In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00367-CR

KELVIN LEE ROY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause No. B-140,221-R

MEMORANDUM OPINION

A jury convicted Kelvin Lee Roy of murder and assessed a punishment of seventy-five years in prison. In two appellate issues, Roy challenges the sufficiency of the evidence and the denial of his request for a jury instruction on the lesser-included offense of manslaughter. On original submission, we found the evidence sufficient to support Roy's conviction of murder and concluded that the trial court properly denied Roy's request for an instruction on the lesser-included offense of

manslaughter. *Roy v. State*, No. 09-14-00367-CR, 2015 WL 5042146, at *3-4 (Tex. App.—Beaumont Aug. 26, 2015) (mem. op.), *rev'd*, 509 S.W.3d 315 (Tex. Crim. App. 2017). The Court of Criminal Appeals reversed our decision that Roy was not entitled to a jury instruction on the lesser-included offense of manslaughter, and remanded the case to this Court for a harm analysis. *Roy v. State*, 509 S.W.3d 315, 319-20 (Tex. Crim. App. 2017). We reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

Background

Roy was charged with the death of Alexandria Bertrand, which resulted from a vehicle collision. According to Taralynn Brown, Roy's former girlfriend, Roy was driving her vehicle on the night of the offense so that she could purchase food. During the drive, Roy passed his exit, repeated words to himself, and lit a dip cigarette.[1] Brown testified that Roy was driving in two lanes and almost struck the side of the freeway and other vehicles, but Roy refused to pull over. Roy told Brown, "I'm going to kill both of us."

Christopher Morgan, Joshua Bryan, and Brittany Monroe testified that they saw Roy drive past them at a high rate of speed. Morgan and Bryan testified that

[1] Roy testified that a "dip cigarette" is a cigarette dipped in P.C.P.

Roy overcorrected and nearly struck the curb. Bryan and Monroe heard the engine revving as it sped past them. Bryan testified that "it was like whoever the driver of the car was hit the gas, because you could see the rear end of the car actually sit down[.]" Morgan, Bryan, and Monroe testified that they never saw the vehicle's brake lights. Morgan believed Roy had "[n]o intent to stop." Monroe testified that it did not appear that Roy was attempting to avoid other vehicles.

Brown testified that Roy continued driving "crazy" and that she begged Roy to stop, but that Roy accelerated and Brown recalled "flying in the air and crashing." April Bertrand testified that she and her daughter, Alexandria, were in their vehicle, stopped at a red light, when Roy struck Bertrand's vehicle. Kevin Huebel testified that he was approaching the red light when Roy flew past him and collided with Bertrand's vehicle. Bertrand testified that Alexandria was ejected from the vehicle. Huebel compared the sound of the accident to an explosion or bomb. Officer Rodney Johnson described the scene as looking like a war zone or a bomb explosion.

Victoria Andis, who heard the crash and saw Roy's vehicle fly toward her and roll to a stop, testified that Brown was screaming and trying to climb out of the vehicle's window. Andis assisted Brown, who told Andis that Roy was

driving crazy, was under the influence, and was trying to kill Brown and himself. Andis smelled alcohol in the vehicle and saw drugs around the vehicle. Monica Hall, a registered nurse who stopped to help, testified that Brown told her that Roy was "under the influence." Officer Chase Alexander testified that Brown told him she thought Roy was under the influence, but she did not mention Roy trying to kill her.

Hall and Alexander testified that Roy was unconscious in his vehicle. Johnson testified that he smelled an odor of alcohol around the vehicle and that Roy was non-responsive. Officer Jesus Loredo testified that Roy was in and out of consciousness, was lethargic, and had a "wild-eyed" appearance. He testified that Roy's symptoms could be indicative of either being intoxicated or having been in an accident. Loredo also smelled a strong odor of alcohol coming from the vehicle and he collected baggies of marihuana and cocaine from the area around the vehicle. Roy denied ownership of the drugs.

Bertrand testified that, at the hospital, Alexandria was pronounced brain dead. Dr. John Ralston, a forensic pathologist, explained that Alexandria suffered from a fracture at the base of her skull, hypermobility, blood in her lungs, bleeding over her brain, a spinal cord injury, and skin lacerations. He testified that Alexandria died of blunt force trauma.

Sergeant Richard Howard testified that he saw no pre-impact skid marks at the scene, which indicated an absence of braking before impact. He testified that he has seen intoxicated people involved in an accident without ever having applied the brakes. Alexander testified that Roy's erratic driving was consistent with a person driving while intoxicated, but was also consistent with a person intending to cause an accident. According to Howard, Roy's vehicle became airborne before striking the back right side of Bertrand's vehicle. Given that the battery was thrown from Roy's vehicle and the vehicle landed quite a distance from the point of impact, Howard believed the vehicle was traveling at a high rate of speed.

Roy testified that on the night of the offense, he and Brown were driving to pay someone for repairing Brown's car. He testified that Brown brought two cups of alcohol and that they drank and used marihuana in the vehicle. Brown testified that she had been drinking that day, but was not intoxicated and did not use marihuana in the vehicle. She believed that Roy was intoxicated when the offense occurred. Roy's blood tested positive for benzodiazepine, phencyclidine (P.C.P.), and T.H.C. and his blood alcohol level was well below the legal limit.

According to Roy, the repairman was not at home, so he lit a dip cigarette and headed home. When he began to feel dizzy, he told Brown to take the steering wheel and attempted to pull over, but he passed out. He attributed this

to the combination of drugs, marihuana, dip cigarette, and alcohol. Roy could not recall speeding down the road or the accident itself. He testified that he did not intend to speed and was unaware of what was happening when the accident occurred.

Roy admitted having a history of drug use and drug-related criminal offenses, including a conviction for assault family violence against Brown. He testified that he smoked marihuana daily, used P.C.P. maybe twice per month, and consumed alcohol once or twice per month. He admitted knowing the risks of drinking and driving, as well as smoking marihuana and driving, but he still chose to drive. Roy denied getting into an argument with Brown, becoming enraged, or threatening Brown with injury or death. He testified that he acted recklessly, but had no intent to injure anyone, including Brown, and that he accepted responsibility for Alexandria's death.

In his second issue, Roy challenges the trial court's denial of his request for a jury instruction on the offense of manslaughter. He contends that the jury could have determined that he was the cause of Alexandria's death by his recklessness but that he did not intend to harm Brown. In reversing our decision that Roy was not entitled to a jury instruction on the lesser-included offense of manslaughter, the Court of Criminal Appeals found that Roy was entitled to an

instruction on manslaughter because a jury could have rationally found that Roy was guilty of only manslaughter. *Roy*, 509 S.W.3d at 319. The Court explained that Roy presented evidence that he was aware of, but consciously disregarded, the risk of causing an accident and that the death occurred as a result of the same conduct. *Id.* The Court found that Roy's reckless conduct–driving while intoxicated–was part of the same conduct that caused Alexandria's death. *Id.* According to the Court, a jury could have rationally found that Roy did not intend to harm Brown and that his reckless behavior caused Alexandria's death. *Id.* The Court further explained that Roy's inability to remember causing the death does not bar him from a manslaughter instruction. *Id.* Finding that Roy was entitled to a jury instruction on the lesser-included offense of manslaughter, the Court of Criminal Appeals remanded the case to this Court for a harm analysis. *Id.* at 319-20.

A trial court's refusal to submit a lesser-included offense that was requested and raised by the evidence results in harm when that failure leaves the jury with the sole option to either convict the defendant of a greater offense or to acquit him. *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995); *Bridges v. State*, 389 S.W.3d 508, 512-13 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The rationale is that "'some' harm occurs because the

jury was not permitted to fulfill its role as factfinder to resolve the factual dispute whether the defendant committed the greater or lesser offense." *Saunders*, 913 S.W.2d at 571. Harm also exists when the penalty imposed for the charged offense exceeds the potential penalty for the lesser-included offense. *Bridges*, 389 S.W.3d at 512.

In this case, the jury was limited to either finding Roy guilty of the greater offense of murder or acquitting him. *See Saunders*, 913 S.W.2d at 571. Roy received a sentence of seventy-five years in prison for murder, which far exceeds the punishment range for manslaughter, a second-degree felony punishable by imprisonment for any term of not more than twenty years or less than two years. *See* Tex. Penal Code Ann. §§ 12.33(a), 19.04(b) (West 2011); *see also Bridges*, 389 S.W.3d at 512. Under these circumstances, we conclude that the trial court's refusal of Roy's requested instruction on the lesser-included offense of manslaughter resulted in harm. *See Saunders*, 913 S.W.2d at 571; *see also Bridges*, 389 S.W.3d at 512-13. Accordingly, we reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STEVE McKEITHEN
Chief Justice

Submitted on April 4, 2017
Opinion Delivered May 31, 2017
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Before McKeithen, C.J., Kreger and Johnson, JJ.