

Opinion issued June 28, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-14-00785-CR

OMAR IBRAHIM, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1362139**

MEMORANDUM OPINION

A jury convicted appellant Omar Ibrahim of murder. *See* TEX. PENAL CODE § 19.02. The jury found that Ibrahim did not act under the influence of sudden passion arising from an adequate cause, and it assessed punishment at 99 years in prison and a \$5,000 fine.

Ibrahim appeals. In his sole issue, he asserts that he received ineffective assistance of counsel due to his trial counsel's failure to object to the State's closing argument. Finding no reversible error, we affirm.

Background

The complainant, Adrian Castro, had been friends with Omar Ibrahim for roughly a year before his death. The two sent each other several Facebook messages that indicated a romantic relationship between them, including some that were "sexual in nature." At trial, Ibrahim claimed that he was not attracted to men and that these messages were not intended in a sexual manner but rather reflected his limited understanding of American culture as an Iraqi immigrant.

One evening, Castro, Ibrahim, and a few friends went out together. Castro had several drinks, while Ibrahim abstained because he did not drink alcohol. The group returned to Castro's apartment, and Ibrahim stayed the night after the others left.

According to Ibrahim, when he awoke on the couch, Castro was standing over him in his underwear. Castro's penis was "touching [Ibrahim's] hands" and close to Ibrahim's face. Ibrahim felt threatened that Castro would sexually assault him. Ibrahim grabbed a knife and told Castro to stay back. Castro continued to try to assault him, and he "ran into" Ibrahim's knife. Castro took a fire extinguisher from the wall and struck Ibrahim with it twice. Ibrahim managed to seize the

extinguisher and hit Castro in the head twice in return. Finding himself wrestled to the ground, Ibrahim claimed he had to choke Castro to death in order to defend himself.

Ibrahim covered Castro's body in several sheets and blankets, tying the bundle together with a number of belts. A maintenance worker visited later that morning, and Ibrahim asked him to help load the bundle into a vehicle. The worker became suspicious after he saw what appeared to be a bloodstain on the ground, and he left shortly thereafter. He testified that after hearing a loud noise, he found that the bundle had been moved back into the apartment. The worker told his supervisor about the incident, and the supervisor contacted the police.

The police discovered the bundle containing Castro's body inside his apartment. An investigator at the scene noted that there were no signs of a struggle having occurred in the apartment, and that several fragile objects in the area were entirely intact. Roughly six days after Castro's body was discovered, police apprehended Ibrahim at a relative's home in Idaho. At that time, Ibrahim had no apparent injuries on his face or arms.

During voir dire, counsel for both Ibrahim and the State discussed the law regarding self-defense. The prosecutor noted that a person was allowed to use deadly force in self-defense "to prevent the imminent commission of certain serious crimes" including sexual assault. The State also emphasized that reasonable

belief that an assault was imminent was based on what a “reasonable person in the position of the defendant at the time he acted would believe.” Ibrahim’s trial counsel further explained the concept of imminent sexual assault, noting that when there is an imminent commission of rape even without its actual occurrence, there is a right to use deadly force in self-defense.

At trial, Ibrahim testified to his version of the events leading up to Castro’s death. He admitted that he killed Castro, but he asserted that it was self-defense because he felt he was about to be raped. Defense counsel also heavily emphasized the issue of self-defense in his closing argument, particularly touching upon the issue of imminent assault:

This man—you or anybody in this room, we don’t have to wait for a drunk person to take their penis and put it in their mouth, or put it in their anus, or to stick it in their face. You don’t have to wait for that. You can defend yourself before that happens. That’s what this man did.

The State responded at length to the self-defense argument in its final closing statement:

No sexual assault occurred that day. By the defendant’s own statement, by the defendant’s own description of what happened, no sexual assault occurred that day. The description of sexual assault, the definition of it talked about penetration. No sexual assault occurred that day.

The closest that it got to—again, according to what the defendant told you yesterday, was that the defendant—or the complainant’s standing there with his penis out and touched him on the hand. That is not sexual assault.

And do you think that's how sexual assault occurs? Realistically, do you think that's how it occurs, that somebody's just going to stand there with their penis out and that's how the sexual assault begins?

The defendant never said anything about the complainant holding him down. The defendant never said anything about Adrian Castro trying to pull his pants down. He never said anything about Adrian Castro trying to put his penis in his mouth. He never said anything about Adrian Castro grabbing his genitals. He did not provide one supporting fact to show that a sexual assault was imminent, period. Not one.

Ibrahim's trial counsel did not object to this portion of the State's closing argument.

The jury charge contained the following instruction on the law of self-defense:

A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as above set out, and when he reasonably believes that such deadly force is immediately necessary:

- (1) to protect himself against the other person's use or attempted use of unlawful deadly force, or
- (2) to prevent the other's imminent commission of sexual assault.

The defendant's belief that the force was immediately necessary is presumed to be reasonable if the defendant:

- (1) knew or had reason to believe that the person against whom the force was used was committing or attempting to commit sexual assault . . .

The trial court submitted a special issue of whether the killing arose under the immediate influence of sudden passion arising from an adequate cause. The jury returned a guilty verdict. The jury also made a unanimous negative finding against the special issue and assessed punishment at 99 years in prison and a fine of \$5,000. Ibrahim appealed.

Analysis

In his sole issue on appeal, Ibrahim argues that his trial counsel was ineffective because he did not object to the State's remarks during closing argument regarding sexual assault and self-defense. Ibrahim asserts that the State misstated the law regarding self-defense when the prosecutor stated in closing argument: "The description of sexual assault, the definition of it talked about penetration. No sexual assault occurred that day." He claims this statement misled the jury to think that actual sexual assault had to occur before he would be justified in using deadly force in self-defense. Ibrahim asserts that trial counsel's failure to object was deficient performance, and that had the objection been made the jury would not have been misled and he would have been acquitted. The State responds that the prosecutor's comments were not objectionable and that no prejudice could have occurred from the remarks.

In order to show that trial counsel was ineffective, an appellant must demonstrate that trial counsel's performance fell below an objective standard of

reasonableness, as well as a probability sufficient to undermine confidence in the outcome that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Rylander v. State*, 101 S.W.3d 107, 109–10 (Tex. Crim. App. 2003); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984).

A reviewing court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” and the defendant bears the burden to overcome the presumption that, under the circumstances, the challenged action was a result of sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Nava v. State*, 415 S.W.3d 289, 307–08 (Tex. Crim. App. 2013). An accused is not entitled to perfect representation, and a reviewing court must look to the totality of the representation when gauging trial counsel’s performance. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). However, “even a single instance of attorney error can rise to the level of deficient performance, if the error was egregious and had a seriously deleterious impact on the balance of the representation.” *Id.*

A claim of ineffective assistance of counsel must be “firmly founded in the record and the record must affirmatively demonstrate the meritorious nature of the claim.” *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012). “Direct appeal is usually an inadequate vehicle for raising such a claim because the record

is generally undeveloped.” *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). One reason that the record alone is frequently insufficient is because “trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.” *Rylander*, 101 S.W.3d at 111. When trial counsel has not been given that opportunity, an appellate court will not find deficient performance unless the challenged conduct was “so outrageous that no competent attorney would have engaged in it.” *Goodspeed*, 187 S.W.3d at 392.

A person is justified in using deadly force against another if, among other circumstances, it is needed to “prevent the other’s imminent commission of . . . sexual assault.” TEX. PENAL CODE § 9.32(a). A belief that deadly force was immediately necessary to prevent sexual assault is presumed reasonable if the other person “was committing or attempting to commit” that offense. TEX. PENAL CODE § 9.32(b)(1)(C).

“It is the duty of trial counsel to confine their arguments to the record; reference to facts that are neither in evidence nor inferable from the evidence is therefore improper.” *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). The Court of Criminal Appeals has set forth four areas of argument that are generally proper: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) pleas for law enforcement. *Id.*; *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008).

Ibrahim argues that the State misstated the law in its closing argument and indicated that actual sexual assault rather than its mere imminent commission was necessary for a viable claim of self-defense. However, when placed in context, the prosecution merely began by establishing a lack of actual sexual assault before proceeding to attack Ibrahim's argument regarding imminence. The prosecution's statement that "No sexual assault occurred that day" was a reasonable deduction from the evidence. *See Brown*, 270 S.W.3d at 570. Immediately after this, the State answered opposing counsel's argument regarding imminence, claiming that Ibrahim "did not provide one supporting fact to show that a sexual assault was imminent, period. Not one." Rather than misleading the jury as to the applicable law, the State's closing argument addressed the possibility of self-defense in the event of either actual sexual assault or imminent sexual assault.

We cannot conclude that trial counsel's performance was deficient because of his failure to object to the prosecution's permissible argument. Rather than conduct that was "so outrageous that no competent attorney would have engaged in it," trial counsel's decision not to object was supported by the applicable law regarding proper argument. *Goodspeed*, 187 S.W.3d at 392; *see Brown*, 270 S.W.3d at 570.

Because Ibrahim has not proved deficient performance by his trial counsel, we overrule his sole issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.

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