In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00435-CR

TINA E. SPEARS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 08-03115

MEMORANDUM OPINION

Tina E. Spears appeals from her murder conviction, for which she received a twelve-year sentence. Spears contends that the trial court made several comments during voir dire that destroyed her presumption of innocence. Spears also asserts that during final argument, the trial court erred when it sustained the State's objection to her attorney's argument inferring that the State was required to prove that Spears had a motive to kill to convict her of murder. We affirm the trial court's judgment.

Background

Spears and Gerry Don Harvey, both from Arkansas, were living together in a camper-trailer in Sabine Pass. According to the testimony at trial, Harvey was a convicted felon and a fugitive from Hot Springs County, Arkansas. Also, Harvey had been abusive towards Spears and had forced her, against her will, to come with him to Texas. Spears, who testified during her trial, admitted that she had shot Harvey, but she claimed that she did it in self-defense because she "felt that was the only way for [her] to be able to leave."

The trial court gave the jury an instruction on self-defense. However, the jury rejected Spears's self-defense claim and convicted her of murder. At punishment, after finding that Spears had acted "under the immediate influence of sudden passion arising from an adequate cause[,]" the jury assessed a twelve year sentence.

Voir Dire

Relying on article 38.05 of the Texas Code of Criminal Procedure,[1] Spears argues that the trial court's statements during voir dire violated her due process rights to the presumption of innocence and consequently, is fundamental error requiring reversal. *See*

[1]Article 38.05 of the Texas Code of Criminal Procedure provides that:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

TEX. CODE CRIM. PROC. ANN. art. 38.05 (Vernon 1979).

TEX. CODE CRIM. PROC. ANN. Art. 38.05 (Vernon 1979). Specifically, Spears argues that (1) the trial court informed the venire that it would be presented with punishment options at a later time, thus, presuming her guilt; and (2) the trial court stated to the venire that the alleged offense in fact had occurred in Jefferson County, thereby eliminating the State's burden to prove venue.

During voir dire, the trial court, after specifically explaining the presumption of innocence and the State's burden of proof, explained that Spears had elected to allow the jury to assess punishment, stating:

> All right. I've talked to you about the defendant's election to have you, the jury, determine punishment if and only if she is first found guilty. You need to know what the punishment range [is] for a first degree felony. One convicted of a first degree felony offense such as murder in the State of Texas carries with it the following punishment range: No less than 5 and no more than 99 years imprisonment or life imprisonment. Also, a fine of up to $10,000 may be assessed. In certain cases, probation may be allowed even for first degree felonies and if it is shown that the defendant meets the qualifications for probation, you, the jury, may consider whether probation is appropriate in this case; but, again, it's your determination. For you to determine that probation would be the appropriate punishment, if you get to that point, you would have to, No. 1, assess a punishment first of imprisonment no more than 10 years, 10 years or less. Furthermore, you would have to recommend to the Court that the defendant's punishment be probated. If that is done, the Court under the law of Texas must follow your recommendation. Now, you can also assess a punishment of 10 years or less and not probate if that's what you deem is appropriate. That's your decision. You will get all of those options later on, but you have to know what the punishment range is.

After these comments, the trial court then asked the venire whether any veniremember could not consider the full range of punishment. Spears contends that by the trial court

stating the jury would "get all of those options later on," the trial court implied that Spears was guilty.

Spears also complains that the trial court implied that she was guilty when the court explained that the offense had occurred in Jefferson County. During voir dire, Spears's attorney told the venire that his client was from Arkansas. At that point, the trial court interjected:

> Just for clarification, even though we're talking about the defendant being from Arkansas, this occurrence happened in Jefferson County, Texas. We're just not taking a case out of Arkansas. There was a reason that it's here, because the event occurred in this county. I just want to make sure. Some folks might be confused about that event as alleged.

Spears contends that by this statement, the trial court informed the jury that "(1) the event occurred, and (2) it occurred in Jefferson County, Texas[,]" thereby eliminating the State's burden to prove those elements.

Immediately following the trial court's statement, Spears's counsel responded:

> The alleged event is that my client intentionally or knowingly caused the death of an individual; and under state law and Federal law and probably laws of most of the civilized world, that's a crime. In Texas, it's called murder. Now, I'm not here to tell you that I don't believe that's a serious crime. I do believe that's a serious crime. My client does too. I'm sure you-all do, but what I mostly want to talk to you about is does anybody believe that this type [of] action is ever justified? Is it ever justified to take some person's life?

Spears's counsel then proceeded to question the venire about the circumstances under which deadly force would be justified.

During voir dire, Spears did not object to the trial court's comments that she complains of here. Generally, a defendant must make a timely, specific objection at trial or the defendant waives the right to have the appeals court address the complaint on appeal. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). It is well established that nearly every right may be waived by a party's failure to timely object during trial. *See Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002).

Despite the law's general requirement of a timely trial objection, we note that the Court of Criminal Appeals, in a plurality opinion, previously found that a trial court's comments "which tainted [the defendant's] presumption of innocence . . . were fundamental error of constitutional dimension and required no objection." *Blue v. State*, 41 S.W.3d 129, 132 (Tex. Crim. App. 2000). In *Blue*, the trial court, while apologizing to the venire for a long delay, explained that the delay had been caused by the defendant's inability to decide whether to accept a plea bargain; and then, the trial court expressed its preference that the defendant enter a guilty plea. *Id.* at 130.

Since deciding *Blue*, the Court of Criminal Appeals has clarified the types of statements that trial courts can make without violating *Blue*. *See Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). In *Jasper*, the Court recognized that several types of comments do not rise to the level of fundamental error unless the comments bear upon the presumption of innocence or vitiate the impartiality of the jury. *Id.* Examples of

such comments include those made to correct a misstatement or misrepresentation of previously admitted testimony, to maintain control and expedite the trial, or to clear up a point of confusion, as well as comments revealing irritation at counsel. *Id.*

With respect to the trial court's comments about the potential punishment range faced by Spears, the context of the trial court's comments concern the venire's ability to consider the full range of punishment possible in the case. The trial court predicated its comments by explaining that punishment would be determined by the venire "if and only if [Spears] is first found guilty[,]" by saying at one point "if you get to that point," and by having earlier explained that Spears was presumed innocent. Because the trial court conditioned its later comment, we conclude that the jury, having heard the trial court's full explanation, would have understood that the trial court had not conveyed any belief about Spears's guilt of the charged offense.

A juror must be able to consider the full range of punishment for an offense, and voir dire questions regarding a veniremember's ability to do so are generally proper. *See Standefer v. State*, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001); *Banda v.* State, 890 S.W.2d 42, 55 (Tex. Crim. App. 1994); *see also* TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (Vernon 2006). Additionally, Spears's jury charge states that "[a]ll persons are presumed to be innocent[,]" and explains that the prosecution has the burden of proving the defendant guilty "beyond a reasonable doubt." We conclude that Spears was required to make a timely objection to the trial court's comments at issue in order to

preserve her complaint because the trial court's comments, when placed in context, do not rise to a level of fundamental error.

With respect to the trial court's explanation that the offense had occurred in Texas, the context of the trial court's comment reveals that it sought to clarify for the jury why an Arkansas resident would be tried in Jefferson County, Texas. The trial court indicated that "this occurrence happened in Jefferson County," but by doing so it did not imply that Spears had committed any crime. Additionally, Spears never contested venue; instead, she explained that she shot Harvey in the camper, which was located in Sabine Pass, Jefferson County, Texas.

At the trial's conclusion, Spears did not advance any claim that she had not shot Harvey, or that he had not been shot in Jefferson County, Texas, nor could she have reasonably argued that these elements were unproven based on the testimony before the jury. In their proper context, the trial court's comments explaining why the trial was taking place in Jefferson County also do not rise to the level of fundamental error. *See Jasper*, 61 S.W.3d at 421.

We conclude that Spears was required to object during trial to the comments about which she now complains on appeal, and we further conclude that by failing to do so, she has waived the complaints she raises in issues one and two. We overrule Spears's first and second issues.

Closing Argument

In issue three, Spears asserts that the trial court erred by sustaining the State's objection to her attorney's argument on self-defense. Specifically, Spears complains about the following:

> [Defense Counsel:] . . . People don't just pick up a gun and shoot somebody. There is a reason for it. What's the reason? Why did [Spears] do it? The State, I didn't hear any other reasoning other than self defense that she was trying to get away from the guy.
>
> [The State]: Objection, Your Honor, argument outside of the record and it is well-known the State must not prove any motive and defense counsel's argument invites the jury to speculate that the State must prove motive and that is improper.
>
> THE COURT: All right. Sustained. Proceed.

Spears argues that because the objected to portion of her argument pertained to her self-defense claim, the trial court, by sustaining the State's objection, discounted her defensive argument and denied her a fair trial.

A criminal defendant is allowed to argue any defensive theory supported by the evidence admitted at trial. *Arnold v. State*, 68 S.W.3d 93, 102 (Tex. App.–Dallas 2001, pet. ref'd), *cf. Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). Counsel, during closing argument, may draw all inferences from the facts in evidence that are reasonable, fair, and legitimate. *Allridge v. State*, 762 S.W.2d 146, 156 (Tex. Crim. App. 1988); *see also Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973) (setting forth the four permissible areas of jury argument). However, arguments that misstate the

law are improper. *Arnold*, 68 S.W.3d at 102; *see also Culton v. State*, 95 S.W.3d 401, 404, 406 (Tex. App.–Houston [1st Dist.] 2002, pet. ref'd). With respect to arguing burdens of proof, defense counsel may not make statements about the State's burden of proof that are inaccurate or misleading. *Loar v. State*, 627 S.W.2d 399, 401 (Tex. Crim. App. 1981); *Arnold*, 68 S.W.3d 102.

In a case involving a claim of self-defense, once a defendant satisfies his initial burden of producing some evidence to justify submitting a self-defense instruction, the State's burden does not change: it must still prove beyond a reasonable doubt that the defendant committed the charged offense. *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991); *see also* TEX. PEN. CODE ANN. §§ 9.31, 9.32 (Vernon Supp. 2009). While the State has the burden of persuasion with respect to the defendant's self-defense claim, the State does not have the burden of producing evidence to refute the defendant's defensive theory. *Saxton*, 804 S.W.2d at 913. Even where relevant to prove the commission of an offense, the State has no burden to prove motive, as motive is not an essential element of a criminal offense. *Loudres v. State*, 614 S.W.2d 407, 411 (Tex. Crim. App. 1980); *see also Crane v. State*, 786 S.W.2d 338, 349 (Tex. Crim. App. 1990).

In this case, the statement made by Spears's counsel that he had not heard "any other reasoning other than self[-]defense," implied a burden of proof that the State did not have; the argument implied that the State, in order to refute Spears's self-defense claim, had to present evidence of Spears's motive to kill Harvey. But the State was not required

to prove what motivated Spears to kill Harvey to prevail. *Loudres,* 614 S.W.2d at 411.While the jurors had to unanimously agree that the defendant's conduct was not justified by self-defense, it was not necessary for each juror to unanimously agree as to why. *Rodriguez v. State*, 212 S.W.3d 819, 821 (Tex. App.–Austin 2006, no pet.). We conclude that the trial court properly sustained the State's objection to Spears's closing argument. We overrule Spears's third issue. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on June 2, 2010
Opinion Delivered June 23, 2010
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.