

Affirmed and Opinion Filed March 7, 2018



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-01494-CR

**JERMAINE JOHN SCOTT, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F15-75578-R**

MEMORANDUM OPINION

Before Justices Francis, Evans, and Boatright
Opinion by Justice Francis

Jermaine John Scott appeals his conviction for murder. After finding appellant guilty, and two enhancement paragraphs true, a jury sentenced him to seventy-five years in prison. Appellant brings two issues asserting the trial court erred in failing to sua sponte instruct the jury on self-defense and he received ineffective assistance of counsel. We affirm the trial court's judgment.

On the afternoon of April 2, 2015, appellant, Nathan Brown, and Donnell Bougere drove to the Oasis apartment complex in south Dallas to buy marijuana. Remeal Woods, who was staying with his parents at the complex, brokered the drug deal.

According to Woods, Brown and Bougere arrived at the complex in an SUV driven by appellant. After some discussion, Brown went up to get the marijuana. Woods spoke with appellant about appellant's tattoo of the number "9" on his forehead. Woods was from Louisiana

and said the tattoo meant appellant was from the 9th ward in New Orleans. When appellant stepped out of the car, Woods saw he had a gun. Woods denied any conflict between he and appellant, but said at this point he went to back to his parent's apartment to get a gun for his own protection. He told the jury appellant shot at him as soon as he came back around the corner of the building.

Latosha Lewis was sitting in the passageway outside her parents' apartment with her sisters Kierra and Shantel. Her parents lived across the way from Remeal Woods. Latosha saw Woods in the parking lot with several men, including appellant. She heard things "getting a little loud" and someone said something about a gun. Latosha told the jury that when appellant moved from the front of the SUV to a location by a towing sign in between two air conditioner units, she saw he had a gun. About then, Woods ran by her and into his apartment.

When Woods came back outside, Latosha saw that now he had a gun. She "asked him to turn around and go back into his mother's house because our children were outside playing." Woods said, "I'm trying to see if he's about that gangsta shit he was talking about." He pushed past Latosha and, as he reached the edge of the passageway, Latosha "heard a shot. One big shot, two shots, maybe one after the other. I don't know, but I heard gunfire." Latosha and her sisters ran to their parents' apartment and as they reached the doorway, Kierra, who had been behind Woods, fell into Latosha's arms. When they got inside, Latosha saw that Kierra had been shot.

Nathan Brown heard a single gunshot while he was in his sister's apartment. When he returned to the parking lot, he saw appellant and Bougere driving away in the SUV. Quinton Smith lived in an upstairs unit, heard a gunshot, and went to his window to see what was happening. Smith saw a dark-skinned man with dreadlocks, later identified as Bougere, running towards an SUV and carrying a gun. Smith stated it appeared to him as if Bougere's gun had just been fired, but he conceded he did not see the shooting. Smith called 911 to report the incident. Paramedics were dispatched to the scene, but they were unable to revive Kierra and she died at the scene.

Donnell Bougere admitted having a gun and being at the apartment complex with appellant but denied being in the parking lot during the shooting. Bougere's mother testified appellant stayed with her in New Orleans after the shooting. When appellant's picture and the description of his forehead tattoo appeared on the news, appellant told her he needed to get the "9" changed.

Appellant was eventually found and arrested in Atlanta, Georgia. A picture from an earlier arrest submitted into evidence showed appellant with a tattoo of a "9" on his forehead. At the time of his arrest, the "9" had been changed into an image of a money bag.

Detective Eric Barnes of the Dallas Police Department investigated the shooting and told the jury he found a single shell casing from a nine millimeter Perfecta near an air conditioner unit where "the shooter was standing during the time of the offense." The investigation showed the shooter likely fired a nine millimeter handgun and the "small to medium sized round" found in the body of the deceased was consistent with the caliber bullets fired from a nine millimeter.

Appellant did not testify at trial but during an interview following his arrest, denied being in Dallas at the time of the incident or being involved in the shooting. At trial, appellant's counsel argued the State failed to prove appellant was at the scene or that he was the shooter. Counsel stressed the relationships between the witnesses, argued their testimony was not credible, and more likely than not Bougere was the shooter. The court's charge did not contain an instruction on self-defense. Appellant's counsel did not request an instruction and did not object to the charge.

In his first issue, appellant contends the trial court erred in failing to instruct the jury on self-defense on its own motion. Appellant concedes his counsel did not request a self-defense instruction or object to the court's charge. Appellant further concedes a trial court is not required to sua sponte instruct the jury on an unrequested defensive issue. *See Posey v. State*, 966 S.W.2d 57, 60–61 (Tex. Crim. App. 1998). Appellant argues, however, he "suffered egregious harm by not having this issue presented to the jury for consideration."

When addressing an assertion of error in the charge, a harm analysis is required only if we first conclude there was error. *Id.* at 60. Here, the trial court did not err in failing to instruct the jury on the unrequested defensive issue. *Id.* Furthermore, appellant provides no argument or citations to authority or the record to support his contention he suffered egregious harm. We resolve appellant's first issue against him.

In his second issue, appellant contends he received ineffective assistance of counsel based on his counsel's failure to raise the issue of self-defense at trial and request a jury instruction on the issue. To succeed in showing ineffective assistance of counsel, an appellant must demonstrate both that his counsel's representation fell below an objective standard of reasonableness and that the alleged deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellant bears the burden of proving his counsel was ineffective by a preponderance of the evidence. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and was motivated by legitimate trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The court of criminal appeals has made clear that in most cases, a silent record which provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *See Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Counsel should ordinarily be afforded the opportunity to explain his actions before being denounced as ineffective and if not given that opportunity, then an appellate court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim App. 2012).

To be entitled to an instruction on the law of self-defense, some evidence must show the defendant reasonably believed his use of force was immediately necessary to protect himself

against the other's use or attempted use of force. *See Reed v. State*, 703 S.W.2d 380, 384 (Tex. App.—Dallas 1986, pet. ref'd). Appellant did not testify at trial. In his statement to the police, he denied being in Dallas on the day of the shooting. No evidence in the record explains appellant's mental state at the time of the shooting or shows he was even aware Woods had a gun at the time he shot in Woods's direction. Because no evidence shows appellant had a reasonable belief his use of force was immediately necessary to protect himself, he was not entitled to an instruction on self-defense and his counsel was not ineffective for failing to request one. *Id*; *see also Ex Parte Nailor*, 149 S.W.3d 125, 133-34 (Tex. Crim. App. 2004).

Appellant suggests his counsel should have focused on the self-defense theory during trial rather than attempting to shift the blame for the shooting to Bougere. Appellant contends the evidence that Bougere was the shooter was too weak to support a viable defense. Essentially, appellant attacks his counsel's choice of strategy. But we will not find counsel's performance deficient unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See Menefield*, 363 S.W.3d at 593. Given appellant's statement to the police that he was not in Dallas at the time of the shooting, we cannot conclude counsel's choice to pursue a trial strategy casting doubt on appellant's presence at the scene falls below an objective standard of reasonableness. We resolve appellant's second issue against him.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JERMAINE JOHN SCOTT, Appellant

No. 05-16-01494-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District
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Trial Court Cause No. F-1575578-R.

Opinion delivered by Justice Francis.

Justices Evans and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered March 7, 2018.