

**Affirmed and Opinion filed December 20, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-00-01312-CR**

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**EARNESTINE TAMMY HARRIS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 232nd District Court  
Harris County, Texas  
Trial Court Cause No. 841,222**

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**OPINION**

A jury found the appellant, Earnestine Tammy Harris, guilty of murdering Andrea Cuthbert and recommended punishment of thirty years in prison and a \$10,000 fine. In this appeal, she raises two related points of error: (1) the trial court erred in not submitting a “sudden passion” instruction; and (2) her counsel was ineffective in failing to request such an instruction. We affirm.

The charge against Harris arose from a shooting that ended a love triangle involving three women—Harris, Cuthbert (the victim), and Jackie Wells. According to Wells, she and Cuthbert had ended their relationship, but continued to live together. She met and fell in love

with Harris, but they never had a mutual romantic relationship. On the evening of the murder, Harris and Wells made plans to go to the grocery store. Cuthbert became enraged when she found out, and tried to prevent Wells from leaving. Wells said Cuthbert, who had a temper and had been previously abusive, slammed the bedroom door and left a hole in the wall.

When Harris arrived, Cuthbert came outside and verbally abused both Harris and Wells. While Harris returned to her car, Cuthbert followed Wells to the parking lot holding a screwdriver, which Wells removed from her hand. Cuthbert told Wells that “somebody is going to die tonight,” but Harris was not close enough to hear the threat. When they reached Harris’s car, Cuthbert prevented Wells from getting inside, and then climbed on top of the car’s hood. Harris drove forward and then stopped suddenly to get her off.

Then Harris got out of the car and argued with Cuthbert. When Wells intervened, Cuthbert grabbed Wells and pushed her toward Harris, saying “If you want to shoot somebody, here you go. Shoot your bitch.” Harris reached around Wells and shot Cuthbert a single time in the chest with .25 caliber automatic handgun. She died at the scene. Harris fled, but turned herself in several hours later.

### *Sudden Passion*

Harris argues that the trial court erred in failing to give an instruction pursuant to Penal Code Section 19.02(d). Section 19.02 (d) provides that a defendant may raise an issue at punishment that the defendant caused the death “under the immediate influence of sudden passion arising from an adequate cause.” TEX. PEN. CODE ANN. § 19.02(d) (Vernon 1994). Harris did not request such an instruction at trial nor did she object to its absence from the charge. Even if the issue was raised by the evidence, however, there is no duty on a trial court *sua sponte* to instruct a jury on unrequested defensive issues. *Posey v. State*, 966 S.W.2d 57, 62-63 (Tex. Crim. App. 1998). By not bringing the issue to the trial court’s attention, Harris cannot now raise the issue for the first time on appeal. We overrule Harris’s

first point of error.

### *Ineffective Assistance of Counsel*

In her second point, Harris argues her trial counsel was ineffective in failing to request the sudden passion instruction. In order to prevail on this complaint, Harris must show that she was entitled to the instruction. *Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000). In support for her position, appellant points to the evidence that Cuthbert:

- was very jealous of Harris;
- was angry and upset;
- yelled at Harris;
- jumped on top of Harris's car;
- pushed Wells; and
- reached for Harris just before the gun was fired.

A defendant is entitled to a charge on sudden passion if any evidence shows the defendant caused the victim's death under the immediate influence of sudden passion arising from an adequate cause. *See* TEX. PEN. CODE ANN. § 19.02(d). The question is whether there was any evidence from which a rational jury could infer such passion. *See Moore v. State*, 969 S.W.2d 4, 11 (Tex. Crim. App. 1998). "Adequate cause" requires a "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." TEX. PEN. CODE ANN. § 19.02 (a)(1). To justify a charge on sudden passion, the provocation must be so extreme that a violent response would be common among ordinary reasonable persons. *Saldivar v. State*, 980 S.W.2d 475, 506 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

In this case, there was no evidence that appellant was emotionally charged or afraid for her life at the time of the shooting. Although she testified at punishment, Harris did not testify about her emotional state at the time of the shooting. There was a great deal of testimony about Cuthbert's anger, but no testimony that *Harris* was in fear or was angry to the degree that she was incapable of cool reflection.

The circumstances surrounding the shooting also do not raise an inference that Harris was incapable of cool reflection. Wells testified Cuthbert was yelling and screaming during the argument with Harris, but none of the other witnesses who were watching the incident agreed. One witness said he found it odd that “there wasn’t really any loud yelling.” The witnesses uniformly testified that when Harris drove away after the shooting, she was not driving quickly. In fact, Wells testified that she “drove real slow.”

We do not find that there is any evidence raising an issue that Harris shot Cuthbert under the immediate influence of a sudden passion arising from an adequate cause. Since the issue was not raised by the evidence, Harris’s attorney did not err in failing to request its inclusion in the court’s charge to the jury at punishment.

We affirm the judgment of the trial court.

Scott Brister  
Chief Justice

Judgment rendered and Opinion filed December 20, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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