true to an enhancement paragraph, the trial court sentenced appellant to thirty years' confinement. In two points of error appellant argues the admission of the weapon used in the offense was fundamental error affecting a substantial right, and that his trial attorney's failure to object to admission of this weapon constituted ineffective assistance of counsel. We affirm.

On December 24, 1998, Bernard Lane, Ronald Hall and Lane's two-year-old son were leaving his apartment parking lot in Lane's car. As he started to back up, Lane noticed appellant in a car in the parking lot, staring at him. He then saw appellant reach into his back seat, pull out a rifle and start shooting at them. Lane was wounded five times in the shooting, Hall was wounded once, and the two-year-old escaped unharmed.

Both Lane and Hall identified appellant as the assailant.

Houston Police Officer Craig Scallan was working a night job as a security officer at an apartment complex on January 1, 1998 when he saw appellant and his girlfriend getting out of a car. Appellant was carrying a bag commonly used to carry hunting rifles. Scallan was aware of the earlier shooting because his police station was less than a half-mile from the scene of the crime. Scallan asked appellant about the gunfire he had heard in the area earlier. Appellant admitted he had been shooting a weapon into the air that night to commemorate the new year. The officer asked what was in the bag and appellant told him it was an assault rifle. Scallan asked to see the rifle and appellant permitted him. Inside was an SKS assault rifle.

Ballistics expert Robert Baldwin said the bullets removed from Lane were fired from the weapon Scallan confiscated from appellant. He also said the shell casings recovered from the scene of the shooting were fired by the weapon in question.

In his first point of error appellant contends the admission of this rifle constituted fundamental error, such that we should reverse even in the absence of an objection from defense counsel.

To preserve error concerning the erroneous admission of evidence, a defendant must timely lodge a specific objection. TEX. R. APP. P. 33.1; TEX. R. CRIM. EVID. 103(a)(1); *Rezac v. State*, 782 S.W.2d 869, 870 (Tex.Crim.App.1990); *Cisneros v. State*, 692 S.W.2d 78, 82-83 (Tex. Crim. App. 1985); *Cacy v. State*, 901 S.W.2d 691, 699 (Tex.App.—El Paso 1995, pet. ref'd). This allows the trial court to rule on the objectionable matter and to allow opposing counsel an opportunity to supply other testimony or to withdraw the evidence. See

Zillender v. State, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977). Other than the right to trial by jury, a criminal defendant may waive any error, including constitutional error, by failing to properly object or request the proper relief. *See Little v. State*, 758 S.W.2d 551, 563-64 (Tex. Crim. App. 1988); *Perry v. State*, 703 S.W.2d 668, 673 (Tex. Crim. App. 1986)("[n]o procedural principle is more familiar to appellate courts of this Nation than that a constitutional right may be waived or forfeited by the failure to make timely assertion of the right"); *Cacy*, 901 S.W.2d at 698. No objection was made at any time during the State's presentation of this evidence. Thus, error has been waived unless Miller can establish that he was not required to object at trial.

Appellant contends that under TEX. R. EVID. 103(d) we should treat the admission of the rifle as fundamental error and therefore excuse him from being required to object. Rule 103(d) permits us to consider "fundamental errors affecting substantial rights" even if those errors were not brought to the attention of the trial court. However, this is a seldom-used exception. One commentator has stated that "fundamental error in the admission or exclusion of evidence when opposing counsel has failed to object or make an offer of proof is so rare in current Texas criminal jurisprudence that it is almost nonexistent." James P. Wallace, *Article I: General Provisions*, 30 HOUS. L. REV. 168 (1993); *see also* 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL 24 (2d ed.1993). It must be remembered that Rule 103(d) does not create an exception to the requirements of Rule 103(a) or Rule 33.1, but was intended to be purely declarative of prior law. *See* 1 STEVEN GOODE ET AL. at 24; Official Comment to TEX. R. CRIM. EVID. 103[1] ("Adoption of this rule is not meant to change the Texas harmless error doctrine. In subsection (d), the federal rule refers to plain error. This has been changed to fundamental error which conforms to Texas practice. The Committee intends no change through 103(d) in present Texas law."). Therefore, for our purposes, Rule 103(d) must be interpreted in light of existing

[1]The Rules of Criminal Evidence have since been combined with the Rules of Civil Evidence. However, there is no indication that this changes the interpretation of Rule 103.

law when considering whether appellant is excused from objecting to the admission of this evidence. *See Miller v. State*, 939 S.W.2d 681, 688 (Tex. App.—El Paso 1996, no pet.).

Fundamental error is shown when the evidence furnished on a vital issue was inadmissible, and exclusion of that evidence creates serious doubt as to the sufficiency of the evidence to sustain the trial court's judgment. *See McGinn v. State*, 961 S.W.2d 161, 177 fn. 5 (Tex. Crim. App. 1998)(citing *Johnson v. State*, 401 S.W.2d 837, 839 (Tex. Crim. App. 1966)), *Boatwright v. State*, 169 Tex. Crim. 280, 343 S.W.2d 707 (1960), and *Villareal v. State*, 140 Tex.Crim. 675, 146 S.W.2d 406 (1940)). We find that a serious doubt as to sufficiency is not raised here. The jury's verdict did not rely solely on the weapon and the resulting ballistics report; it also relied on eyewitness identifications from the victims of the shooting. Appellant's first point of error is overruled.

In his second point of error appellant argues that, if admission of the rifle was not fundamental error, then his trial counsel rendered ineffective assistance in not seeking to suppress it.

The criteria for assessing ineffective assistance of counsel has been set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test focuses on reasonableness, measuring the assistance received against the prevailing norms of the legal profession. *Id.* at 690, 104 S.Ct. at 2066. Counsel is presumed to have rendered adequate assistance, and it is incumbent on the defendant to identify those acts or omissions which do not amount to reasonable professional judgment and are outside the "range of professionally competent assistance." *Id.* To show prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The key question becomes whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *See Castoreno v. State*, 932 S.W.2d597, 604 (Tex.App.—San Antonio 1996, pet. ref'd) (citing *Strickland*, 466

U.S. at 687). The constitutional right to counsel, whether appointed or retained, does not mean errorless counsel. *Hernandez v.* State, 726 S.W.2d 53, 58 (Tex. Crim. App. 1986); *Castoreno*, 932 S.W.2d at 604.

Appellant's complaint centers around trial counsel's failure to file a motion to suppress. In order to show himself entitled to a finding of ineffective assistance under these circumstances, appellant must show that he would have prevailed on the motion to suppress. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). In order to do this, appellant "was required to have produced evidence that defeated the presumption of proper police conduct." *Id.*; *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). Here appellant does no more than cast doubt on the propriety of Scallan's actions. The record does not tell us, for example, when Scallan decided to take away the weapon or when appellant was taken into custody. Absent these details, appellant has not produced evidence that defeats the presumption of proper police conduct. We overrule appellant's second point of error and affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed December 14, 2000.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.

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