In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-17-00160-CR

LADONNA JOHNSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 140th District Court
Lubbock County, Texas
Trial Court Nos. 2015-406494 Count 2, Honorable Jim Bob Darnell, Presiding

November 27, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Ladonna Johnson (appellant) appeals her conviction for aggravated assault with a deadly weapon. According to the evidence, appellant engaged in a verbal fight with her husband when she threw hot grease at him. He was holding the couple's three-year-old daughter at the time. The hot grease landed on the child causing her to suffer severe burns. This led the State to indict appellant on two counts of aggravated assault. Only the second count was submitted to the jury, which found her guilty of the crime alleged. We affirm.

Issue One - Insufficient Evidence

Appellant initially contends that the evidence was insufficient to support the verdict. We overrule the issue.

Through count two of the indictment, the State alleged that appellant "did then and there intentionally, knowingly, or recklessly cause bodily injury to [the child] . . . by burning the [child] and the defendant did then and there use or exhibit a deadly weapon, to-wit: hot grease, during the commission of said assault[.]" No definition of the phrase "deadly weapon" was included in the indictment. According to appellant, this obligated the State to prove that the grease was a *per se* deadly weapon, i.e., a firearm or something else manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury. Yet, the trial court defined the term in its charge as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." In so instructing the jurors and upon their convicting appellant based on that instruction, there purportedly arose a fatal variance. And, because the State did not prove the hot grease was a "deadly weapon *per se*," the evidence was insufficient to support the verdict, according to appellant.

The legislature defined "deadly weapon" as either A) "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury;" or B) "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17)(A),(B) (West Supp. 2016). Given this definition and to get where appellant wants to take us, we must accept the premise implicit in her argument. That is, we must agree with her conclusion that failing to define the phrase "deadly weapon" in the indictment is the

functional equivalent to defining it as a firearm or other article designed or made for the purpose of killing or inflicting serious injury. Yet, appellant cited us to no authority so holding. Nor did she provide us with any analysis on the matter. Instead, she merely concluded as much.

Our own research uncovered no authority supporting appellant's argument. On the other hand, the State referred us to the opinion of *Johnson v. State*, 91 S.W.3d 413 (Tex. App.—Waco 2003, pet. ref'd). There, Johnson was accused, via the indictment, of causing "'bodily injury [to his wife] by cutting her neck with a knife, and [Johnson] did then and there use or exhibit a deadly weapon, to-wit: a knife, during the commission of said offense.'" *Id.* at 415. Like here, the indictment there did not allude to either aspect of the definition of "deadly weapon" found in § 1.07(a)(17) of the Penal Code. And, like appellant here, Johnson alleged that "by referring to the use only of 'a knife,' and omitting any reference to the language in subsection 'B,' the indictment of necessity allege[d] a violation of section 1.07(a)(17)(A)," that is, a deadly weapon *per se*. *Id*. The reviewing court rejected the proposition. It observed that the State was not obligated to specify whether the deadly weapon fell within either § 1.07(a)(17)(A) or (B). It was enough for the indictment to simply track the language of the statute creating and defining aggravated assault. *Id.* at 417.

So, in effect, the State's argument in *Johnson* was correct; alleging "deadly weapon" in general encompassed both (A) and (B) of § 1.07(a)(17). *See id.* at 415 (noting that "the State contends, the indictment encompasses both subsection 'A' and subsection 'B.'"). Failing to select one or the other aspect of the definition did not result in an automatic default to (A). And, because neither (A) nor (B) had to be included in

the indictment, there arose no fatal variance when the trial court selected (B) for inclusion in its jury charge. *See id.* at 418 (stating that despite the indictment's failure to mention either (A) or (B), "[t]he evidence at trial showed that [Johnson] cut his wife's throat with a knife. This proof shows that he committed an aggravated assault while using or exhibiting a deadly weapon, which is what is alleged in the indictment. In addition, the indictment sufficiently informed Johnson about the charge against him and was clear enough about the offense that he would not be subjected to double jeopardy by a differently-worded indictment about the same offense. Thus there is no variance.").

We agree with *Johnson*. It was enough for the indictment to track the language of the statute creating and defining aggravated assault. That occurred here. The State need not have defined "deadly weapon" in the indictment. And, failing to define it did not automatically obligate the State to prove the purported deadly weapon was of the kind described in § 1.07(a)(17)(A). Lacking legal foundation, appellant's argument is meritless.

Issue Two - Lesser Included Offense

Next, appellant contends that the trial court erred in refusing to instruct the jury on the lesser included offense of misdemeanor assault. In reading the contention, we discovered that she expressly conditioned the viability of her argument upon the viability of her first issue.[1] In other words, she believes herself entitled to an instruction on simple assault because the State failed to present evidence that the hot grease was a "deadly weapon *per se.*" But because we rejected her first issue, her second issue also lacks foundation. Moreover, appellant does not assert that the evidence failed to prove

[1] To quote from appellant's brief: "Appellant's argument for the inclusion of the LIO [lesser included offense] on simple assault pertains to her argument in her first point of error herein, which is incorporated by reference into this point as if set out at length."

that the manner in which the hot grease was used was capable of causing death or serious bodily injury for purposes of illustrating the presence of a deadly weapon under § 1.07(a)(17)(B) of the Penal Code. Thus, we overrule it as well.

Issue Three - Effective Assistance of Counsel

Next, appellant contends that she was denied the effective assistance of counsel. This allegedly occurred when her trial counsel failed to investigate and pursue an insanity defense. Appellant raised the complaint within a motion for new trial. Though the trial court convened a hearing on the matter, it permitted the motion to be overruled by operation of law. We overrule the issue.

Ineffective assistance of counsel is composed of two elements. One is deficient performance, while the other is harm caused by the deficiency. *Ex parte Lahood*, 401 S.W.3d 45, 49 (Tex. Crim. App. 2013). More importantly, the burden lies with the proponent to establish each. *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 2009).

For purposes of this appeal, we assume *arguendo* that trial counsel failed to do that of which appellant accuses them. Instead, we focus on the element of harm. The latter is established when there is a reasonable probability that the outcome of the trial would have been different but for counsel's deficiency. *Ex parte Lahood*, 401 S.W.3d at 50. Such a probability exists when it is sufficient to undermine confidence in the outcome. *Id.*; *Hickman v. State*, No. 07-14-00193-CR, 2016 Tex. App. LEXIS 1968, at *4 (Tex. App.—Amarillo Feb. 24, 2016, pet. ref'd). (mem. op.). And when the deficiency concerns the failure to assert an affirmative defense, such as insanity, *Hill v. State*, 320 S.W.3d 901, 903-04 (Tex. App.—Amarillo 2010, pet. ref'd); TEX. PENAL CODE ANN.

§ 8.01 (noting insanity is an affirmative defense), the existence of prejudice or harm depends in large part on the likelihood that the defense would have succeeded at trial. *Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009).

Because the issue before us was encompassed within a motion for new trial denied by the trial court, the standard of review is one of abused discretion. *Hickman*, 2016 Tex. App. LEXIS 1968, at *2-3. Under that standard, we do not substitute our decision for that of the trial court. *Id.* at *3, *quoting Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). Rather, we decide if the decision was arbitrary or unreasonable, that is, whether no reasonable view of the record could support the ruling. *Id.* In making that determination, we not only view the evidence in a light most favoring the trial court's decision but also presume that all reasonable fact findings that could have been made against the losing party were indeed made against that party. *Id.*

The appellate record contains evidence of appellant having mental issues. Several years before she engaged in the conduct resulting in her current conviction, she had been deemed insane by a medical professional during her prosecution for a misdemeanor. Other evidence indicated that she suffered from schizoaffective disorder, which disorder was being treated with various medications. However, when on her medication, appellant would be "sweet," according to her husband. And, though "they" had been trying to get those medications "right" for a while, appellant had been doing "good" for the last "couple" of years, according to that same witness.

Also appearing of record is a recording of appellant talking to herself while sitting in the police car after her arrest. She could be heard saying that, because she was on her medication, she could not claim to be insane "this time."

Additionally, no medical professionals testified at the new trial hearing. Thus, there was no suggestion from any expert that appellant lacked the ability to distinguish between right and wrong or was otherwise insane when she opted to throw the hot grease. Nor did any lay person testify at the hearing that appellant was insane when assaulting the child.

In applying the standard of review against the record before us, we find ourselves unable to conclude that no reasonable view of the record supports the ruling. It may be that appellant suffered from mental disorders, but the trial court had little evidence upon which to infer that a jury could have found appellant insane when throwing the hot grease. Instead, it heard evidence indicating that her mental disorders were effectively treated through medication, that she was on those medications and doing well for the last couple of years, and that appellant herself was capable of analyzing the prospect of her claiming insanity "this time." So, it would not have been arbitrary for the trial court to conclude that appellant failed to prove the second prong of the ineffective assistance test. It could well have decided that appellant failed to show any reasonable probability that the outcome would have differed had her trial attorney investigated and pursued the defense of insanity. *See Conrad v. State*, 77 S.W.3d 424, 426-27 (Tex. App.—Fort Worth 2002, pet. ref'd) (involving the failure to pursue an insanity defense and concluding that the harm prong was not established due to the absence of expert and lay testimony indicating appellant was insane when committing the offense).

We affirm the judgment of the trial court.

Brian Quinn
Chief Justice

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