Opinion issued February 3, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00974-CR

CEDRIC COTTRELL EVANS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Case No. 1077372

MEMORANDUM OPINION

A jury found appellant, Cedric Cottrell Evans, guilty of the offense of murder[1] and assessed his punishment at confinement for thirty-five years. In two points of error, appellant contends that the evidence is factually insufficient to

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[1] TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (Vernon 2003).

support his conviction and his trial counsel provided ineffective assistance of counsel at both the guilt and punishment phases of trial.

We affirm.

Factual Background

Victor Gordon testified that on July 20, 2006, his friend, the complainant, Santos Harris, was at Gordon's apartment waiting for a ride. At approximately 5:00 p.m., appellant, also Gordon's friend, came to the apartment and asked for the complainant. Gordon, appellant, and the complainant then sat down on furniture in the living room and talked. Gordon did not sense any hostility between the complainant and appellant, and Gordon explained that they were just "hanging out." After a short time, appellant left the apartment. When appellant returned twenty minutes later, Gordon did not notice "much anything different." Gordon sat back down on his couch, and appellant and the complainant were having a "normal guys' conversation" in the kitchen. At some point, the complainant borrowed Gordon's telephone to make a call. When he hung up the telephone, the complainant called to appellant. Gordon then saw appellant and the complainant "hugging like homeboys" in the kitchen area of the apartment. Suddenly, Gordon heard several pops, which he knew to be the sound of gunfire, coming from the kitchen. Gordon looked toward the complainant and appellant and noted that "they were still hugging." Gordon then went to get his girlfriend, who was in the

apartment, and they went to the bedroom of the apartment to get "out the back." Although Gordon lowered himself down to the ground from the balcony of his second-story apartment, his girlfriend could not get over the rail of the balcony and exit the apartment. As Gordon tried to coax his girlfriend down, he saw a neighbor and asked him to call for emergency assistance. Gordon then returned to his apartment, where he saw the complainant lying dead in the doorway of the apartment's kitchen. On cross-examination, Gordon stated that he drank "some beer" on the date of the shooting.

Houston Police Department ("HPD") Officer J. Racus testified that he responded to a call for emergency assistance regarding the shooting. When he arrived, he saw the complainant's body inside the apartment. Although officers found no firearms in the apartment, they did find several shell casings in the apartment and removed two bullets from the kitchen. HPD Officer S. Kennedy testified that after he identified appellant as a suspect in the shooting, he subsequently received information that appellant had left Harris County. Kennedy attempted to "track" appellant, and, about four months later, he received information that appellant was in custody in Rockville, Maryland. Kennedy further stated that a car that was "used in the murder" was located in Memphis, Arkansas.

Harris County Medical Examiner M. Feeney testified that she performed the autopsy on the complainant's body and found that the complainant had a bullet lodged in his head. Feeney explained that the "range of fire" was "pretty close, probably within about a foot or so," the complainant suffered other bullet wounds or graze wounds, and the gunshot wounds caused his death.

Dr. W. Davis, the Harris County Medical Examiner trace evidence manager, testified that a test was performed on the complainant's hands for gunshot residue and there was no gunshot residue on the complainant's hands. On cross-examination, Davis agreed that he did not know who did the testing of the complainant's hands and could not confirm that proper protocol was followed.

Sufficiency of the Evidence

In his first point of error, appellant argues that the evidence, although "probably" legally sufficient, is factually insufficient to support his conviction because there is no evidence "of a weapon," "any prior altercation" between appellant and the complainant, or a motive for a shooting. Appellant also asserts that the evidence identifying him as the shooter is only circumstantial and "weak" because it is based on a single eyewitness's "limited view" and is "substantially outweighed by evidence suggesting that Gordon or another" was the murderer.

We now review the factual sufficiency of the evidence under the same appellant standard of review as that for legal sufficiency. *Ervin v. State*, No. 01-

10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] November 10, 2010, no pet. h.) (citing *Brooks v. State*, PP-0210-09, 2010 WL 3894613, at *14, 21–22 (Tex. Crim. App. Oct. 6, 2010)). Under this standard, we are to examine "the evidence in the light most favorable to the prosecution" and determine whether "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 442 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979). Under this standard, evidence is insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982).

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual or if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (Vernon 2003).

Gordon testified that appellant and the complainant were hugging in the kitchen of his apartment both before and at the time he heard gunshots. After hearing the gunshots, Gordon looked over at the men and saw that they were still hugging. Gordon then checked on his girlfriend, and they attempted to leave the apartment from a balcony connected to the back bedroom of the apartment. After Gordon managed to get down from the balcony, he went back up the stairs to return to his apartment, and he found the complainant's body bleeding from

gunshot wounds. Dr. Feeney testified that, based upon her autopsy findings, the "range of fire" for the gunshots that killed the complainant was "pretty close" and was "probably within about a foot or so."

It is well established that the testimony of a single eyewitness may be legally sufficient to support a conviction of a criminal offense. *Proctor v. State*, 319 S.W.3d 175, 185 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Although Gordon did not testify that he saw either man with a gun, Gordon's testimony that he heard the gunshots at the time appellant and the complainant were hugging is significant in light of Dr. Feeney's testimony that the complainant was shot in close range and "probably" within a foot. Even without evidence related to what appellant and the complainant were discussing at the time, and even without proof of any clear motive, the jury could have found, based upon Gordon's and Feeney's testimony, that appellant was the only person that could have shot the complainant. *See Clayton v. State*, 235 S.W .3d 772, 781 (Tex. Crim. App. 2007) (stating that motive is not element of murder, even though "it may be a circumstance indicative of guilt"); *Pitonyak v. State*, 253 S.W.3d 834, 844–45 (Tex. App.—Austin 2008, pet. ref'd) (stating that State did not have to prove that appellant had motive for murder). The jury could have also drawn an inference of guilt based upon the testimony of Gordon and the officers, which demonstrated that appellant had left the scene and the State following the shooting. *Clayton*, 235 S.W.3d at 780

(recognizing that factfinder may draw inference of guilt from "circumstance of flight" and stating that defendant's flight "constitute[d] an additional piece of incriminating circumstantial evidence").

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant committed the offense of murder by shooting the complainant. Accordingly, we hold that the evidence is sufficient to support appellant's conviction.

We overrule appellant's first point of error.

Ineffective Assistance of Counsel

In his second point of error, appellant argues that his trial counsel rendered ineffective assistance at both the guilt and punishment phases of trial because counsel "asked no questions of any witness that arguably constructed any defense" and, at punishment, "effectively present[ed] no evidence [of] justification or mitigation to the jury." Appellant asserts that trial counsel failed to "summarize the evidence in a light favorable to the defense through argument," commented that the jury might have thought that Gordon "seemed pretty credible," provided a limited cross-examination of Gordon, did not effectively explore the relationship between the complainant and appellant or the circumstances surrounding the shooting, did not inquire as to whether Gordon's girlfriend had provided a

statement to police officers, did not ask Gordon the name of the neighbor who called for emergency assistance, did not introduce appellant's statement, and did not effectively cross-examine the police officers or medical examiner witnesses. Appellant also asserts that trial counsel rendered ineffective assistance when he asked appellant's mother, during the punishment phase, about what had happened to cause the shooting.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Strickland* generally requires a two-step analysis in which an appellant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional error, there is a reasonable probability that the result of the proceedings would have been different. *Id*. at 687–94, 104 S. Ct. 2064–2068; *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that his performance falls within the wide range of reasonable professional assistance or trial strategy. *Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006); *Thompson*, 9 S.W.3d at 813.

A failure to make a showing under either prong defeats an ineffective-assistance claim. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Allegations of ineffectiveness must be firmly founded in the record. *See Thompson*, 9 S.W.3d at 813; *Bone v. State*, 77 S.W.3d 828, 833 & n.13 (Tex. Crim. App. 2002). In the absence of evidence of counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined, and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

In regard to trial counsel's closing argument, he focused on the lack of evidence presented by the State to support such a significant charge as murder against appellant. Counsel noted that, other than Gordon, the State had failed to present testimony from any other witness present at the apartment complex at the time of the shooting. Counsel highlighted the absence of testimony from Gordon's girlfriend, who he claimed was in the apartment at the time of the shooting, and Gordon's neighbor, who he claimed had called for emergency assistance after the shooting. Counsel also noted that the State had failed to introduce into evidence a recording of the call for emergency assistance. Our review of counsel's closing argument demonstrates that counsel did summarize the evidence in appellant's

favor, and he presented a substantial argument that the State had failed to meet its burden of proof.

In regard to trial counsel's comments on Gordon's credibility, although he suggested that the jury might initially find Gordon to be credible, he argued that the jury should be skeptical of Gordon's testimony for several reasons. Counsel noted that the events had occurred three years prior to trial and Gordon had significant time to "think about his testimony, to adopt, to figure out what kind of attitude he wants to adopt." Counsel explained that Gordon should have been considered a suspect and that Gordon and his girlfriend were "connected to the scene." Counsel asserted that Gordon's testimony that he had heard a "couple" of gunshots did not match with the evidence showing that police officers had recovered at least six shell casings inside the apartment. Counsel stressed that Gordon was the only witness presented by the State, and he argued that Gordon's version did not "make sense." Counsel also stressed that appellant faced the very serious charge of murder, and yet the State had presented only minimal evidence against him.

In regard to trial counsel's cross-examination of Gordon, he elicited from Gordon the admission that Gordon had been drinking beer on the day of the shooting. Gordon had already testified that he had not sensed any hostility between the complainant and appellant at the time of the shooting. This testimony,

provided by Gordon on direct examination, was favorable to appellant. Moreover, Gordon had simply described the men as "hugging" at the time of the shooting, and he did not testify that he saw a weapon. Counsel could have deliberately chosen to avoid any further inquiry of Gordon on cross-examination about any details of the appellant's relationship with the complainant or the circumstances at the time of the shooting. Counsel could have reasonably been concerned that Gordon's answers to such questioning could have provided the jury with a better understanding of a motive for the shooting and the circumstances surrounding the shooting. In his closing arguments, counsel emphasized the limited nature of Gordon's testimony, and he argued that it created reasonable doubt.

Additionally, Gordon had already explained in his direct testimony that he only had a "casual" relationship with both the complainant and appellant, and Gordon's testimony indicated that he may have had no information as to why the shooting occurred. Gordon had also stated that he did not know the neighbor who had called for emergency assistance and was no longer dating the woman who was with him in the apartment on the day of the shooting. In sum, counsel could have reasonably believed that the lack of detailed evidence presented by the State regarding the relationship between appellant and the complainant, the circumstances surrounding the shooting, and the motive for the shooting was favorable to the defense and created a substantial argument for the existence of

reasonable doubt. In fact, this was the primary theme in counsel's closing argument. Counsel forcefully argued that the State had poorly investigated the shooting and had poorly presented the case to the jury based solely on a single eyewitness whose testimony did not "make sense."

In regard to the trial counsel's efforts to challenge the testimony presented by the police officers and the medical examiners, counsel effectively cross-examined Davis, the trace evidence manager, when he elicited from Davis the admission that he did not know who had tested the complainant's hands for gun residue and that he could not confirm that proper protocol had been followed in this testing. With these admissions, counsel sought to create doubt as to whether the complainant had been armed or had fired a gun during the incident. Appellant's counsel also cross-examined Officer Dacus, and with his questioning sought to suggest that the officers who had arrived on the scene initially had not conducted an adequate search to determine if there were any firearms in the apartment. During closing arguments, counsel argued that the State's failure to introduce a firearm into evidence suggested that reasonable doubt existed as to appellant's guilt.

We also note that, during the State's direct examination of Officer Kennedy, trial counsel objected to testimony that would have further supported an inference of appellant's flight from Texas after the shooting. Moreover, during the State's

closing arguments, appellant's counsel vigorously objected to multiple arguments presented by the State that were not supported by the record. The trial court sustained several of these objections and also instructed the jury, pursuant to counsel's request, to disregard certain arguments made by the State. For example, pursuant to counsel's request, the trial court instructed the jury to disregard the State's argument that Gordon's version of events had been consistent with a prior statement because no such statement was in evidence.

Finally, in regard to appellant's complaint that his trial counsel did not introduce his prior statement into evidence, we note that his statement was hearsay. *See* TEX. R. EVID. 801(d). Also, appellant did not file a motion for new trial, and, thus, there is nothing in the record to indicate why appellant's counsel did not attempt to introduce appellant's statement into evidence. He could have concluded that any attempt would have been futile. There is also nothing in the record to indicate that Gordon's girlfriend provided a statement to police officers or that any such statement would have been helpful to appellant. In sum, appellant has not, in regard the guilt phase, demonstrated that his trial counsel's performance fell below an objective standard of reasonableness.

In regard to appellant's challenge of his trial counsel's performance at the punishment phase of trial, he specifically complains about the following question that counsel posed to his mother: "What was going on that day, what happened

between them to cause [appellant] to shoot him?" Appellant complains that there could have been no purpose "to admit from [his] mother that he shot the complainant" in an effort to establish mitigating circumstances. At the time of the punishment phase, the jury had convicted appellant of the complainant's murder. Based upon the challenged question and the series of following questions, appellant's counsel appears to have been attempting to introduce information to explain the circumstances surrounding the shooting in an effort to ask for leniency in punishment. The State immediately objected, and appellant's mother was not permitted to answer the specific question. However, in response to a subsequent question, appellant's mother described appellant as a good person and she stated that he was not a "cold-blooded killer." With this testimony, in addition to her testimony that she still "struggle[d]" to understand what had happened, counsel sought to suggest to the jury that appellant deserved mercy even though the complainant had been killed. Counsel also introduced evidence that appellant had never been convicted of any felonies. In sum, appellant has not, in regard to the punishment phase, demonstrated that his trial counsel's performance fell below an objective standard of reasonableness. Accordingly, because appellant has not demonstrated that his trial counsel's actions fell below an objective standard of reasonableness, we hold that appellant has not satisfied *Strickland's* first prong.

We overrule appellant's second point of error.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

Do not publish. TEX. R. APP. P. 47.2(b).