In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-07-00427-CR

JESUS RENE QUINTERO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 05-07-06473 CR

MEMORANDUM OPINION

A jury found Jesus Rene Quintero guilty of one count of murder and one count of attempted murder. The jury assessed punishment at thirty years of confinement for the murder and five years of confinement and a $5,000 fine for the attempted murder. On appeal, Quintero raises five issues. The first two issues complain that the State exercised two of its peremptory strikes in a discriminatory manner. The third and fourth issues complain of charge error. The fifth issue complains of ineffective assistance of counsel. We affirm.

Background

A group of five friends, including complainants Alejandro Juarez and Mandrique Mejia, were playing soccer outside the home of Jhovany Juarez. Appellant drove by in a green Cadillac and opened fire, striking Alejandro Juarez in the back and striking Mandrique Mejia in the head. Subsequently, Alejandro Juarez died from the gunshot wound to his back.

Batson Challenges

Issues one and two contend the trial court erred in overruling Quintero's *Batson* challenges to the State's use of peremptory strikes against two minority venirepersons. *See Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *see also* TEX. CODE CRIM. PROC. ANN. art 35.261 (Vernon 2006).

> A *Batson* challenge proceeds by the following steps: First, the defendant makes a prima facie case that a venireperson was excluded on the basis of race. Then, the prosecution must come forth with race-neutral reasons for exercising the peremptory challenge. The defendant has the opportunity to rebut those reasons. The burden of persuasion remains with the defendant. Finally, the judge rules on whether the neutral reasons given for the peremptory challenge were contrived to conceal racially discriminatory intent.

Jasper v. State, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001).

In this case, the State provided reasons for its strikes and Quintero offered a rebuttal. The trial court accepted the State's explanations as race neutral and overruled the *Batson* challenges. Because the State tendered race-neutral explanations for its strikes, and the trial court ruled on the ultimate question of purposeful discrimination, the

preliminary issue of whether Quintero made a *prima facie* case of discrimination becomes moot. *See Ladd v. State*, 3 S.W.3d 547, 563 n. 8 (Tex. Crim. App. 1999). Therefore, the issue on appeal under such circumstances is whether the State's reasons were in fact race neutral. *Johnson v. State*, 68 S.W.3d 644, 649 (Tex. Crim. App. 2002). "Because a trial court is in a unique position to make such a determination, the judge's decision is accorded great deference and will not be overturned unless it is clearly erroneous." *Jasper*, 61 S.W.3d at 421-22.

The State struck Venireperson Three, the only Hispanic member of the venire. The prosecutor explained that she struck Venireperson Three because he is Mormon. The prosecutor also explained that Venireperson Three "seemed weak" because he was on a jury that reached a not guilty verdict on a case involving driving while intoxicated and because he was a masonry contractor who appeared to be "blue collar." In rebuttal, defense counsel conceded that Venireperson Three stated that he had been the foreman on a jury that had returned a not guilty finding, but argued that as he was the sole Hispanic member of the venire, the State should not be allowed to strike him.

On appeal, Quintero argues that the stated reason the State chose for striking Venireperson Three is not supported by the record. During jury selection, the prosecutor asked the members of the venire to identify whether they had served on a criminal jury. Venireperson Three responded, "I sat on a jury. Insurance." The prosecutor asked, "Was it a criminal case?" Venireperson Three responded, "I don't know. It's an insurance case

with automobile. Somebody was DWI." The prosecutor asked, "You actually made the jury and decided his guilt or innocence?" Venireperson Three replied that he sat on the jury, acted as foreman, and reached a verdict of "not guilty."

Even if Venireperson Three had never served on a prior criminal jury, a matter that is not clear from this record, "[i]t is not enough merely to show that a proffered explanation turns out to be incorrect." *Johnson*, 68 S.W.3d at 649. Instead, the party that unsuccessfully advanced a *Batson* challenge must show that "the explanation given was merely a pretext for discrimination." *Id*. Here, the State's explanation for striking Venireperson Three focused on the prosecutor's subjective appraisal, based on Venireperson Three's occupation and his prior jury service, that he would be a "weak juror;" in other words, a juror that might be sympathetic with defendants generally. The prosecutor suggested that defense counsel question Venireperson Three individually about his prior service, but defense counsel chose not to do so.

On appeal, Quintero argues that the State failed to meaningfully question the venireperson about his prior service. *See Moore v. State*, 265 S.W.3d 73, 89 (Tex. App.—Houston [1st Dist.] 2008), *pet. dism'd, improvidently granted*, 286 S.W.3d 371 (Tex. Crim. App. 2009). In *Moore*, the State exercised a peremptory strike against a member of the venire without directing any questions to her. *Id.* at 89. The appellate court held that failing to ask the venireperson more specific questions regarding her

experience with children weighed in favor of finding the State's reason for the strike was not genuine.

In this case, the State did inquire further about the venireperson's jury service, but the venireperson's answer concerning his prior service failed to clarify whether the potential juror's experience had been in a criminal case. Nevertheless, the prior case concerned driving while intoxicated and the jury in that case reached a verdict in the defendant's favor. The State was not required to engage in more detailed questioning to further evaluate why Venireperson Three could not remember whether he had served previously on a criminal or civil jury, and it could rely on the venireperson's statement about that jury's verdict in evaluating whether it wanted to allow Venireperson Three to serve on the jury.

Quintero also argues that the State's explanation that it struck Venireperson Three because he was a Mormon was itself a violation of the Equal Protection Clause. However, as Quintero acknowledges in his brief, the Court of Criminal Appeals has ruled to the contrary. *Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) ("[T]he interests served by the system of peremptory challenges in Texas are sufficiently great to justify State implementation of choices made by litigants to exclude persons from service on juries in individual cases on the basis of their religious affiliation."). Consequently, we cannot conclude that Quintero has met his burden of showing that the State engaged

in any improper purposeful discrimination in striking Venireperson Three. We overrule issue one.

Quintero also challenges the State's strike of Venireperson Eleven. Venireperson Eleven was one of two African-Americans on the venire. The State's primary explanation for striking Venireperson Eleven was that he appeared to be sleeping during voir dire. The trial court noted, "For the record, [Venireperson Eleven] appears to be sleeping at this moment in the courtroom." Defense counsel opined, "Judge, he is leaned back, but his eyes are open. He's got that lazy cat look going, but he's paying attention." The trial court asked Venireperson Eleven whether he was "very sleepy or tired." Venireperson Eleven replied, "No, ma'am. I have a hamstring pulled . . . . [a]nd sitting is the worst part of what's happening to me."

On appeal, Quintero argues that the trial court erred in accepting the State's explanation about why it struck Venireperson Eleven because "the record conclusively showed that he was not sleeping." However, the issue on appeal is whether, in view of the entire record, the trial court erred in its "conclusion that a facially race-neutral explanation for a peremptory challenge is genuine, rather than a pretext[.]" *Watkins v. State*, 245 S.W.3d 444, 448 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 129 S.Ct. 92, 172 L.Ed.2d 78 (2008). While the trial court is entitled to great deference in making its decision about whether to accept the explanation about jury strikes, our deference to the trial court does not preclude relief if the record as a whole reveals that the strike at issue

was based on an improper discriminatory intent. *See Miller-El v. Dretke,* 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

Viewing the record as a whole, Venireperson Eleven had his head back and appeared to be sleeping, and the trial court also heard his explanation about the physical pain he was caused to suffer by sitting. In light of the deference given to a trial court's decision to accept the explanation that it was given to support a given strike, the record as a whole in this case does not contradict the State's contention that it struck Venireperson Eleven due to his inattentiveness. *See Moore*, 265 S.W.3d at 82 (sleeping or inattentiveness during portions of voir dire is a valid reason to exercise peremptory challenge). We hold that Quintero has failed to show that the trial court's decision to accept the State's race-neutral reason for striking Venireperson Eleven was clearly erroneous; therefore, we overrule issue two.

Sudden Passion

Issue three contends the trial court erred in refusing to instruct the jury on sudden passion in the punishment phase of the trial. "At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause." TEX. PEN. CODE ANN. § 19.02(d) (Vernon 2003). Sudden passion is an affirmative defense upon which the defendant bears the burden of proof by a preponderance of the evidence. *Id.* "[A] sudden passion charge should be given if there is some evidence to support it, even if that

evidence is weak, impeached, contradicted, or unbelievable." *Trevino v. State,* 100 S.W.3d 232, 238 (Tex. Crim. App. 2003).

Quintero offered several reasons to explain why he was fearful of others. Quintero testified that he dated a girl who had dated Jhovany Juarez. After Quintero began dating the girl, he began to receive threatening telephone calls. Additionally, Quintero testified that he and his mother were victims of a drive-by shooting in 2003, when a person named Armanzo Cantu shot Quintero. Quintero claimed that he then started carrying a gun because "these people" had attempted to kill him.

Quintero also testified about the circumstances in the immediate period before Juarez's death. Quintero testified that he had encountered Cantu in the neighborhood the day before the offense. According to Quintero, Cantu made an obscene gesture "that kind of made me mad" because Cantu was trying to "punk me." Subsequently, Quintero followed Cantu into a trailer park. As Quintero was leaving, a person named Paulino threw bottles at him. Then Quintero saw "this person that shot me" and shot into the air. Quintero explained that on the following day, he shot towards the people that he felt had threatened his life.

There are several reasons why Quintero was not entitled to an instruction on sudden passion. First, "[a]n instruction on sudden passion is proper only when the sudden passion was directly caused by and arose out of provocation by the deceased at the time of the offense." *McKinney v. State,* 179 S.W.3d 565, 570 (Tex. Crim. App.

2005). Quintero had been shot at least two years before the offense. The shooting of Quintero is a former provocation that is expressly excluded from the definition of "sudden passion." *See id.; see* TEX. PEN. CODE ANN. § 19.02(a)(2) (Vernon 2003) ("'Sudden passion' means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.").

Second, Quintero testified that the day before he shot Alejandro Juarez, Quintero had encountered Armanzo Cantu in the neighborhood and Cantu "flipped [him] off." This action is neither sudden nor is it provocation adequate to justify homicide. *See* TEX. PEN. CODE ANN. § 19.02(a)(1) (Vernon 2003). ("'Adequate cause' means 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.").

Third, the incidents that Quintero described as having provoked his conduct did not involve the deceased. Generally, "evidence of provocation by the decedent is required for a sudden-passion charge." *McKinney*, 179 S.W.3d at 571. In this case, there is no evidence in the record that Alejandro Juarez either committed the acts of violence that occurred in 2003 or that he had encountered Quintero the day before the offense. Further, there was no evidence that Alejandro Juarez and Mejia acted together at the time of the offense in provoking Quintero to fire his gun. *See* TEX. PEN. CODE ANN. §

19.02(a)(2). We hold that Quintero has failed to demonstrate the court erred in refusing to instruct the jury on sudden passion; therefore, we overrule issue three.

Transferred Intent

Issue four contends the trial court erred in charging the jury on transferred intent. A person is criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different person was injured, harmed, or otherwise affected. TEX. PEN. CODE ANN. § 6.04(b)(2) (Vernon 2003). Over objection, the trial court instructed the jury that it could find Quintero guilty of murder if it found that Quintero intentionally, or knowingly caused the death of Alejandro Juarez or if it found that Quintero, while intending to shoot Jhovany Juarez, did actually, intentionally or knowingly cause the death of Alejandro Juarez. On appeal, Quintero argues there was no evidence presented at trial that Quintero intended to shoot Jhovany Juarez.

The trial court must charge the jury on the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007). In this case, there was evidence from which the jury may have inferred that Quintero intended to shoot Jhovany Juarez. Quintero testified that he began receiving threatening calls soon after he began dating a girl who had broken off her relationship with Jhovany Juarez. The threatening calls were being made by a person using a phone registered to Juarez's mother. Quintero claimed that he carried a weapon to protect himself from the people he believed were threatening him.

Jhovany Juarez disclaimed any animus towards Quintero, and on cross-examination Jhovany denied that he had fired a shotgun at Quintero and his mother. He also denied that he had made threatening calls to Quintero. Nevertheless, based on the evidence before the jury, the jury could have inferred that Quintero had a motive to harm Jhovany Juarez.

Jhovany Juarez was the only member of the group playing soccer who Quintero knew. Quintero admitted that he shot in the direction of the group of people playing soccer that included Jhovany Juarez. He also claimed to have fired only two bullets, and Quintero insisted that he shot towards the group without aiming.

The evidence admitted to the jury about the animus that existed between Jhovany Jaurez and Quintero, together with the evidence that Quintero knew Jhovany Juarez who was in the group playing soccer, supports the trial court's submission of an instruction based on a theory that Quintero intended to kill Jhovany but struck Alejandro instead. We hold that the trial court did not err in instructing the jury on the law of transferred intent. *See* TEX. PEN. CODE ANN. § 6.04(b)(2). We overrule issue four.

Ineffective Assistance

In his fifth issue, Quintero complains that he received ineffective assistance of counsel because his trial counsel failed to request a jury instruction on the lesser-included offense of manslaughter.[1] Under *Strickland v. Washington,* appellant must establish

[1]A person commits manslaughter if he recklessly causes the death of an individual. TEX. PEN. CODE ANN. § 19.04 (Vernon 2003). A person commits the third degree

both deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Bone v. State,* 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Any allegation of ineffective assistance of counsel must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Bone,* 77 S.W.3d at 835; *Thompson v. State,* 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone,* 77 S.W.3d at 833. If, however, no reasonable trial strategy would justify counsel's actions, an appellant can satisfy the deficient-performance prong of *Strickland* even in the absence of a record regarding counsel's subjective reasons for his actions. *Andrews v. State,* 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

Here, counsel's decision to forgo the opportunity to request an instruction on a lesser-included offense could have been the result of a reasoned decision to pursue an "all-or-nothing" strategy. *See Ex parte Thompson,* 179 S.W.3d 549, 557 (Tex. Crim. App. 2005); *Ex parte White,* 160 S.W.3d 46, 55 (Tex. Crim. App. 2004). In *Thompson* and in *White,* the applicant was not entitled to habeas relief when trial counsel's failure to

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offense of deadly conduct if he knowingly discharges a firearm in the direction of one or more individuals or a habitation. TEX. PEN. CODE ANN. § 22.05 (b),(e) (Vernon 2003). A person commits murder if he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission of the offense he commits an act clearly dangerous to human life that causes the death of an individual. TEX. PEN. CODE ANN. § 19.02(b)(3) (Vernon 2003).

request the trial court to submit a lesser-included offense to the jury was a matter of the applicant's strategy. *Ex parte Thompson,* 179 S.W.3d at 557; *White,* 160 S.W.3d at 55. The record in this case provides no information regarding Quintero's trial strategy. Because the decision to forgo a jury charge on a lesser-included offense can be a valid trial strategy, on a silent record we must presume that counsel provided reasonable assistance. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We overrule issue five and affirm the judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on March 3, 2010
Opinion Delivered March 10, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.