

Opinion issued October 6, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00161-CR

BOBBY LEE JONES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Case No. 08CR1456

MEMORANDUM OPINION

A jury convicted appellant, Bobby Lee Jones, of murder, and the trial court assessed punishment at fifty years' confinement. In one issue, appellant argues that his trial counsel rendered ineffective assistance during the guilt-innocence

phrase of trial by calling appellant's wife as a witness, thus allowing the State to cross-examine her, rather than claiming a spousal privilege. We affirm.

BACKGROUND

Appellant and the complainant, Felicia Adrienne Scott, had an on again, off again, romantic relationship for several years. On May 12, 2008, Scott was at Club D'Elegance in Galveston when she ran into an old boyfriend, Steven Smith, and asked him for a ride to Parkland Housing Project to pick up her car. They left Club D'Elegance in Smith's Lincoln at about 2:00 a.m. with one of Smith's friends, Demarshay Dominique Lacy. As they made their way toward Parkland, appellant began following them in a tan-colored SUV. At the intersection of 35th Street and Ball Avenue, both cars stopped and everyone exited the vehicles. Shortly thereafter, Scott was shot four times and died.

Officer Robert Sanderson responded to a dispatch call about a shooting at 35th Street and Ball. En route to the scene, he saw appellant speeding down Broadway towards the causeway bridge to the mainland. Sanderson gave chase and apprehended him. Sanderson testified that he found a .38 revolver in plain view on the driver's side floorboard, and that Appellant was fully cooperative during his arrest. A search also revealed a 9mm pistol in the backseat. Testing reflected the presence of gunshot residue on appellant's hands, which is consistent with his "having either recently fired a weapon, being nearby a weapon when it

was discharged, or contacting a surface that had gunshot primer residue particles on it.”

No usable fingerprints were detected on the two guns recovered. DNA swabs from the guns were also insufficient for an interpretable DNA profile but, from the available testing, appellant could not be excluded as a contributor. The medical examiner testified that he could not identify what exact caliber of bullet passed through Scott’s body, but that the wounds were caused by a medium caliber bullet, i.e., .38, 9mm, or .40 caliber. Two .38 bullets matching the .38 revolver in the vehicle appellant was driving were the only bullets recovered from the scene.

A. The Conflicting Testimony

At trial, conflicting stories were presented about the events leading up to Scott’s death. The State presented Smith and Lacy, who each testified that appellant had followed them and began ramming into their car and shooting at them while they were heading to Parkland. Smith testified that Scott knew it was appellant following them, and she was scared, nervous, shaking, and panicked. During this chase, Scott begged Smith to “get me away from here,” and told Lacy that appellant is “stalking me.” According to Smith, an agitated Scott also called 911, telling the dispatcher that “Mr. Jones was chasing the car that she was in and she was trying to get away and he was ramming into the back of the car.”

Smith and Lacy testified that at one point appellant smashed into Smith's car, causing it to lose a wheel, wreck, and come to a stop on 35th Street. After appellant also came to a stop, he got out of his car with a gun and approach Scott. Smith and Lacy both testified that neither they nor Scott had a gun at the scene. Smith ran up to appellant and demanded to know why appellant was chasing and shooting his car. Appellant ignored Smith and continued moving towards Scott.

Both Smith and Lacy stated they ran away from the scene, leaving Scott with appellant. Before fleeing, Lacy testified to hearing Scott asked appellant "why he was tripping?" and appellant responding "Bitch, you're going to quit playing with me." Smith similarly heard appellant say to Scott, "Bitch, you got me fucked up; you think you can hide from me."

An investigator testified to listening to the recordings of Scott's 911 call during this confrontation. She heard a male voice on the tape saying "You want to play with me? You want to play with me?" and a female voice screaming "Bobby, leave me alone," and "Bobby, you shot me."

Smith testified that Scott said to appellant: "Please don't hurt me" and "Leave me alone. I got kids" right before Smith saw appellant fire his weapon in Scott's general direction. Smith also heard additional shots after he fled. Lacy heard several gunshots as he ran from the scene as well, but could not identify from which direction.

A nearby resident who was awakened by the sound of the crashing vehicles testified to witnessing Scott's shooting. Through his window, he saw three people—two males and a female—get out of Smith's Lincoln and the men run off in different directions. He also saw a male get out of a tan-colored SUV and confront the female, yelling "Do you want to play with me" or "fuck with me?" and then shooting her four times. That witness stated that these four shots were the only ones he heard or saw that night. The witness then saw the shooter get back into his tan SUV and drive off.

Appellant contested these versions of the events, testifying instead that he was only following Smith's car because he understood that Scott wanted him to. According to appellant, Scott instructed him to meet her outside of Club D' Elegance between 1:30 and 1:45 a.m. and they planned for Scott to come out to meet him at his car unless she was with her step-father, in which case appellant was supposed to follow her to Parkland. Appellant claims he saw Scott leave the club with her step-father and then ride past his car in Smith's Lincoln. Scott looked over at him and appellant took this as a request that he follow the car.

Appellant testified that he never rammed into Smith's car, and that it was in fact Smith that unexpectedly fired a gun into the air while they were driving. He was surprised by this behavior, as well as Smith's weaving between lanes on the road. Appellant stated that when they came upon 35th and Ball Street, Smith

smashed into the curb and came to a stop. Appellant parked his vehicle and took a gun from the glove box and slipped it into his pants before getting out of the car because he was concerned about how the occupants of Smith's car had been acting. Scott ran up to appellant, but he ignored her, instead confronting Smith asking, "Why is y'all playing with me" and "Why y'all shooting?" According to appellant, a gunfight quickly erupted, with Smith firing at appellant first and appellant returning fire in self defense. Appellant testified that, while he was shooting, he did not shoot Scott because he was aiming at Smith instead. Appellant also stated he never fired his weapon with intent to cause serious bodily injury or the death of Scott.

B. Appellant's Wife's Testimony

At issue in this appeal is testimony of appellant's wife, Bridgette Jones. During the guilt-innocence phase of trial, appellant's counsel called Jones as a fact witness. She testified that she and appellant have been married for 21 years, have no children together, and that she would not lie for appellant. She stated that the SUV the appellant was driving on May 12, 2008 was hers, that the gun in the glove box belonged to appellant's nephew, and that she had inadvertently left it in the vehicle. She further testified that when she retrieved the vehicle from impound after appellant's arrest, it was not damaged at all except for a missing piece of

chrome, contrary to testimony that appellant had used the vehicle to ram into Smith's car.

On cross-examination, Jones testified that her husband called her right before he was arrested and stated that he had "shot somebody." She also testified that when she called the police station to inquire about getting the vehicle appellant was driving released, she stated that her husband was in jail because "he had killed somebody." Jones clarified, though, that she only said that because she had heard from a detective that was the reason for her husband's incarceration.

INEFFECTIVE ASSISTANCE OF COUNSEL

In a single point of error, appellant contends that he was denied effective assistance of counsel during the guilt-innocence phase of his trial, because his counsel failed to assert appellant's husband-wife privilege under Texas Rule of Evidence 504.

A. Standard of Review

The United States Supreme Court has established a two-pronged test for determining whether there was ineffective assistance of trial counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984). To prevail on a claim under *Strickland*, 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 proceeding would have been different. *Id.*; *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

Strickland's first prong requires that the defendant show, by a preponderance of the evidence, that trial counsel's representation objectively fell below professional standards. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). *Strickland*'s second prong requires the defendant to show a "reasonable probability"—i.e., "probability sufficient to undermine confidence in the outcome"—that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Thompson*, 9 S.W.3d at 812. A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

An allegation of ineffectiveness must be firmly founded in the record, which must demonstrate affirmatively the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. To establish ineffective assistance, the appellant must overcome the strong presumption that counsel's conduct falls within the wide range of reasonably professionally assistance or might reasonably be considered sound trial strategy. *Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006). We will not speculate to find trial counsel ineffective when the record is silent on his counsel's reasoning or strategy, *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston

[1st Dist.] 1996, no pet.), and we are especially hesitant to declare ineffective assistance based upon a single alleged miscalculation, during what amounts to otherwise satisfactory representation. *Thompson*, 9 S.W.3d at 814.

In rare cases, the record can be sufficient to prove that counsel's performance was deficient, despite the absence of affirmative evidence of counsel's reasoning or strategy. *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). Such cases are limited to occasions where no reasonable attorney could have made such a decision. *Weaver v. State*, 265 S.W.3d 523, 538 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd).

Under *Strickland's* second prong, the appellant must show that counsel's deficient performance actually prejudiced or harmed his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This requires a showing that counsel's errors undermined the confidence in the result from trial. *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim. App. 2007); *Jaenicke v. State*, 109 S.W.3d 793, 797 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

B. Husband-Wife Privilege

The spouse of a criminal defendant has a privilege not to be called as a witness for the State. TEX. R. EVID. 504(b)(1). A spouse who nonetheless testifies on a defendant's behalf is then subject to cross-examination. TEX. R. EVID. 504(b)(1).

C. Analysis

Appellant argues that his counsel was ineffective because, until his counsel called his wife Jones to the stand, the State had no legal right to extract her testimony about his cell phone call before his arrest in which appellant told Jones he was about to be arrested for shooting someone. Appellant contends that counsel's failure to know or utilize his spousal privilege resulted in ineffective assistance since Jones essentially made "a vicarious confession on behalf of the [a]ppellant." According to appellant, this "harm could not be cured" and her testimony could not be supported by any reasonable trial strategy. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

The State on the other hand points to elements of Jones's testimony that could have helped appellant such that having her testify could have been part of a reasoned trial strategy. For example, Jones brought out that appellant was a family man that had been married 21 years. She also explained that the gun used in the shooting was in the vehicle appellant was driving by accident, implying that appellant was not a "gun-toting guy looking for this kind of trouble." She also testified that her vehicle was not damaged, which was potentially inconsistent with testimony that appellant had rammed into Smith's car. Thus, the State argues,

appellant cannot demonstrate that his counsel's calling his wife to testify amounted to ineffective assistance of counsel under the first prong of *Strickland*.

In addition, the State argues that the appellant has not demonstrated a reasonable probability that, but for counsel's alleged error, the outcome would have been different under *Strickland*'s second prong. According to the State, Jones's testimony that appellant told her he shot someone "hardly mattered since Appellant himself testified that he had been in a gunfight." Given the testimony of the various eyewitnesses and investigators, the State insists that "there is no reasonable probability a factfinder would have a reasonable doubt of Appellant's guilt" regardless of Jones's testimony.

Appellant has failed to demonstrate, by a preponderance of the evidence, any prejudice to his defense caused by his wife's testimony as required under *Strickland*'s second prong. Although appellant claims that trial counsel was effectively creating a reasonable doubt during the guilt and innocence phase of his trial until his wife testified about him telling her "he shot somebody," the record reflects that the jury had heard substantial evidence supporting its guilt finding.

Two witnesses, Smith and Lacy, who were driving with Scott testified that the appellant chased and fired at them. Smith saw the appellant fire a gun in Scott's direction and heard additional shots as he ran from the scene. Lacy saw the appellant exit his truck with a gun, and heard gunshots as he fled. An eye witness

to the murder saw a male fitting appellant's appearance exit an SUV and shoot four times at a female. Contrary to appellant's contention that there was a gunfight, this witness heard only those four shots and saw only one gun on the night of the murder. Appellant himself testified to shooting at someone that night, although claiming self-defense. During her 911 call, Scott herself identified appellant as the one who shot her.

Given the overwhelming weight of the evidence presented to the jury, appellant has not demonstrated that a different verdict would have been returned had his wife not testified as she did. Thus, appellant has failed to satisfy the second prong of *Strickland. Andrews*, 159 S.W.3d at 102.

Having concluded that appellant has not demonstrated his trial counsel rendered ineffective assistance of counsel, we overrule appellant's single point of error.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

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

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