Opinion issued January 27, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-01127-CR

JAMES IRVIN QUICK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1179074

MEMORANDUM OPINION

Appellant, James Irvin Quick, appeals a judgment convicting him for the murder of Michelle Denise Melton. *See* TEX. PENAL CODE ANN. § 19.02 (West 2003). In two issues, appellant asserts that the trial court abused its discretion by

overruling his objection that the State's closing argument commented on appellant's failure to testify and by disallowing expert testimony that purportedly negated the requisite intent for murder. Concluding that the trial court did not abuse its discretion in making these rulings, we affirm the judgment.

Background

Late in life, appellant and the complainant's mother, Clotile, married. However, their marriage often involved arguments over finances, and they decided to divorce. Throughout the divorce process, the couple frequently fought over the ownership of their property. The complainant and her husband were called numerous times to appellant's home to help mediate disputes.

In August 2008, appellant, Clotile, the complainant, and her husband met at appellant's home to discuss the pending divorce. A dispute arose regarding the ownership of appellant's sister's property. Appellant went to his front door, locked it, and placed the key in his pocket. Appellant then left the room to retrieve a .357 revolver. Finding the front door locked, the complainant, her husband, and Clotile left the house through the dining room window.

The complainant and her husband ran away, but when she saw that Clotile had fallen into the bushes below the window, the complainant ran back to assist her. Appellant stood inside his house in front of the window, knelt down, aimed the revolver at the complainant, and fired. The bullet entered the complainant's

side, passing through her arm and torso. The complainant collapsed on the driveway, where she died. Appellant went outside of his house and shot at the complainant's husband but missed.

In a videotaped custodial statement given to Detective Matt Bruegger, appellant admitted to killing the complainant. During the statement, Det. Bruegger asked appellant, "Where were you aiming?" Appellant responded, "I aimed at her. She was running away." Det. Bruegger then asked, "What was your intention when you were shooting at her?" Appellant stated, "I had no intentions . . . my only intention was to force them out of the house. I just lost it. I should have keep [sic] control."

Appellant pleaded not guilty to the jury. The jury found him guilty and the trial court assessed his sentence at 15 years in prison.

Closing Argument

In his first issue, appellant contends the trial court abused its discretion by overruling his objection to certain comments made by the State during closing arguments concerning appellant's failure to testify.

A. Applicable Law

The State's closing argument violates a defendant's constitutional and statutory rights against self-incrimination if, viewed from the standpoint of the jury, the argument was (1) manifestly intended to be a comment on the accused's

failure to testify or (2) of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify. *Fuentes v. State*, 991 S.W.2d 267, 275 (Tex. Crim. App. 1999) (quoting *Banks v. State*, 643 S.W.2d 129, 134 (Tex. Crim. App. 1982)). "A mere implication or indirect allusion to a defendant's failure to testify will not result in reversible error." *Allen v. State*, 693 S.W.2d 380, 386 (Tex. Crim. App. 1984); *see also Staley v. State*, 887 S.W.2d 885, 895 (Tex. Crim. App. 1994). The facts and circumstances of each case must be analyzed to determine whether the language directs the jury's attention to the defendant's failure to testify. *See Dickinson v. State*, 685 S.W.2d 320, 323 (Tex. Crim. App. 1984).

The State may refer to an accused's failure to testify in closing argument if the State's comment is invited by defense counsel's closing argument and it does not exceed the scope of the invitation. *Andujo v. State*, 755 S.W.2d 138, 144 (Tex. Crim. App. 1988); *Martinez v. State*, 851 S.W.2d 387, 389 (Tex. App.—Corpus Christi 1993, pet. ref'd). An invited comment within the scope of the invitation is proper although it indirectly alludes to the defendant's failure to testify. *Martinez*, 851 S.W.2d at 390; *see Porter v. State*, 601 S.W.2d 721, 722–23 (Tex. Crim. App. 1980). Additionally, if a defendant's statement is admitted into evidence, the State may properly refer to that statement to compare it to the other evidence in the case, and that reference is not considered as a comment on the defendant's failure to

testify or his right to remain silent. *Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004).

B. Analysis

Appellant complains that the trial court abused its discretion in overruling his objection to the State's comment stating, "Well, let's ask Mr. Quick. Mr. Quick, where were you aiming? And I have it here on the video. Where were you aiming?" The State's comment was in response to appellant's counsel's closing argument claiming that we "[w]on't know exactly where he was aiming."

Viewing the State's comment from the jury's standpoint, the State's rhetorical comment, "let's ask Mr. Quick" and its rhetorical question, "where were you aiming?" did not implicitly highlight appellant's failure to testify. *See Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001) (requiring clear implication that State's comment during closing argument referred to defendant's failure to testify or right to remain silent). Rather, the State was introducing its next comment, directing the jury's attention to appellant's answer, already in evidence on the videotaped confession. *See Garcia*, 126 S.W.3d at 924 (holding that reference to defendant's statement already in evidence is not improper comment on defendant's failure to testify or right to remain silent); *Lopez v. State*, 339 S.W.2d 906, 910–11 (Tex. Crim. App. 1960). The language that the State used was not of such a character that the jury would have naturally and necessarily

have considered it a comment on appellant's failure to testify. *See Bustamante*, 48 S.W.3d at 765; *Fuentes*, 991 S.W.2d at 275.

Moreover, by suggesting a lack of evidence as to whether appellant was pointing the revolver at the complainant, appellant invited the State to respond. *See Andujo*, 755 S.W.2d at 144; *Martinez*, 851 S.W.2d at 389. The State's comment was within the scope of the invitation because it pointed out the evidence in the record that showed the very thing appellant's counsel had argued we "[w]on't know." Accordingly, we conclude that the trial court did not abuse its discretion in overruling appellant's objection to comments made by the State during closing arguments.

We overrule appellant's first issue.

Exclusion of Expert Witness Testimony

In his second issue, appellant contends that the trial court abused its discretion in refusing to allow appellant's three psychiatric and psychological experts to testify during the guilt-innocence stage of trial. Specifically, appellant claims that because of the deficient executive functioning of his brain, he did not form the requisite intent for murder. *See* TEX. PENAL CODE ANN. § 19.02(b)(1)–(2) (West 2003) (requiring intentional or knowing mental state). Additionally, appellant contends that because the trial court erroneously excluded the testimony

of his experts, he was effectively denied the opportunity to put on a defense that he was guilty only of manslaughter.

A. Applicable Law

We review a trial court's ruling to admit or exclude evidence under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 101–02 (Tex. Crim. App. 1996); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). A trial court abuses its discretion if its decision falls outside of the "zone of reasonable disagreement." *Montgomery*, 810 S.W.2d at 391. In conducting this review, we defer to the trial judge's assessment of the weight and credibility of the evidence and view the evidence in the light most favorable to the trial court's decision. *See Kelly v. State*, 824 S.W.2d 568, 574 (Tex. Crim. App. 1992).

Admission of expert testimony is governed by Rule 702 of the Texas Rule of Evidence. TEX. R. EVID. 702. When addressing the admissibility of expert testimony, the trial court's "first task is to determine whether the testimony is sufficiently reliable and relevant to help the jury in reaching accurate results." *Kelly*, 824 S.W.2d at 572. Testimony that is unreliable or irrelevant does not assist a juror in understanding the evidence or determining a fact in issue, as required by Rule 702. *See* TEX. R. EVID. 702; *Kelly*, 824 S.W.2d at 572. When examining admissibility under Rule 702, the trial court must determine whether the expert "make[s] an effort to tie pertinent facts of the case to the scientific principles which

are the subject of his testimony." *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996).

A person commits murder if he (1) intentionally or knowingly causes the death of an individual or (2) 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). A person intends a result of his conduct if that result is his conscious objective or desire. *Id*. § 6.03(a) (West 2003). A person knows a result of his conduct if he is aware that his conduct is reasonably certain to cause the result. *Id*. § 6.03(b). In contrast, a person commits manslaughter if he recklessly causes the death of another. *Id*. § 19.04(a). A person acts recklessly with respect to the result of his conduct if he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. *Id*. § 6.03(c).

"Texas does not recognize diminished capacity as an affirmative defense i.e., a lesser form of the defense of insanity." *Jackson v. State*, 160 S.W.3d 568, 573 (Tex. Crim. App. 2005). However, Texas law does recognize diminished capacity doctrine as an ordinary defense "that the State failed to prove that the defendant had the required state of mind at the time of the offense." *Id*. As with the other elements of the offense, the defendant may offer relevant evidence negating the requisite mental state. *Id.* at 574; *see* TEX. CODE CRIM. PROC. ANN. art. 38.36(a)

(West 2005) (defendant may offer testimony as to "all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense"). This evidence may sometimes include evidence of a defendant's history of mental illness. *Jackson*, 160 S.W.3d at 574. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. However, such evidence may be excluded if it does not truly negate the requisite intent. *See id.*[1]

B. Analysis

The trial court conducted a hearing at the State's request to determine whether appellant's three defense experts, Drs. Thomas Allen, Larry Pollock, and David Self, would be allowed to testify during the defense's case-in-chief. Appellant's trial attorney explained to the court that Drs. Allen and Pollock would testify as to how they arrived at the conclusion that appellant had a problem in executive functioning. The attorney further explained that in doing so, their testimonies would lay the foundation for the expert opinion of Dr. Self that, as a result of appellant's deficient executive functioning, appellant acted only

[1] *See, e.g.*, *United States v. Cameron*, 907 F.2d 1051, 1067–68 (11th Cir. 1990) (stating, "evidence offered as 'psychiatric evidence to negate specific intent' is admissible . . . when such evidence focuses on the defendant's specific state of mind at the time of the charged offense," but holding that defendant failed to demonstrate how her expert's generalized psychiatric testimony would negate intent in drug-trafficking prosecution).

recklessly and did not possess the requisite mental state for murder—either intentionally or knowingly causing the result of death or intentionally causing the result of serious bodily harm. *See* TEX. PENAL CODE ANN. § 19.02(b)(1)–(2) (West 2003). The attorney represented to the trial court that the doctors were not going to testify that appellant lacked the capacity to form criminal intent.

The doctors' expert reports were entered into the record for the purposes of that hearing only. According to Dr. Allen's report, appellant had "an awareness of increasing difficulty with what appears to be working memory and impaired executive functioning, most likely a part of age related changes and poor general health, but there could be other causes." Additionally, "[w]hile functioning within the normal limits of intelligence [appellant] is showing impairment in executive functioning and working memory. He can be easily confused, especially under stressful circumstances."

Dr. Pollock's report states that the results of appellant's "neuropsychological evaluation revealed significant neurocognitive impairments. Deficits were found in . . . executive functioning," specifically, "visual tracking and speed of auditory processing." Further, appellant's "deficits in executive functioning cause him to have problems in multitasking, planning and organization, and speed and flexibility of thinking."

Dr. Self's report defines executive functioning as "a set of cognitive abilities that control and regulate other abilities and behaviors. Executive functions are necessary for goal-oriented behavior. They include the ability to initiate and stop actions, to monitor and change behavior as needed, and to plan future behavior when faced with novel tasks and situations. Executive functions allow us to anticipate outcomes and abstractly are often considered components of executive function." Dr. Self's report explained that at the time of the incident, "[appellant's] already deficient executive brain function was totally overwhelmed, causing his [sic] to act in an extremely reckless manner. He was momentarily unable to abort his course of action and chose [sic] from the available alternative courses appropriate to the situation."

The expert reports fail to show that appellant did not act intentionally or knowingly, nor do they show that appellant acted recklessly. The reports do not discuss how appellant's mental functioning would affect his ability to act intentionally, knowingly, or recklessly. Although his report concludes that appellant acted in an "extremely reckless manner," Dr. Self premises that determination on the assertion that appellant was "momentarily unable to abort his course of action and chose [sic] from the available alternative courses appropriate to the situation." This does not meet the definition for recklessness in the penal code, which requires proof that the person was aware of but consciously

disregarded a substantial and unjustifiable risk that the circumstances existed or the result would occur. *See* TEX. PENAL CODE ANN. § 6.03(c). Similarly, Dr. Self's testimony concerning appellant's inability to abort his course of action and choose from the available alternative courses does not address whether appellant knew that his conduct was reasonably certain to cause the result. *See id.* § 6.03(a). The expert reports, therefore, fail to show that appellant did not act knowingly and do not show that appellant acted recklessly.

In short, while appellant's attorney explained to the trial court that his experts would testify that he acted only recklessly and did not possess the requisite mental state for murder, the expert reports do not support that testimony. We hold the trial court did not abuse its discretion in excluding appellant's expert testimony. *See Sexton v. State*, 93 S.W.3d 96, 99 (Tex. Crim. App. 2002).

Appellant also argues that the erroneous exclusion of the expert testimony denied him his constitutional rights to present a defense. *See* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 1. However, this argument is premised on appellant's claim that the trial court abused its discretion in excluding his experts' testimony. Accordingly, we do not reach appellant's constitutional claim.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

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