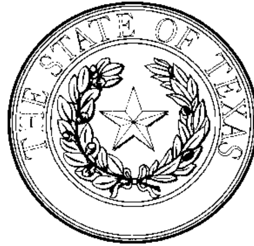
**Opinion issued October 6, 2011**




**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00986-CR**

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**ROBERT FULTON BURNS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 338th District Court**
**Harris County, Texas**
**Trial Court Case No. 1226943**

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## MEMORANDUM OPINION

A jury convicted appellant Robert Fulton Burns of murder and sentenced him to 45 years in prison. In two issues, Burns argues that he received ineffective assistance of counsel at trial and that the trial court abused its discretion when it

overruled an objection made during the State's closing argument. We affirm the judgment.

## Background

Burns was accused of murdering Louis Holiday. Burns had been living in Holiday's house for a week when he went on a three-day cocaine binge. During this time he used crack cocaine, including a rock that he stole from Holiday. Holiday confronted Burns in the garage about the stolen crack, and the argument between them turned "physical." Burns testified that before reentering the house, Holiday threatened to kill him and said that he was going inside to get his gun. Burns had seen Holiday's gun on the living room couch several days earlier. Burns followed Holiday into the house with an ax taken from the garage. As Holiday was searching for his gun in the sofa, Burns approached him from behind and struck him three times in the head with the blunt end of the ax. Holiday collapsed and died while Burns fled. Police later recovered a gun from inside a shoe or boot in Holiday's bedroom closet.

At trial, Burns argued that he acted in self-defense and that the house had no ready escape for him. *See* TEX. PENAL CODE ANN. § 9.32 (West 2011) (establishing justification of deadly force in defense of person). During direct examination, Burns admitted that he had been using drugs in the days and hours before the killing and that he had stolen the crack rock from Holiday. The medical

examiner who performed the autopsy testified that there had been at least six blows and chops to Holiday's head. Also, the State's expert in blood spatter analysis testified that the blood patterns in the living room indicated eleven "events" of a bloodied object having been swung up or down.

## Analysis

### I. Ineffective assistance of counsel

Burns contends that he received ineffective assistance of counsel at trial. Specifically, he faults defense counsel for having elicited testimony about his drug activity on direct examination, which he argues could constitute "criminal activity" tending to preclude a self-defense theory under the jury charge. The jury instruction referenced by Burns tracks the language of the Penal Code regarding limitations on the right to use deadly force in self-defense:

> (c) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.
>
> (d) . . . [I]n determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.

TEX. PENAL CODE ANN. § 9.32(c), (d) (West 2011). Additionally, Burns argues that defense counsel's direct examination regarding his use of crack cocaine brought into question the soundness of Burns's mental state and ability to

reasonably perceive a real or apparent danger to himself that would justify the use of deadly force in self-defense. *See* TEX. PENAL CODE ANN. § 9.32(a) ("A person is justified in using deadly force against another . . . when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . .").

The United States Supreme Court has established the standard for determining whether trial counsel rendered ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). To prevail on a claim of ineffective assistance of counsel under *Strickland*, an appellant must show that counsel's performance fell below an objective standard of reasonableness, and that 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). A failure to make a showing under either prong of the *Strickland* analysis defeats a claim of ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

Assertions of ineffective assistance must be firmly founded in the record. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Here, the record does not unambiguously show the reasons for defense counsel's approach. Burns did not file a motion for new trial in which counsel's strategy or lack thereof could have been developed on the record. When the record is silent, we must presume counsel had a sound trial strategy behind his actions. *Busby v. State*, 990 S.W.2d

263, 268–69 (Tex. Crim. App. 1999); *Safari v. State*, 961 S.W.2d 437, 445 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).

Burns was the only surviving person with first-hand knowledge of what happened between him and Holiday, and he was the only one with first-hand knowledge of his own belief about Holiday's intention to harm him. Burns's testimony may have been deemed necessary to establish a justification defense, and counsel could have reasonably decided to present unfavorable facts as part of the direct examination in order to make Burns appear more credible to the jury and to diminish the impact of anticipated cross-examination. Part of defense counsel's closing argument supports the inference that this is what he intended: "[Burns] testified. He did not get up there and give you false remorse. 'No, I did not call the police. I'm using dope, just like Mr. Holiday. We are in there using dope together.' No sugarcoating there." Because the elicited testimony about drug use could have been part of a sound trial strategy, Burns has not established the first *Strickland* prong (objectively unprofessional conduct), and he therefore cannot make out a claim of ineffective assistance of counsel on direct appeal. *See, e.g.*, *Yarborough v. Gentry*, 540 U.S. 1, 9, 124 S. Ct. 1, 6 (2003) (explaining that "by candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case).

We overrule appellant's first issue.

## II. State's closing argument

In his second issue, Burns argues that the trial court abused its discretion when it overruled defense counsel's objection to the State's characterization of forensic evidence during closing argument. We review the trial court's ruling on an objection to closing argument for abuse of discretion. *See Cole v. State*, 194 S.W.3d 538, 545–46 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). An abuse of discretion occurs only when the trial judge's decision was so clearly wrong as to lie outside the zone of reasonable disagreement. *See, e.g.*, *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). Permissible jury argument generally falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Berry v. State*, 233 S.W.3d 847, 859 (Tex. Crim. App. 2007). Impermissible closing arguments by a prosecutor include making reference to extraneous offenses for which the accused is not currently on trial and introducing prejudicial evidence before the jury which is outside the record. *Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990).

Before examining the allegedly improper statement made by the State, we review the record as to the underlying testimony presented at trial. As part of its case in chief, the State elicited testimony from Officer C. Duncan, a blood spatter

analysis expert for the Houston Police Department. Officer Duncan testified as to what the blood spatter patterns discovered at the crime scene indicated about the number and nature of the blows to Holiday's body.

> Duncan: I recognize ten separate events, plus you always add one for the original impact that created the blood source. So, in my opinion, there was at least eleven events that created the impact spatter – the castoff patterns present at the scene.
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> . . .
>
> State: Officer Duncan, the eleven events, the word "event" as you used it, can that mean an event is a swing of a large object, such as this ax handle, with or without the head of the ax?
>
> Duncan: Absolutely. The events that I've described as events was a swinging motion putting blood in flight apart from an impact into a blood source. The impact spatter, the castoff, is created by this swinging motion of an implement.

Defense counsel asked Officer Duncan to clarify that an "event" is not necessarily an injury or strike to a person.

> Defense: Are you saying, then, that that instrument actually came into contact with, let's say, a person eleven times; is that your testimony?
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> Duncan: No, that is not.
>
> Defense: What exactly do you mean by an event then?
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> Duncan: The event is being the action of swinging but coming into contact with a blood source. Now, there's more than one blood source, obviously, on the scene. One, you have the saturated carpet, that saturated stain. So if I were to swing, not even make contact – not make an impact, but come in contact with a saturated carpet and then drawback, I have reapplied blood onto the implement and have caused this blood to now fly off with centrifugal force and impact the

wall. So, no, I'm not saying that it came into contact with the individual eleven times.

During closing argument, the State made a statement apparently premised on Officer Duncan's earlier testimony regarding eleven "events."

> State: Is this reasonable? Is that sort of rage reasonable? Eleven strikes. That's one, two –
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> Court: Is there an objection?
>
> Defense: Yes. That is not what the evidence showed. The CSU said events – when asked if events were strikes, he said, "No, they are not strikes." That was his testimony.
>
> Court: Overruled. Again, this is argument. You are the exclusive judges of the facts proved, not the attorneys.
>
> State: One, two, three, four, five, six, seven, eight, nine, ten, eleven, and that's just in my mind thinking how many times it takes to haul that ax back up over your head and swing it back down. Hitting or missing his head, there's that many events, according to Duncan, that the head of this ax, or that ax blade, went into the blood source and came back up.

The question before this court is whether the trial court abused its discretion in overruling defense counsel's objection. Burns essentially argues that the court allowed the State to mislead the jury as to what Officer Duncan had said, and therefore they were less likely to believe Burns's testimony that he had struck Holiday only three times instead of many more times.

Burns cannot prevail on this theory because the totality of the State's closing argument about the spatter evidence was not, in fact, inconsistent with Officer Duncan's testimony. After the court overruled the objection, the State completed

the idea that it had started to convey. The prosecutor equated eleven "events" with "how many times it takes to haul that ax back up over your head and swing it back down," "[h]itting or missing his head," and the number of times "that the head of this ax, or that ax blade, went into the blood source and came back up." These statements mirror those made by Officer Duncan or, at least, constitute a reasonable deduction from his testimony. *See Berry*, 233 S.W.3d at 860 (finding even an "aggressive" statement by a prosecutor to fall within the bounds of permissible jury argument given that it was otherwise a reasonable deduction from prior testimony). Because the State simply restated Duncan's testimony or made reasonable deductions therefrom, the trial court did not abuse its discretion when it overruled defense counsel's objection.

We overrule the second issue.

## Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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