In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00398-CR

JOSHUA BRADLEY YOUNG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 75th District Court
Liberty County, Texas
Trial Cause No. CR28253

MEMORANDUM OPINION

Joshua Bradley Young appeals his convictions for five counts of aggravated assault with a deadly weapon on a peace officer. Young, his girlfriend (Stephanie Moye), and their friend (Brett Edwards) had been taking methamphetamines for several days and fell asleep inside a trailer on Young's family's property in Liberty County. A captain with the Liberty County Sheriff's Department received information from numerous sources that Young might be uncooperative if law enforcement authorities attempted to execute an outstanding warrant for his arrest. Officers arrived at the trailer after dark to execute the warrants for the arrest of Young and Moye. The officers announced their

presence. When the lights were turned off in the trailer, the officers retreated. During the all-night standoff, shots were fired from inside the trailer. The officers did not return fire. Young, Moye, and Edwards were ultimately forced out of the trailer with tear gas. No officers were injured. Moye, Young, and Edwards were taken into custody. After being questioned and submitting to a gun residue test, Edwards was released.

Spent shell casings from a 12-gauge round were located inside the trailer. Several parts of a disassembled shotgun were found concealed in different areas. Young, Edwards, and Moye were swabbed for DNA testing. Fingerprint and DNA testing did not link any of them to the gun.

Stephanie Moye testified that when the Liberty County police announced their presence, she saw Young turn off the light and grab his loaded shotgun. Moye stated that Edwards pulled her down off the bed and they got beside each other on the floor. She explained that Young fired several shots. No one returned fire. She testified that she did not shoot the gun that night. She knows Edwards did not shoot the gun because he was right next to her. She explained that she knows Young shot the gun because, even though it was dark, the muzzle flash when the gun was fired provided enough light for her to see Young's face.

Shortly after Moye was forced out of the trailer, she provided a statement implicating Young as the shooter. At trial, Moye admitted that her grand jury testimony that Edwards was the shooter was a lie.

Brett Edwards testified he was awakened by a gunshot coming from inside the trailer, and he "[s]at [Moye] down on the ground." He heard five to ten gunshots from inside the trailer during the night. He claimed he did not shoot the gun, and he knew Moye did not shoot the gun because she was on the floor and was scared. Edwards testified he never saw who shot a gun that night because it was dark. Common sense told him that Young must have been the shooter. Edwards said that no gunshots came from outside the trailer. During the night no one in the trailer said anything. He did not know that police were outside until the tear gas forced him out of the trailer the next morning. He said that after the incident he had a conversation with Young while Young was incarcerated. Young told Edwards that if Edwards took the blame he would probably get probation since it would be his first offense. Edwards testified he did not take the blame because he did not shoot the gun that night.

Jo Janna Gipson, Moye's mother, testified that about a week prior to the incident she talked to Young. She indicated that at the time there was a warrant out for Young's arrest. Young said he would not go to jail but would "start shooting first." Fearing for her daughter's safety, Gipson contacted a friend who was a detective with the Liberty County Sheriff's Department, Gipson's prior employer, to inform the detective of Young's statement. Although Gipson testified she contacted the detective on October 9, 2008, which would have been the day after the shooting, Gipson later testified that she contacted him before the shooting because she did not want her daughter to get in a

shootout. Gipson testified that some of the Liberty County Sheriff's Department officers had known Moye since she was a little girl. Gipson also testified that a couple of weeks after the shooting, she visited Young in jail. He indicated to Gipson that pieces of the gun were still in the trailer. He asked Gipson to retrieve the pieces of the gun. She did not report this to law enforcement.

Tracy Jacobs testified for the defense. Jacobs had been convicted of assault. At the time he testified, he was serving five years straight probation for felony theft. He testified that he was friends with both Edwards and Young and that Edwards told him that Edwards shot at the officers from inside the trailer. Although Jacobs admitted he knew where the Sherriff's Department was located, he never reported Edwards's comment to law enforcement even though Young had been arrested for the crime.

Five police officers testified that they were attempting to serve a warrant for Young that night and that shots from inside the trailer hit in their immediate vicinity and threatened them with imminent bodily injury.

Prior to the close of evidence, the State abandoned the attempted capital murder counts in the indictment and proceeded only on the remaining seven counts of aggravated assault with a deadly weapon on a police officer. The jury found Young guilty on five counts of aggravated assault with a deadly weapon. The trial court found enhancements to be true and sentenced Young to five consecutive life sentences, with the first of the life sentences to be "stacked" on what Young was serving on parole at the time of sentencing.

SUFFICIENCY OF THE EVIDENCE

In his first and third issues, Young challenges the sufficiency of the evidence supporting the jury's guilty verdicts.[1] In a sufficiency review, an appellate court considers all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The jury is the ultimate authority on the credibility of witnesses and the weight to be given their testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). We give deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. The Court of Criminal Appeals has concluded that

> the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis* [*v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)], are overruled.

Brooks v. State, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010).

To support the convictions, the State was required to prove that Young intentionally or knowingly threatened the peace officers with imminent bodily injury by using or exhibiting a deadly weapon during the commission of the assault, that the peace

[1] After having been properly admonished of the risks of self-representation by the trial court, Young chose to represent himself in this appeal.

officers were public servants, that Young knew the officers were public servants, and that the public servants were lawfully discharging an official duty when the offenses were committed. *See* Tex. Penal Code Ann. §§ 22.01(a)(2); 22.02(a)(2),(b)(2)(B) (West 2011). Young argues that the only evidence that he exhibited a firearm was elicited through Moye's testimony. He maintains that her testimony should have been excluded because she made an inconsistent statement to the grand jury. Young also argues Gipson lied when she testified that they had a conversation about his outstanding warrants. He also asserts that he did not tell her "he would not go to jail [but] . . . would start shooting first." He argues that this testimony was improperly admitted over his objections.

Moye testified she saw Young shoot the gun, and Edwards testified that Young had to have been the shooter. Although there was no physical evidence linking Young to the gun, pieces of the gun were retrieved from his home on the same property where his father and grandfather lived. Gipson testified that Young wanted her to retrieve the pieces of the gun that were not found by law enforcement. The jury also heard evidence that Young spoke with Edwards after the shooting and told him that if he took the blame he would only get probation. Although Jacobs testified that Edwards stated he was the shooter, Jacobs never reported the comment to the police even though Young had been arrested for the crime. The jury could reasonably believe Edwards and disbelieve Jacobs. Although Young challenges the consistency of Moye's testimony and Gipson's testimony, we must give deference to the jury's responsibility to fairly resolve conflicts in

the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. The evidence is sufficient to support the jury's verdicts. Issues one and three are overruled.

PROSECUTORIAL MISCONDUCT CLAIMS

In his second, fourth, and fifth issues, Young complains of alleged prosecutorial misconduct. In issue two, he contends "[t]he [p]rosecutor knowingly used inadmiss[i]ble, perjured testimony in order to win a conviction." In issue four, Young maintains that the prosecution knew that it did not have a record of Gipson's reporting her statement until after the shooting, and the prosecution failed to correct the false testimony. Young did not complain of prosecutorial misconduct prior to trial or during the State's presentation of Moye's or Gipson's testimony. He did not preserve error. *See Hajjar v. State*, 176 S.W.3d 554, 566 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (Prosecutorial misconduct is independent basis for objection that must be specifically urged to preserve error.). Issues two and four are overruled.

In issue five, Young complains of the prosecutor's statement during closing argument that "Josh Young, after he fired that gun, wiped it down, disassembled it, and hi[d] it." Young argues that no evidence supports this statement. He asserts that, despite the lack of an objection to the argument, this Court should perform a harm analysis and remand the cause for a new trial. By not objecting, however, Young waived his right to complain about the argument on appeal. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex.

Crim. App. 2007). Regardless, proper jury argument involves summation of the evidence, reasonable deduction from the evidence, answers to argument of opposing counsel, and pleas for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). The State's argument that Young fired the gun, wiped it down, disassembled it, and hid it was a reasonable deduction from the evidence and did not constitute prosecutorial misconduct. *See id.* Issue five is overruled.

EXTRANEOUS OFFENSE EVIDENCE

In Young's sixth issue, he argues the trial court abused its discretion by admitting Young's extraneous offenses into evidence during the guilt/innocence phase of the trial. During the State's questioning of one of the detectives, the State asked whether Young's father told the detective that "Young was not going back to prison[.]" Young objected and the trial court sustained the objection. The trial court denied Young's request for a mistrial. Another officer testified that he was present at Young's residence because "[w]e were getting ready to go execute a blue warrant on a subject that was wanted for I believe a parole violation." Young moved for a mistrial. Young complains that the trial court should have granted the mistrial because the trial court erred in "rel[ying] on inaccurate recall of the facts as to what Gipson and Mr. Young allegedly said." He argues the jury was informed that Young "is an ex-felon" and thus "any hope of [a] [p]resumption of [i]nnocence" was "destroyed."

The jury heard testimony from an officer who indicated he had known Young for many years and that the officer had received information that Young would accelerate the risk of serving the warrant. Young did not object to this testimony. The jury also heard evidence from Edwards that Young tried to get him to take the blame for the shooting because Edwards did not have a criminal history and would possibly get probation. Young did not object to this testimony on the basis that it was extraneous-offense evidence, and the jury could infer that Young had a more extensive criminal history and would not be eligible for parole. "[O]verruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling." *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998). Issue six is overruled.

INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS

In issues seven and eight, Young asserts he was provided ineffective assistance of counsel at trial. Trial counsel's explanation for the allegedly deficient conduct is important to the appellate review. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). The record here contains no motion for new trial or testimony concerning the alleged ineffective assistance. When an appellant fails to show that counsel's conduct was not the result of a strategic decision, "a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*,

253 S.W.3d 686, 696-97 (Tex. Crim. App. 2008) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

In issue seven, Young maintains that if his counsel had filed a motion to quash or dismiss the indictment based on Moye's perjured grand jury testimony, the result would have been different because the State would have been foreclosed from pursuing the indictment. Edwards told the sheriff's department captain that since neither he nor Moye shot the gun that night, Young must have been the shooter, and Edwards gave the same testimony to the grand jury. The grand jury found probable cause to believe the charges against Young were true even with Moye's testimony that Edwards was the shooter. Issue seven is overruled.

In issue eight, Young argues his counsel should have further questioned venire member #28, a former police officer who ultimately served on the jury. Young maintains that his counsel's failure to further question and challenge the venire member for cause probably resulted "in an unreliable guilty verdict." Defense counsel questioned the entire panel extensively about potential biases or prejudices, and venire member #28 did not give any responses that would give rise to concern about his ability to be fair. The following exchange occurred when defense counsel questioned the venire panel regarding whether anyone was related to law enforcement:

> [Venire Member #28]: I'm not related; but I was a police officer, a captain for 35 years in Pasadena.
>
> [Defense Counsel]: In Pasadena?

> [Venire Member #28]: I have been retired five years.
>
> [Defense Counsel]: Excellent. Fair to say you might give a little more credence to the police over a lay person?
>
> [Venire Member #28]: I was captain for the last 20 years, and I had about 200 officers that worked for me. I know they lie to you.
>
> [Defense Counsel]: You heard it here first. Police lie. We're all subject to our biases. I will put it politely. All right. Thank you.

On this record, we cannot say Young's counsel was ineffective for failing to question venire member #28 further, or for failing to challenge him for cause. *See Delrio v. State*, 840 S.W.2d 443, 444, 446-47 (Tex. Crim. App. 1992). Issue eight is overruled.

PROBABLE CAUSE FOR THE SEARCH WARRANT

In issue nine, Young contends the trial court abused its discretion in denying his motion to suppress the search warrant. Young filed a motion in limine asking for a hearing prior to any mention in the jury's presence of a search warrant. After a hearing during trial and outside the jury's presence, Young moved to suppress the warrant because it did not support probable cause for the search. The trial court overruled Young's objection. The affidavit gave details of what had transpired during the standoff, who the actors were, and the location of the crime scene.

Young argues that the affiant "was never at the scene and has no personal knowledge of the contents of the affidavit" and that all his information supporting the affidavit came from a sergeant who was not at the scene and had no personal knowledge

himself. Young argues that the affidavit does not present sufficient facts for the court to determine that probable cause existed, and the affidavit provides no corroborating information other than the officer's conclusions.

In a review of a magistrate's decision to issue a warrant, a court applies a highly deferential standard. *State v. McLain*, 337 S.W.3d 268, 275 (Tex. Crim. App. 2011). If the magistrate had a substantial basis for concluding that probable cause existed, a court will uphold the magistrate's probable-cause determination. *Gates*, 462 U.S. at 236. A court should not analyze the affidavit in a hyper-technical manner, but rather interpret the affidavit in a realistic manner, recognizing that the magistrate may draw reasonable inferences. *McLain*, 337 S.W.3d at 271; *Rodriquez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007) (footnotes and citations omitted). Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found at the specified location. *McLain*, 337 S.W.3d at 272.

When officers are cooperating in an investigation, the sum of information known to them may be considered. *Wilson v. State*, 98 S.W.3d 265, 271 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Observations reported to one officer by other officers engaged in the investigation "can constitute a reliable basis" for issuing a search warrant. *Wynn v. State*, 996 S.W.2d 324, 326 (Tex. App.—Fort Worth 1999, no pet.). Here, the direct information available to the magistrate, along with the reasonable inferences that could be drawn from the affidavit, provided a substantial basis for the conclusion that

probable cause existed that evidence of a crime would be found at the location specified in the search warrant. The trial court did not err in denying Young's motion to suppress. Issue nine is overruled.

CUMULATION ORDERS

In his final issue, Young asserts that the cumulation orders in the judgments are void. Of the five appealed judgments, only the judgment for count two involves stacking. Young complains that the trial court's oral pronouncement that "Count 2 is going to be stacked upon what you're serving on parole" is deficient because "it provides no information about the prior sentence." The written judgment on Count 2 states, "The Court orders that the sentence in this conviction shall run consecutively to and shall begin only when the judgment and sentence in the following case has ceased to operate: Criminal Cause Number CR20866, styled The State of Texas vs. Joshua Bradley Young, in the 75th District Court of Liberty County, Texas, wherein the Defendant was on the 8th day of August, 1995, duly and legally sentenced to serve a term of Twenty (20) years Imprisonment for the offense of Organized Crime – Enhancement." Young does not argue that there is a fatal variance between the trial court's oral pronouncement and the written order of sentence cumulation, but instead argues that the oral pronouncement is too vague. From the pen packet admitted during punishment, the particular conviction and sentence for which Young was on parole is clear. *See Hill v. State*, 213 S.W.3d 533, 536-37 (Tex. App.—Texarkana 2007, no pet.) ("[T]he context of the oral pronouncement

makes clear that all understood the pronouncement to be what was ultimately incorporated into the written order."). Young's final issue is overruled. The trial court's judgments are affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on December 22, 2011
Opinion Delivered May 9, 2012
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.