Affirmed and Memorandum Opinion filed February 23, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00080-CR

JOSHA RENEE PRIOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 73278

M E M O R A N D U M O P I N I O N

Appellant Josha Renee Prior appeals her conviction following a jury trial for aggravated assault with a deadly weapon. *See* Tex. Penal Code Ann. §§ 22.01(a)(2), 22.02(a)(2) (Vernon 2015). Appellant contends that she received ineffective assistance of counsel. We affirm.

BACKGROUND

Appellant's conviction arises from a confrontation with complainant Bruce Batcher at a convenience store in Brazoria County, Texas, on March 14, 2015. Most facts surrounding the altercation were disputed at trial.

Appellant testified that she was parked in the convenience store parking lot cleaning out her car while her brother went inside the store. Appellant testified that she noticed Bratcher in the parking lot looking at her "funny," so she nodded her head as a hello to him. Appellant stated at trial that she was scared of Bratcher and asked herself under her breath: "Why is he looking at me?" According to appellant, Bratcher responded aggressively with profanity and walked toward her after asking: "What did you say?" Appellant said she felt threatened, went to her car, and pulled out a BB gun that was similar in appearance to a real gun. Appellant claimed she immediately stuck the BB gun into her waistband and never pointed it at Bratcher. Appellant acknowledged a BB gun can be used to hurt someone.

Bratcher testified that he was going to the convenience store to get candy for his wife when he noticed someone in the parking lot bending over with her underwear exposed. According to Bratcher, appellant directed profanity at him as he walked past and asked what he was looking at. Bratcher responded, "Pardon me?" Appellant repeated herself and Bratcher replied with profanity. Appellant responded by saying she had something for Bratcher and pulled a gun out of her car that looked similar to a gun owned by Bratcher's wife. Bratcher testified that he saw the barrel after appellant slid the top of the gun back to cock it. According to Bratcher, appellant pointed the gun at him and waived her arms around using more profanity. Bratcher testified that he was afraid appellant would shoot him with the gun she was pointing at him. Bratcher said appellant eventually put the gun into her waistband; Bratcher called to his wife, who was sitting in their vehicle a short

distance away, for help. Bratcher's wife testified that she saw Bratcher interacting with appellant but could not hear them over the car engine and never saw a gun.

Deputy Jeffrey Jernigan of the City of Pearland Police Department testified that no other witnesses present at the scene reported the incident to the police or came forward to testify. No weapon was recovered. The jury saw pictures of Bratcher's wife's gun, which Bratcher claimed looked like the gun appellant had used.

During the charge conference, appellant's trial counsel asked the trial court to remove a self-defense instruction from the jury charge.[1] The trial court asked appellant directly if it was her decision to not let the jury decide if she was acting in self-defense, and she responded affirmatively. The trial court omitted the self-defense instruction from the jury charge in conformity with this request.

The jury found appellant guilty and sentenced her to five years in the Texas Department of Criminal Justice Institutional Division. Additionally, the jury assessed a $10,000 fine. Appellant filed a motion for new trial based on ineffective assistance of counsel, and a hearing was set for February 6, 2015. The record does not reflect that the hearing was held or that the trial court expressly ruled on the motion. Therefore, the motion was overruled by operation of law. *See* Tex. R. App. P. 21.8. (motions not ruled on within 75 days after imposition of sentence will be deemed denied). Appellant timely filed a notice of appeal.

STANDARD OF REVIEW

To prevail on a claim for ineffective assistance of counsel, an appellant must

[1] The text of the instruction does not appear in the appellate record. Under the Texas Penal Code, "[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." Tex. Penal Code Ann. § 9.31 (Vernon 2015).

show by a preponderance of the evidence that (1) trial counsel's performance fell below the objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting *Strickland* standards in Texas).

To satisfy *Strickland*'s first prong, the appellant must identify acts or omissions of counsel that allegedly were not the result of reasonable judgment. *Strickland*, 466 U.S. at 690. A defendant must overcome the presumption that trial counsel's actions fell within the wide range of reasonable and professional assistance. *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). If the reasons for counsel's conduct at trial do not appear in the record and it is possible that the conduct could have been grounded in legitimate trial strategy, then an appellate court will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. *Id.*; *see also Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012). To warrant reversal when trial counsel has not been afforded an opportunity to explain his reasons, the challenged conduct must be "so outrageous that no competent attorney would have engaged in it." *Roberts v. State*, 220 S.W.3d 521, 533–34 (Tex. Crim. App. 2007) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

To satisfy *Strickland*'s second prong, the appellant must establish a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694. Failure to satisfy either prong defeats an ineffective assistance claim. *See id.* at 697.

In determining whether counsel was ineffective, we consider the totality of the circumstances of the particular case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "An appellate court should be especially hesitant to

declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation . . . .” *Id.* at 814.

ANALYSIS

Appellant contends she received ineffective assistance because (1) trial counsel elicited testimony from appellant on direct examination admitting to the exhibition of a BB gun, which had no logical purpose other than demonstrating that appellant acted in self-defense; and then (2) requested the omission of a self-defense instruction. The record is silent as to counsel’s trial strategy, and appellant has not rebutted the strong presumption that counsel exercised reasonable professional judgment. *See id.*

Although appellant testified that she felt threatened and exhibited a BB gun, she asserted she never threatened Bratcher’s life. Appellant claimed a BB gun is only a toy, and she never pointed it at Bratcher. An accused must admit to all the elements of a crime charged before the accused can to rely on a legal justification such as self-defense. *See Ex parte Nailor*, 149 S.W.3d 125, 132–134 (Tex. Crim. App. 2004).

In *Nailor*, the appellant argued he did not intend to cause harm and was acting defensively when the complainant’s injuries occurred. The court concluded that counsel’s performance was not deficient for failing to request an instruction on self-defense; instead of relying on self-defense, counsel argued lack of intent. *Id.* at 134. Because the appellant in *Nailor* attempted to negate elements of the crime rather than admit them and argue they were legally justified, he was not entitled to the defense. *Id.* (quoting *Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999).

Here appellant similarly argued that she never meant to threaten Bratcher—

denying an intentional mens rea—and she never pointed the gun at Bratcher—denying the actus reus relied on by the State to show assault with a deadly weapon. Because appellant did not admit to the elements of the crime, it is not clear she was entitled to an instruction on self-defense.

Additionally, appellant admitted she did not call the police because "nobody touched nobody," and she could have ended the confrontation by getting in her car instead of pulling out the BB gun. In light of this testimony, her counsel rationally could have concluded that a request to exclude self-defense from the charge was appropriate. *See* Tex. Penal Code Ann. § 9.31(b) (Vernon 2015) ("The use of force is not justified: (1) in response to verbal provocation alone . . . or (5) if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was: (A) carrying a weapon in violation of Section 46.02.").

Throughout the trial, counsel challenged the credibility of the witnesses, highlighted the lack of corroborating evidence, and argued that a BB gun was a toy and not a deadly weapon. Instead of arguing self-defense, counsel urged the jury to find the State had not met its burden to prove all the elements of the crime beyond a reasonable doubt. Trial counsel reasonably could have concluded that removal of a self-defense instruction was sound strategy in light of appellant's admissions during cross-examination. *See Goodspeed*, 187 S.W.3d at 394 ("These proposed reasons are speculative, but . . . that is the problem with trying to evaluate an ineffective assistance claim in which defense counsel has not been given an opportunity to respond, and why such claims are usually rejected.").

In *Vasquez v. State*, 830 S.W.2d 948 (Tex. Crim. App. 1992), the court held that counsel was deficient in not requesting a necessity instruction when appellant's testimony raised the defense and appellant had nothing to lose by

requesting such an instruction. *Id.* at 951. This case is distinguishable from *Vasquez* because appellant's testimony did not clearly raise self-defense, and including such an instruction could have focused the jury on unfavorable and inconsistent testimony of the appellant.

Because self-defense was not clearly raised by the evidence and was not explicitly relied on by counsel, requesting a charge regarding that defense be omitted was not ineffective assistance in this case. *See Nailor*, 149 S.W.3d at 134 (failure to request jury instruction on self-defense was not ineffective assistance because self-defense was not explicitly presented in the evidence and counsel did not rely on theory of self-defense at trial); *Wert v. State*, 383 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (counsel was not ineffective for failing to request a defense of property instruction when that defense was inconsistent with trial strategy).

This record does not demonstrate that trial counsel's strategy fell outside the range of professional assistance, and appellant has not overcome the presumption that trial counsel's performance was constitutionally sufficient. Because appellant has failed to satisfy *Strickland's* first prong, we need not address the second prong. *Strickland*, 466 U.S. at 697.

CONCLUSION

We overrule appellant's sole issue on appeal and affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Brown.
Do Not Publish — Tex. R. App. P. 47.2(b).