In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00401-CR

TAUREEN JAE BASS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause No. B150188-R

MEMORANDUM OPINION

Taureen Jae Bass appeals his conviction and thirty-year sentence for engaging in organized criminal activity. *See generally* Tex. Penal Code Ann. § 71.02(a)(1) (West Supp. 2016). In two issues, Bass argues the trial court committed reversible error by including a comment on the weight of the evidence in the jury charge and his trial counsel was ineffective for failing to object to the erroneous jury charge.

Background

The indictment alleged that on or about December 12, 2014, Bass

> did then and there intentionally and knowingly enter a habitation, without the effective consent of Kenyatta Walker, the owner, and attempted to commit and committed Aggravated Assault and a deadly weapon, to wit[:] a firearm, was used or exhibited during the commission of the offense[,]
>
> [a]nd the defendant did then and there commit said offense with the intent to establish, maintain, or participate in a combination or in the profits of a combination who collaborated in carrying on said criminal activity[.]

In the trial, the State relied upon a theory of party liability to establish Bass's guilt for the offense. *See McIntosh v. State*, 52 S.W.3d 196, 200–01 (Tex. Crim. App. 2001). The trial record includes testimony from three alleged members of the combination: (1) a drug supplier from Houston named Leonardo "Leno" Elizalde; (2) Leno Elizalde's brother, David Elizalde, and (3) the appellant, Taureen Jae Bass.

Bass lived in Beaumont and worked five or six days per week as a "hot shot" driver delivering parts and valves for refineries in several states, including Texas, Oklahoma and Pennsylvania. As a sideline that began in 2013, Bass obtained marijuana and methamphetamine from Leno Elizalde in Houston. Bass testified he would buy either a five or ten pound package of marijuana or a two pound package of methamphetamine that Bass or his brother would resell for a slight profit. Leno

Elizalde claimed that he supplied Bass with illegal drugs every other week or two and Bass paid him back after the drugs were distributed.

In December 2014, Bass owed Leno Elizalde money because his methamphetamine had been seized when Bass's brother was arrested. Leno Elizalde claimed that early in December 2014, Bass called him to say that he "had a lick" in Orange, which Leno Elizalde explained meant that Bass was planning a robbery, and requested his assistance. Leno Elizalde testified that he decided to participate and recruited David Elizalde and a friend, Francisco "Cisco" Sanchez, who were also from Houston. Bass and Leno Elizalde met the day before the robbery, and the four traveled to Orange to scope out the scene and plan the robbery and their escape route. On December 12, 2014, Bass arrived at Leno Elizalde's house in Houston and obtained guns, masks, and hats to use in the robbery. Leno Elizalde picked up David Elizalde and Cisco Sanchez and joined Bass in Beaumont. Bass drove his truck to the location of the robbery in Orange. Bass remained in the vehicle while the others broke down the door and entered the house. A shootout ensued. Leno Elizalde grabbed two packages of marijuana and returned to the truck. David Elizalde was wounded but escaped to Bass's truck. Cisco Sanchez died in the front yard of the house from a gunshot wound after Leno Elizalde and Bass could not get Cisco into the truck. Bass took the Elizalde brothers to Bass's brother's house where they

cleaned up David Elizalde's wound. They obtained bandages from Bass's wife. Bass took their clothing and weapons and drove his truck away. Bass's brother drove the Elizaldes to Bass's home, then the Elizaldes returned to Houston.

David Elizalde's account of the robbery and its aftermath largely agreed with Leno Elizalde's story. However, David Elizalde testified that the robbery was Bass's cousin's idea. David Elizalde testified that Bass showed them two houses in their scouting trip: one where drugs were sold and another where the dealers kept the drugs and money. David Elizalde claimed that they warned them that their intended victims had been robbed before and might be expecting trouble. According to David Elizalde, it was Leno Elizalde who handed out the masks as they were driving to the location of the robbery. He acknowledged that Leno Elizalde was "pretty much in charge of this kind of stuff[.]"

Bass provided a different account of the planning and execution of the home invasion robbery. According to Bass, the Elizalde brothers and Sanchez showed up unannounced at Bass's house before the day of the robbery and asked Bass to take them to Orange. Bass complied because they were dangerous, and he was afraid of them. Bass claimed Leno Elizalde directed Bass to the location of the house. Bass denied having engaged in any discussion or planning of a robbery during the drive

back to Beaumont. According to Bass, the brothers were speaking Spanish, and Bass did not understand what they were saying.

Bass testified that a day or two later, the day of the robbery, he dropped off a load in Houston and returned home. That night, Leno Elizalde, along with David Elizalde and Cisco Sanchez, appeared at Bass's door and asked for money that Bass owed him. Bass stated that Leno Elizalde did not appear to be concerned when Bass told him he did not have the money. Elizalde told Bass to drive them to Orange, and Bass agreed to do so, assuming that Leno Elizalde could pick up some money. When they came to a house, Leno Elizalde told Bass to pull over. Bass claimed he did not see guns or masks, but he was frightened when the others jumped out of the truck and started running. Bass testified he considered leaving them there when he heard gunfire inside the house, but Bass knew the others would have to return to Bass's house to retrieve their car, and he suspected they would kill him if he abandoned them. Bass testified that he was frightened, but he complied when Leno Elizalde told Bass to get out of the truck and help Cisco Sanchez. Bass took the Elizaldes to his brother's house and had his wife bring them some bandages. Later, Bass's brother drove the Elizalde brothers to Bass's house. Bass testified that Leno Elizalde told Bass to get rid of the truck. Bass drove his truck to a remote area in Hardin County and reported it stolen. Bass denied that he set fire to his truck, but it was completely

consumed by a fire approximately twenty-five minutes after Bass telephoned Leno Elizalde from Hardin County.

The Charge

In the charge conference, the parties agreed on the wording of a duress instruction proposed by the trial court. That instruction provided in part

> You have heard evidence that, when the defendant engaged in certain conduct in this case (waited for the others while they were in the house, tried to help get one of the others into his truck, drove the others back to his brother's house, helped the wounded Elizalde brother, had his wife bring first aid supplies, had his brother drive the Elizalde's [sic] back to the defendant's house, and disposed of his pick up truck), he did so because he was compelled by a threat of imminent death or serious bodily injury to himself or another.

Additionally, the charge informed the jury that the burden of proof was upon Bass to prove by a preponderance of the evidence that:

> 1. [h]e was compelled to engage in the conduct by a threat of imminent death or serious bodily injury to himself or another person if he did not engage in that conduct;
>
> 2. [t]he threat would render a person of reasonable firmness incapable of resisting the pressure; and
>
> 3. [h]e did not intentionally, knowingly, or recklessly place himself in a situation in which it was probable that he would be subject to compulsion.

The trial court included definitions of bodily injury, serious bodily injury, preponderance of the evidence, and the three elements of duress.

Bass argues the jury charge on the affirmative defense of duress was erroneous because the trial court drew attention to particular acts the trial court believed would apply to a duress defense. He maintains the harm was egregious because the comment on the weight of the evidence concerned his defense and the attorneys addressed duress extensively in their arguments to the jury.

We review an alleged jury charge error that the defendant did not object to at trial in two steps: we determine "(1) whether error existed in the charge; and (2) whether sufficient harm resulted from the error to compel reversal." *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). We will not reverse for charge error "unless the record shows 'egregious harm' to the defendant." *Id.* (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). Errors that result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. *Almanza*, 686 S.W.2d at 172.

The trial court must give the jury

> a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.

Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007). The jury charge in this case referred to particular conduct by the defendant and informed the jury that there was evidence that the defendant engaged in this conduct because he was compelled by a threat of imminent death or serious bodily injury to himself or another. Such an allusion in the jury charge to particular facts in evidence is improper. *See Bartlett v. State*, 270 S.W.3d 147, 151–52 (Tex. Crim. App. 2008). "[T]he actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Ovalle v. State*, 13 S.W.3d 774, 786 (Tex. Crim. App. 2000) (quoting *Almanza*, 686 S.W.2d at 171). A defendant cannot show egregious harm from an erroneous jury charge that benefits him. *See Martin v. State*, 200 S.W.3d 635, 642 (Tex. Crim. App. 2006).

Bass argues that by summarizing the evidence, the trial court limited the jury's consideration of other evidence that may have supported the affirmative defense of duress. Bass complains that he testified several times of his fear and his reasons for being afraid. We note, however, that in the jury charge on duress, the trial court informed the jury, "You have heard evidence that, when the defendant engaged in certain conduct in this case . . . he did so because he was compelled by a threat of

imminent death or serious bodily injury to himself or another." Although the trial court improperly summarized the evidence germane to the affirmative defense of duress, the trial court did not limit the jury's consideration of Bass's fear, as he argues in his brief. Although improper, the emphasis on the evidence supporting an issue on which Bass had the burden of proof was beneficial to his defense. Because the instruction bolstered rather than prevented the jury from considering duress, we overrule issue one.

Ineffective Assistance of Counsel

Bass contends that his trial counsel was ineffective for failing to object to the trial court's instruction on duress. To show ineffective assistance of counsel, a defendant must establish that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that the result of the proceeding would have been different but for the attorney's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). An allegation of ineffectiveness will be sustained only if it is firmly founded in the record and if the record affirmatively demonstrates the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). On a silent record, the reviewing court may conclude counsel's performance was deficient only if the challenged conduct was "so outrageous that no competent attorney would have

engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

In this case, trial counsel argued,

> If the parts that he intended to do -- intended to drive back to his brother's house or if he intended to help patch up David or he intended to go get rid of his truck -- did -- why did he do it? That's where duress comes into. Did he do it because of fear? . . .
>
> . . . .
>
> . . . If you find that more likely than not T.J. [Bass] did all these other things -- like is charged here, the -- waited for the others outside, tried to help get one of the others into the truck, drove the others back to his brother's house, et cetera, et cetera. It's in the charge here. And if you believe just by the slightest bit of evidence that he did that because he was -- out of fear of injury or death in this case, like he said, then that's duress; and you can find him not guilty based on that alone.

It could be a reasonable trial strategy to conclude that the trial court's instruction on duress allowed Bass to argue to the jury that all of the conduct that Bass engaged in was done out of fear. Because trial counsel could have declined to object to the charge as a matter of trial strategy, the record does not support a finding of deficient performance. *See Thompson*, 9 S.W.3d at 814. Because the first prong of *Strickland* has not been established, we do not reach the prejudice prong. *See Strickland*, 466 U.S. at 697; *Mallett v. State*, 65 S.W.3d 59, 68 (Tex. Crim. App. 2001).

Bass argues that the trial court abused its discretion by failing to conduct an evidentiary hearing on Bass's claim of ineffective assistance. Bass first raised an

issue regarding counsel's performance and requested a hearing in an amended motion for new trial that was filed more than thirty days after the date of sentencing. An amended motion for new trial must be filed no later than thirty days after sentencing. *See* Tex. R. App. P. 21.4(b). The trial court did not abuse its discretion by declining to conduct an evidentiary hearing and allowing the motion for new trial to be overruled by operation of law. *Klapesky v. State*, 256 S.W.3d 442, 454–55 (Tex. App.—Austin 2008, pet. ref'd).

We overrule issue two. The trial court's judgment is affirmed.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on May 22, 2017
Opinion Delivered August 30, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.