In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-11-00082-CR

LANNY DEAN CAMPBELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 196th Judicial District Court
Hunt County, Texas
Trial Court No. 26517

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

There was no dispute that Lanny Dean Campbell had shot and killed James Michael McKinnis. After a jury convicted Campbell of murder, he was sentenced to thirty-five years' imprisonment. On appeal, Campbell argues that there was error in the jury's punishment charge because the trial court failed to sua sponte include a definition of the term "preponderance of the evidence" as it related to the issue of sudden passion which he had raised. Campbell also complains that his counsel rendered ineffective assistance when he elicited testimony regarding Campbell's invocation of his right to counsel. We find that it was no error to have omitted a definition of "preponderance of the evidence" when there was no request for its inclusion and further hold that Campbell's counsel did not render ineffective assistance.

I. Campbell Cannot Show that Egregious Harm Resulted from the Court's Charge

"At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from adequate cause." TEX. PENAL CODE ANN. § 19.02(d) (West 2011). Campbell raised and obtained an instruction on the issue of sudden passion during punishment. "If the defendant proves the issue [of sudden passion] in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree." *Id.* Although Campbell failed to make a specific request that the definition of preponderance of the evidence be included in the jury charge, Campbell contends that the trial court erred in failing to make a sua sponte inclusion of a definition of that term in the charge given

to the jury in the punishment phase of the trial.

Our review of alleged error in this jury charge involves a two-step process. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994); *see also Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009). Initially, we determine whether error occurred, and then evaluate whether sufficient harm resulted from the error to require reversal. *Abdnor*, 871 S.W.2d at 731–32.

A trial court must submit a charge setting forth the "law applicable to the case." TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). "The purpose of the jury charge . . . is to inform the jury of the applicable law and guide them in its application to the case." *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007). "It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and prevent confusion." *Id.* A trial judge

> must ensure that all of the law applicable to the criminal offense that is set out in the indictment or information is incorporated into the jury charge as well as the general admonishments, including reference to the presumption of innocence, proof beyond a reasonable doubt, unanimity of the verdict, and so forth. Here he has a sua sponte duty—a duty to act without any request or objections from the parties.

Id. However, "it does not inevitably follow that [the trial judge] has a similar sua sponte duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues," which frequently depend upon trial strategy and tactics. *Id.* Yet, when a defensive issue on sudden passion is raised and included in the charge, we believe it advisable for the court to include

an instruction on the burden of proof at that time. *See id.* at 251 (when limiting instruction for extraneous offense evidence is properly requested during the guilt/innocence phase and the trial court instructs jury not to consider extraneous offense evidence admitted for limited purpose unless it believes beyond reasonable doubt that defendant committed extraneous offense, court must define burden of proof); *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000) (failure to sua sponte instruct jury on proper burden of proof for extraneous offenses during punishment phase of trial was erroneous); *Bolden v. State*, 73 S.W.3d 428, 431 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

Campbell did not object to the jury charge. Because Campbell did not raise his complaint at trial, we must first decide whether the trial court committed error in not including a definition of "preponderance of the evidence" sua sponte. This question is apparently unique in Texas.

At one point in time, Texas law required that all criminal jury charges contain a specific definition of the term "beyond a reasonable doubt" (this definition as prescribed by the Texas Court of Criminal Appeals containing within itself three definitions) and that a failure to include it when requested was reversible error. *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991). The next step was a ruling that a trial court's failure to include the definition sua sponte was automatically reversible error. *Reyes v. State*, 938 S.W.2d 718 (Tex. Crim. App. 1996). Thereafter, taking a complete about-face, the Texas Court of Criminal Appeals determined that the reasoning in *Geesa* and *Reyes* ignored over a hundred years' precedent, was quite seriously

flawed, and the reasonable doubt definition in *Geesa* was confusing and redundant, stating, "We find that the better practice is to give no definition of reasonable doubt at all to the jury." *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000).

The term "preponderance of the evidence" does not seem to suffer from the difficulty in definition that is found in defining "beyond a reasonable doubt." Both civilly and criminally, the courts in Texas have found that some variation of the phrase "greater weight of the credible evidence" has sufficed as a definition for many years. *Nat'l Bank of Garland v. Gough*, 197 S.W. 1119, 1121 (Tex. Civ. App. 1917); *Allen v. State*, 841 S.W.2d 7, 11 (Tex. Crim. App. 1992) (citing *Superior Lloyds of Am. v. Foxworth*, 178 S.W.2d 724 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.)).

Even though a generally accepted definition is available, the definition of preponderance of the evidence seems a common-sense one which could easily be understood by a jury. The phrase itself does not incorporate any arcane words or what might be called "legalese." For the most part, one could almost say that "preponderance of the evidence" means exactly what it says and needs little further definition. Certainly, a juror can determine it to be a much less onerous burden than "beyond a reasonable doubt," irrespective of whether a definition was provided the jury. Accordingly, although we have previously noted that it is the better practice to include a definition of preponderance of the evidence and a definition should certainly be included upon the request of a defendant, where appropriate, we cannot say that it was error for the trial court to have not

included such a definition in the jury charge.

Even if there would be error for the trial court to have failed to make a sua sponte insertion of the definition of preponderance of the evidence, the error which would have resulted would not have been so egregious or created such harm that Campbell did not have a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g), *superseded on other grounds by rule as stated in Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988); *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008); *Boones v. State*, 170 S.W.3d 653, 660 (Tex. App.—Texarkana 2005, no pet.). Egregious harm occurs where an error affects the very basis of a case, deprives the defendant of a valuable right, vitally affects a defensive theory, or makes the case for conviction or punishment clearly and significantly more persuasive. *Boones*, 170 S.W.3d at 660 (citing *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)).

Egregious harm is a difficult standard to meet and must be determined on a case-by-case basis. *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). We consider the charge itself, the state of the evidence (including contested issues and the weight of the probative evidence), arguments of counsel, and the record as a whole in addressing harm. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

The jury charge itself required the jury to "determine by a preponderance of the evidence whether or not [Campbell] caused the death under the immediate influence of sudden passion arising from an adequate cause." The proper definitions of sudden passion and adequate cause as

defined by statute were provided, and the application paragraph of the charge was proper.

During the arguments of counsel, the State erroneously told the jury that it was Campbell's burden to prove sudden passion "beyond the preponderance of the evidence." However, Campbell's counsel emphasized the proper standard:

> Now, I do want to address this special issue on page 5. And the first thing that I would like to make sure you understand—because this is different, and it's not explained to you, I don't believe, anywhere else in here. It says, You must determine by a preponderance of the evidence.
>
> . . . the burden of proof is by a preponderance of the evidence and that means that you find that the evidence that you received proved a little bit more one way or the other, not beyond a reasonable doubt, not clear and convincing, but preponderance of the evidence.
>
> Now, Mr. Lilley misspoke when he said beyond a preponderance of the evidence, and that would be easy to do because we have been talking about beyond a reasonable doubt all week, but look at the words here "by a preponderance of the evidence."

With regard to the record, Campbell testified that McKinnis shoved him in his living room during an argument, throwing him "down on the ground into [a] toolbox." Campbell became scared and went to his bedroom to retrieve a gun. Campbell testified that he took "a shell out of [the gun] to make sure it had one in the chamber, and I fired one through the floor as a warning to him to get the hell out of my house." Campbell stated that when he went back to the living room, McKinnis "started coming towards me, and I told him to leave one more time. And he kept coming and I shot him in the foot. And then he started reaching for me and coming again, and I raised it higher and shot, and he still was reaching for my gun, and I shot again."

The jury also heard a substantially different version of events from that to which Campbell testified. Campbell's son, Jordan, testified that Campbell was the first aggressor. According to Jordan, McKinnis was asking Campbell why he was being instructed to leave. In response, Jordan testified "my dad pushed him and [McKinnis] said, Well, we can take this outside like real men if you want to, but I don't want to. My dad said I can handle this." Jordan told the jury that he never saw McKinnis push Campbell. Jordan remembered McKinnis "heading down the steps and I was behind him. . . I remember. . . my dad opening the door and I remember gunshots." McKinnis' body was found in the front yard.

Jordan's version of events was confirmed by eyewitness Brian Stanley. Stanley said that Campbell and McKinnis engaged in an argument, McKinnis did not shove Campbell, and McKinnis left the argument by exiting through the door. Stanley expounded further, saying that Campbell "came outside" and started shooting at McKinnis.

By rejecting Campbell's self-defense issue raised during the guilt/innocence phase, the jury indicated its disbelief in Campbell's story. In line with its previous rejection of self-defense, the jury could have decided that McKinnis did not provoke Campbell in a manner that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render them capable of cool reflection.

Considering the jury charge, arguments of counsel, the record in this case, and Campbell's thirty-five-year sentence, we hold that Campbell has failed to show that he was egregiously

harmed as a result of the alleged jury charge error.

We overrule this point of error.

II. Campbell Received Effective Assistance of Counsel

Next, Campbell argues, without specific citation to the record, that his counsel improperly commented before the jury on Campbell's invocation of his constitutional right to an attorney prior to interrogation. Campbell contends this conduct resulted in ineffective assistance.

We begin our analysis with the rule that any allegation of ineffectiveness of counsel must be firmly founded in the record. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Wallace v. State*, 75 S.W.3d 576, 589 (Tex. App.—Texarkana 2002), *aff'd*, 106 S.W.3d 103 (Tex. Crim. App. 2003). From the record received by this Court, which does not contain counsel's reasons for mentioning Campbell's right to seek an attorney prior to interrogation, Campbell bears the burden of proving that counsel was ineffective by a preponderance of the evidence. *Goodspeed*, 187 S.W.3d at 392; *Thompson*, 9 S.W.3d at 813; *Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984). Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing an evaluation of the merits of the claim involving ineffective assistance claims. *Thompson*, 9 S.W.3d at 813. "In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect" the reasoning of trial counsel. *Id.* at 813–14. As demonstrated below, this is such a case.

We apply the two-pronged *Strickland* test handed down by the United States Supreme Court to determine whether Campbell received ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Failure to satisfy either prong of the *Strickland* test is fatal. *Ex parte Martinez*, 195 S.W.3d 713, 730 n.14 (Tex. Crim. App. 2006).

First, Campbell must show that counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms. *Strickland*, 466 U.S. at 687–88. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and that the challenged action could be considered sound trial strategy. *Id*. at 689; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). Therefore, we will not second-guess the strategy of Campbell's counsel at trial through hindsight. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979); *Hall v. State*, 161 S.W.3d 142, 152 (Tex. App.—Texarkana 2005, pet. ref'd).

Here, the State's brief points us to two places in the record. Campbell's counsel was cross-examining investigator Roger Seals, when counsel asked, "Isn't it true, Mr. Seals, that when asked to talk to the law enforcement authorities, my client invoked his constitutional right and asked to have his attorney?" Seals replied that Campbell had invoked this right and answered "no" when asked if he had "any problem with the Constitution." Later in the trial, counsel confirmed from Lieutenant Tommy Grandfield that Campbell did not have an attorney at the time he was interviewed and gave a statement.

One of the arguments counsel made to the jury involved the possibility of an illegal search. Neither Campbell nor his wife (nor any other person authorized to do so) had provided consent to search their home, and Grandfield testified that a search warrant was then required. Counsel argued,

> We heard testimony from different people, especially including Mr. Haines, that Investigator Haines went through the premises when he arrives somewhere around a quarter of 2:00 in the morning. We know according to this testimony that prior to that, and at the same time, there was Investigator Peters. There was Investigator Snead. There were two other informed [sic] officers. There was even Wills Point police officers there, according to Mr. Haines.
>
> And these people were not going in the house to brew a pot of coffee. They were going into search. They had no authority to go into search. Because this search warrant, if you read it, does not say that you can recover the stuff that you have already found. It says now, at 4:17 a.m., law enforcement authority, you have the right to now go and search . . .
>
> And the Court tells you if you, the jury, believe or have reasonable doubt that the evidence was obtained in violation of the provisions of Article, referring back to the Constitution and the laws of Texas, Constitution and the laws of the United States of America. And then in such an event, you shall disregard any evidence that's obtained.

Haines had testified "at approximately 4:30 a.m." he was "notified that the search warrant had been signed and to begin processing the crime scene." It could have been counsel's trial strategy to hint to the jury that the officers were not following the constitutional playbook.[1] Counsel could have believed that the jury might think if the investigators had ignored Campbell's right to counsel, perhaps they also obtained evidence in violation of the Constitution during the search. Counsel also could have sought to challenge the credibility of the officers and

[1]Campbell cites to cases holding that one's invocation of the right to counsel is inadmissible as evidence of guilt. *Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991).

investigators through this line of questioning. Absent a record explaining counsel's reasoning, we will not second-guess the strategy of Campbell's counsel at trial through hindsight.

The second *Strickland* prejudice prong requires a showing that but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–88. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome, meaning that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Smith*, 286 S.W.3d at 340.

With respect to this second prong, Campbell notes that the jury was interested in Campbell's statement obtained during interrogation, although it was not entered into evidence. He argues that because his invocation of his right to counsel was brought to the jury's attention, "the jury was able to infer guilt and the trial counsel severely diminished Mr. Campbell's argument of self-defense." However, Grandfield admitted that the substance of the statement made by Campbell, at a time when he did not have an attorney present, included a version of events that he had been "pushed down by James Michael McKinnis." This testimony substantiated the self-defense claim. Thus, the jury's request for the substance of the statement does not establish egregious harm and dispels the theory that counsel's mention of Campbell's invocation in this case led to an inference of guilt. Additionally, considering Jordan's and Stanley's testimony, we find that Campbell has failed to demonstrate that the result of the proceeding would have been different absent counsel's alleged error.

We overrule Campbell's last point of error.

III. Conclusion

We affirm the judgment of the trial court.

Bailey C. Moseley
Justice

Date Submitted: December 19, 2011
Date Decided: January 6, 2012

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