In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00295-CR

LEO PAUL FRANK, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 75th District Court
Liberty County, Texas
Trial Cause No. CR27148

MEMORANDUM OPINION

Leo Paul Frank, Jr. was convicted of murder in a trial to the court. *See* TEX. PEN. CODE ANN. § 19.02(b)(2) (Vernon 2003). In punishment, the trial court found the offense was committed under the influence of sudden passion and sentenced Frank to eighteen years of confinement in the Texas Department of Criminal Justice, Correctional Institutions Division. *See* TEX. PEN. CODE ANN. § 19.02(d) (Vernon 2003). On appeal, Frank challenges the legal sufficiency of the evidence supporting his conviction for murder and contends the

trial court denied Frank due process when it assessed his punishment without first holding a separate punishment hearing. We affirm the judgment.

Frank, Quincy Dorsett Childress, Percy A. Donatto, Sr., and George Larry Childress, were drinking beer at George Larry Childress's home when the homicide occurred.[1] Qwendelynn Mitchell was also present. Qwendelynn, Percy, and Larry testified. Frank testified on his own behalf at trial.

According to Qwendelynn, Frank and Quincy began arguing about their respective knowledge of the war in Iraq. Offended at being called "boy," the victim, Quincy, picked up a golf club and poked Frank on the side of his head with the club. Qwendelynn admitted the poking action was threatening but testified the action was not violent or aggressive. Frank walked out to his truck, followed by Quincy, who had called Frank out into the street to fight. Qwendelynn expected a fistfight but the men did not move into the street to fight. Quincy was not carrying a gun. Qwendelynn went into the house because she did not want to be there to break up a fight if one occurred. It was clear to Qwendelynn that Frank did not want to fight Quincy. Quincy stated, "'So, what are you going to do now? Shoot me?'" Frank fired three shots in quick succession, fatally wounding Quincy with a single shot to the abdomen. Frank fled the scene. Qwendelynn admitted that Quincy was considerably younger than Frank.

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[1] George Larry Childress, who goes by "Larry," is a first cousin to Leo Paul Frank, Jr. Larry was Quincy Dorsett Childress's uncle. For ease of identification, we refer to the victim, Quincy, and the three eyewitnesses by their first names.

Percy testified that he did not see the shooting and that he left as soon as he heard the shots. Percy claimed he neither heard an argument about military service nor saw Quincy with a golf club.

Larry testified that the argument started when Frank called Quincy "a little punk in Iraq" and a "boy." Larry agreed that the epithets offended Quincy. Larry testified that Quincy "poked [Frank] up the side of the head several times and told him to quit" before Frank pushed the club away and went to his vehicle. Larry denied that Quincy hit Frank in the face with the golf club. Larry recalled that Quincy threatened to "whip his ass" and that while Quincy was standing in the yard, Quincy told Frank "don't come back to Raywood." Larry did not hear Quincy challenge Frank to a fight. According to Larry, Quincy did not want to fight Frank. At the same time he heard the shots, Larry heard Quincy say to Frank, "'You're going to shoot me now.'" Then Quincy said "'I have been shot.'" Larry went into the house and telephoned for emergency services. After listening to a tape of a statement he made with an officer, Larry admitted he told the officer that Quincy and Frank were "hugged up" over by the truck. At trial, Larry claimed he saw no physical blows between the two men while they were by the truck. Like Qwendelynn, Larry also heard three shots, but Larry also noticed a pause between the first and second shots. Larry testified that the shot that struck Quincy must have been the first shot.

Frank testified on his own behalf at trial. According to Frank, the group was chatting and drinking beer and the conversation eventually turned to veterans. Frank claimed he was

"taking up for the veterans." Frank testified that Quincy told Frank "he was going to make my old ass respect him" and repeatedly hit Frank on the knee with the golf club. Frank testified that he apologized. Frank told Larry to talk to Quincy and then Quincy hit Frank "across the face" with the club. Larry and Percy turned their backs. Frank walked out the door. Frank claimed Quincy still had the golf club in his hand when he asked if Frank was going to get his shotgun. Frank testified that when he opened the door to his truck, he heard Quincy behind him. Frank stepped out and shot "on the ground." Frank claimed that he backed up against Larry's truck and Quincy hit him. Frank felt that he could not escape while Quincy had him pinned against the truck. Frank shot again, striking Quincy. Frank claimed that he was trying to shoot Quincy in the leg. According to Frank, Quincy was "on top of" Frank when he shot and that he had to pry Quincy's fingers off of the bed of the truck so that Frank could get away. On cross-examination, Frank testified that he believed Quincy was still holding the golf club at the time.

The investigating officer testified that Frank did not have any noticeable marks that would indicate that he had been hit on the face with a golf club. The officer also noted that in his interview, Frank related that Quincy had poked or hit Frank with the handle of the golf club. He testified that a golf club can be used as a deadly weapon. The spot where Quincy was shot was ten to twelve feet from where Frank retrieved the rifle.

On appeal, Frank argues that the evidence establishes that he acted in self-defense and that a rational trier of fact could not have found beyond a reasonable doubt that Frank

committed murder. In reviewing the legal sufficiency of the evidence in a case where self-defense was an issue at trial,

> we look not to whether the State presented evidence which refuted appellant's self-defense testimony, but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt.

Saxton v. State, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991).

A person is justified in using deadly force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force. *See* TEX. PEN. CODE ANN. §§ 9.31(a), 9.32(a) (Vernon Supp. 2009). Frank argues the evidence is legally insufficient to establish his guilt because a rational trier of fact could not have found that Frank was not justified in his use of deadly force. Frank relies on his version of the facts; that is, that Quincy attacked Frank with a golf club, pinned Frank against the truck, and Frank fired two warning shots before shooting Quincy. The trial court heard testimony from other witnesses who related a different sequence of events.

Qwendelynn and Larry testified that Frank provoked Quincy with insulting words, while Frank claimed he did not intend to offend Quincy. All of the witnesses agreed that Quincy touched Frank with a golf club while the men were on the porch, but the witnesses differed regarding the amount of force involved. Frank himself provided a statement that

Quincy poked him with the handle rather than the end of the golf club. The trial court could have believed the witnesses who testified that Quincy was not acting in a violent manner. *Klein v. State*, 273 S.W.3d 297, 302 (Tex. Crim. App. 2008) (holding that trier of fact resolves conflicts in testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts).

The witnesses agreed that Quincy followed Frank into the yard, but they provided different accounts of Quincy's behavior outside. Qwendelynn testified that Quincy challenged Frank to a fistfight but Frank did not fight Quincy. Larry testified that Quincy told Frank not to come back, but he did not understand Quincy to be challenging Frank to a fight. Only Frank testified that Quincy had the golf club when he was outside in the yard and only Frank testified that Quincy attacked Frank outside. Again, the trial court could believe those witnesses who claimed that Quincy did not use or threaten deadly force. *See id.*

The trial court heard conflicting testimony regarding the parties' movements and actions at the time of the shooting. Frank claimed he retrieved his rifle from his truck, then backed up and shot at the ground while Quincy approached and pinned Frank against Larry's truck. The State's witness suggested this was a distance of ten to twelve feet. At trial, Larry indicated there was some distance between the two men. The witnesses agreed that Frank fired his rifle three times, but they disagreed about the timing of the shots. The trial court could believe the witness who testified that Frank shot three times in quick succession and disbelieve Frank's claim that he fired two warning shots first. *See id.*

Viewed in the light most favorable to the prosecution, a rational trier of fact could have found that Frank intended to cause serious bodily injury to Quincy, that Frank committed an act clearly dangerous to human life by shooting a firearm at Quincy, that Frank was not justified in using deadly force against Quincy, and that Frank did not reasonably believe that using the firearm to shoot Quincy was immediately necessary to protect Frank against Quincy's use of unlawful deadly force. *See Saxton*, 804 S.W.2d at 914. We hold the evidence is legally sufficient to support the conviction. We overrule issue one.

In his second issue, Frank contends he was denied due process when the trial court assessed his punishment without first conducting a separate punishment hearing.[2] The State contends Frank failed to preserve error. Frank argues he preserved error by filing a motion for new trial and contends that he was "denied the opportunity to present evidence that would assist the Trial Court in determining the appropriate punishment."

At the conclusion of the guilt phase of the bench trial, the trial court stated that it found Frank guilty but added that "I believe that there was sudden passion with adequate cause." The trial court asked if there was any legal reason why sentence "should not now be pronounced[.]" No objection was made and the trial court pronounced sentence. Frank filed

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[2] Regardless of whether trial is to the judge or to a jury, evidence may be offered as to any matter the trial court deems relevant to sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2009). Only a trial before a jury on a plea of not guilty must be bifurcated. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(a) (Vernon Supp. 2009). We construe appellant's issue to complain that he was deprived of an opportunity to present evidence relating to punishment, not that the trial court erred in conducting a unitary trial.

a motion for new trial on punishment. At the hearing on the motion for new trial, defense counsel informed the trial court that he had two or three witnesses to call if the court would reconsider punishment. Counsel addressed the trial court, as follows: “What I don’t want to do is put on evidence today and you change your mind about sudden passion which you could very well do. You could reverse yourself actually and find him guilty of murder.” The trial court assured counsel that “I’m not going to change my mind.” The trial court informed counsel that “[i]f your client wants to present evidence, I will certainly give him his day in court.” Counsel noted “You don’t have to do this pursuant to the code” but mentioned that he had thought the trial court would order a presentence investigation report. The hearing concluded without any evidence having been presented.

To preserve a complaint for appeal, the appellant must show that he made a timely complaint to the trial court and obtained a ruling. *See* TEX. R. APP. P. 33.1. In this case, Frank did not object to being immediately sentenced upon a finding of guilt by the trial court and did not inform the trial court that he had additional evidence relating to punishment. Frank raised the issue in a motion for new trial on punishment. Thus, the limited issue preserved for appellate review is not whether the trial court erred in failing to conduct a separate punishment hearing but whether the trial court erred in failing to grant a motion for new trial on punishment. *See* TEX. R. APP. P. 21.1(b). As Frank’s motion for new trial was based upon matters not determinable from the record, an evidentiary hearing was required to establish error. *See Reyes v. State,* 849 S.W.2d 812, 816 (Tex. Crim. App. 1993).

At the motion for new trial hearing, the trial court granted Frank the opportunity to present evidence in support of his motion for new trial. Frank declined to present any testimony. During the hearing on his motion for new trial, Frank also conceded that a presentence investigation report was not required in his case. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 9(g)(3) (Vernon Supp. 2009) (a presentence investigation report is not required if the only available punishment is imprisonment); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3g(a)(1)(A) (Vernon Supp. 2009) (a judge is not authorized to grant community supervision to a defendant adjudged guilty of murder). Thus, Frank's assertion that he was denied an opportunity to present evidence is not supported by the record. To the contrary, Frank was provided with an opportunity to present evidence at the only stage of the proceedings in which he requested such an opportunity. We overrule issue two. We affirm the judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on January 19, 2010
Opinion Delivered April 7, 2010
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Before McKeithen, C.J., Kreger and Horton, JJ.