In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00368-CR

THOMAS LEROY HAGEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 10-01-00261 CR

MEMORANDUM OPINION

Thomas Leroy Hagen was convicted of aggravated assault causing serious bodily injury, assault by choking, and unlawful restraint. He asserts a violation of his Sixth Amendment right to counsel. He also challenges the sufficiency of the evidence. Because the evidence is sufficient to support the challenged jury verdicts, and seeing no violation of the right to counsel, we affirm the trial court's judgments.

The complainant testified that she and Hagen had an argument in the trailer where they lived. Hagen accused the complainant of selling her body for drugs. She wanted to

leave the trailer, was crying, and told Hagen to "let [her] out." She attempted to leave but Hagen would not let her. Every time she tried to open the door he would "grab [her] and throw [her] down, throw [her] back and push [her] back." She tried to leave through the bedroom window and he choked her. She sustained scratches and bruises from Hagen "toss[ing her] around" the trailer "like a rag doll [and] being thrown on the couch." She thought she was not going to survive.

Hagen broke her glass Santa sleighs when he "took his arm and swept them onto the [hardwood] floor." When he was throwing her around, she fell onto a piece of glass and suffered a cut to her wrist. She could see her bone. She started crying "really hard[.]" He brought her to the sink and washed the cut. He left the trailer to go next door to get "New-Skin" to treat the wound. He had her cell phone. She "physically could not move at that point" and "was too scared to move." He returned and put the "New-Skin" on four or five times, which burned and did not relieve her pain. He wrapped her hand with gauze. She took some Tylenol and watched a movie.

Michelle Robinson, whose daughter dated complainant's son, saw the bandage on complainant's hand. Complainant told her she fell. Robinson did not believe her. Robinson told complainant she needed stitches. Robinson offered to drive to the hospital because she felt "something was going on." Hagen got upset and said he wanted to go. Hagen drove complainant to the hospital and Robinson followed in her vehicle. While waiting at the hospital, Robinson overheard complainant say, "Well, no girl should get --

deserve to get beat." Hagen responded, "Well, you shouldn't have done what you did. You deserve it." When Hagen left to smoke a cigarette, complainant told Robinson that Hagen abused her. Robinson noticed marks around complainant's neck and told her that she needed to tell the police. Complainant said she was afraid of Hagen.

Complainant told Hagen that she was going home with Robinson, and asked Hagen to leave. Robinson and complainant left the hospital after complainant received treatment, and went to the Willis police station to file a report. Complainant then stayed at Robinson's house. The next day, Hagen went to Robinson's house. Robinson told him not to come to her house again. He continued to call complainant. Robinson took complainant to make a second report to the police. Hagen still had complainant's vehicle and would not give her the keys. Complainant stayed with Robinson for a few days until Hagen left complainant's house.

The physician's assistant that treated complainant the day of the altercation testified. Complainant told him that her boyfriend pushed her down, and she fell on glass. The physician's assistant explained how he stitched the wound. Although he noted she had full range of motion, it is possible for her to have later issues with the injury because "[s]he could have had some micro nerve damage or micro vascular nerve damage[.]" Her injury is a "great concern . . . [because] it overlies the carpal ligament which is called the carpal tunnel syndrome." Her injury could be a permanent and continuing injury. He has not treated her since the day of the altercation, but he noted that her complaints at trial

about the continuing problems with her wrist could be consistent with an impairment of the function of her wrist.

Officer Jonathan Povsha with the Willis Police Department received a call from Robinson on the night of the altercation. He told Robinson that due to the distance, and the fact that the department was "short manned[,]" he could not come to Robinson's house. He told them they could come to the station. They arrived about fifteen or twenty minutes later. Complainant gave her statement and Povsha took pictures. Povsha forwarded the paperwork and his report to the detectives. A warrant was requested for Hagen. Complainant said she and Hagen were common-law spouses and that the broken glass she fell on was from drinking glasses.

Officer Ferman Rachal testified that two days after the injury, complainant called and was concerned about an incident. He told her to come to the office, and she arrived with another lady to fill out an affidavit. He described complainant as "[t]errified" and "in fear of her . . . life and of her well-being." She had a cut on her wrist that had been stitched and marks on her upper chest and around the throat area. She said she and her boyfriend or husband had an argument, that he pushed her and she fell into a glass table, and that he had choked her. Another officer took photographs. Complainant asked if he could notify her of an arrest so she would know that it was safe to go home.

Complainant testified her wrist is scarred. The jury saw her wrist. She explained that she works in a bakery and has lost feeling in her wrist at times. Sometimes when she

picks up boxes she drops them. If the boxes are in a freezer over her head, she drops them on her head when her wrist goes numb. She has adapted to the injury but still drops boxes at least once every eight-hour shift. She now has to avoid removing the rotisserie chickens from the oven due to her fear of dropping them. Robinson noticed that complainant drops items and has trouble picking items up.

Complainant testified that after Hagen was arrested, he wrote her between ten and thirty letters over a seven month period. Three of the letters were admitted into evidence over Hagen's objection. In the first letter Hagen said he loved and missed her, he was sorry for what happened, and was praying that she could forgive him and give him another chance. She testified the other two letters consisted of apologies as well. She did not write him back.

EFFECTIVE ASSISTANCE OF COUNSEL

Hagen maintains he was denied effective assistance of counsel when the trial court admitted the letters Hagen wrote. Hagen argues that "[b]y allowing the [S]tate to introduce these letters into evidence as a confession in its case-in-chief, the Court stripped Appellant of his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and under the Due Process of Law Clause of the Texas Constitution." He maintains that this violation of his constitutional rights requires that the evidence be excluded under article 38.23 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 38.23 (West 2005).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defense." U.S. Const. amend. VI. This right attaches at the initiation of adversarial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Cobb v. State*, 93 S.W.3d 1, 5 (Tex. Crim. App. 2000), *rev'd on other grounds*, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). Hagen relies on *Massiah v. U.S.*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed. 246 (1964), and *Holloway v. State*, 780 S.W.2d 787, 794-95 (Tex. Crim. App. 1989), in arguing that the State was required to show that his admissions were made with the consent of counsel or after a waiver of counsel. *Massiah* involved the use of an undercover informant to elicit a defendant's incriminating statements. The Supreme Court held that a confession should be excluded as unconstitutionally obtained in violation of the Sixth Amendment right to counsel when that confession was "deliberately elicited" by law enforcement. 377 U.S. at 204, 206-107. In *Holloway*, the Texas Court of Criminal Appeals held that the Sixth Amendment did not permit the "police-initiated interrogation of an indicted accused who has retained or has been appointed defense counsel" absent notice to defense counsel. 780 S.W.2d at 795.

Law enforcement did not deliberately elicit Hagen's statements, or interrogate Hagen to obtain the statements. The letters Hagen wrote were sent to complainant. *See*

Kuhlmann v. Wilson, 477 U.S. 436, 459, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (The State's securing -- by "luck or happenstance" -- incriminating statements from the accused after the right to counsel has attached does not necessarily establish a Sixth Amendment violation; "[r]ather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."). Hagen was not denied effective assistance of counsel by the admission of the letters Hagen wrote to complainant from jail. Issue one is overruled.

SUFFICIENCY OF THE EVIDENCE

Hagen argues the evidence is insufficient to support the jury's convictions for unlawful restraint and aggravated assault causing serious bodily injury. In determining whether there is sufficient evidence to support the jury verdict, an appellate court reviews all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

A person commits the offense of assault if he "intentionally, knowingly, or recklessly causes bodily injury to another[.]" Tex. Penal Code Ann. § 22.01(a)(1) (West 2011). A person commits the offense of aggravated assault if he commits an assault and he "causes serious bodily injury to another[.]" *Id.* § 22.02(a)(1) (West 2011). Hagen

asserts that the evidence is insufficient to support the jury's finding that complainant suffered "serious bodily injury" or that Hagen caused the injury.

The Penal Code defines "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code Ann. § 1.07(a)(46) (West 2011). Complainant testified that the cut to her wrist was so deep she could "see bone[,]" and she received internal and external stitches. Complainant has modified her tasks at work to adapt to her continuing injury. The physician's assistant that treated complainant testified that her injury could be permanent and continuing, and that she could have later issues with the injury because of possible nerve damage and problems related to carpal tunnel syndrome. The jury saw the photographs of the injury taken the day of and two days after the injury. A rational finder of fact could find beyond a reasonable doubt that complainant suffered serious bodily injury.

In support of Hagen's argument that the evidence is insufficient to support the jury's finding that he caused her hand injury, he contends that her statement to the hospital staff was that she "fell on some glass." The physician's assistant testified that the medical records stated that Hagen "[p]ushed her down," and she "fell on glass[.]" Complainant testified that Hagen pushed her down and she fell on the glass. Both of complainant's written statements to the police reflected that Hagen pushed her down and

she fell. A rational finder of fact could find beyond a reasonable doubt that Hagen caused complainant's injury by pushing her and causing her to fall resulting in a protracted loss or impairment of function to her wrist. The evidence is sufficient to support the jury's verdict finding Hagen guilty of aggravated assault causing serious bodily injury. Issue two is overruled.

Hagan argues the evidence is insufficient to support the jury's verdict finding him guilty of unlawful restraint. Specifically, Hagen maintains the evidence is insufficient to support the jury's finding that Hagen prevented complainant from leaving her home. He argues complainant "was free to leave whenever she wanted" and had "ample opportunity" to leave.

A person commits unlawful restraint if "he intentionally or knowingly restrains another person." Tex. Penal Code Ann. § 20.02(a) (West 2011). To restrain someone means "to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person." *Id.* § 20.01(1) (West 2011). "Restraint is 'without consent' if it is accomplished by . . . force, intimidation, or deception[.]" *Id.* § 20.01(1)(A).

Complainant testified that during the altercation she told Hagen to "let [her] out." She tried to leave through the front door and Hagen would not let her leave. Every time she tried to open the door he would "grab [her] and throw [her] down, throw [her] back and push [her] back." She tried to get out of the bedroom window and he grabbed her and

choked her. She was afraid. She thought she was not going to survive. A rational finder of fact could find that Hagen intentionally or knowingly confined complainant without her consent by force or intimidation. The evidence is sufficient to support the jury's verdict of guilty of unlawful restraint. Issue three is overruled. The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on June 23, 2011
Opinion Delivered August 31, 2011
Do Not Publish

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