IN THE
TENTH COURT OF APPEALS

No. 10-18-00250-CR

GEORGE KRISTOPHER NEVILLE,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2016-1624-C1

OPINION

George Kristopher Neville was convicted of Assault and Official Oppression, both Class A misdemeanors, and sentenced to 6 months in jail—both sentences to run concurrently. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(1); 39.03(a)(1). The trial court suspended both sentences, and Neville was placed on community supervision for 12 months. Because the trial court did not err in denying Neville's motion to disqualify the district attorney's office or in failing to submit a requested charge to the jury and because the State was not required to prove excessive force, the trial court's judgment is affirmed.

BACKGROUND

Neville was an officer with the Waco Police Department. He was part of the street-crimes unit and rode with a partner. He and his partner provided backup to another street-crimes unit that was attempting to stop a suspect in a vehicle. By the time Neville and his partner arrived on the scene, the suspect was in custody and handcuffed. When the suspect would not give Neville his name, Neville resorted to calling the suspect a "dumbass." When the suspect returned the name-calling, to which Neville took offense, Neville grabbed the suspect by the throat for a few seconds. Approximately a month later, an internal investigation was conducted, and Neville was ultimately charged with two offenses.

MOTION TO DISQUALIFY

Neville filed a pretrial motion to disqualify the McLennan County District Attorney's Office alleging: (1) that the district attorney, or someone from the office, called the Waco Police Department and suggested the department review a video of Neville's encounter with a criminal suspect; (2) as a result of that call, an internal investigation was conducted in which Neville was required to give a statement; (3) such statement, known as a *Garrity*[1] statement, may not be used against Neville in a criminal proceeding; (4) the Waco Police Department provided all of its internal investigation materials, including Neville's *Garrity* statement and a 21-page transcript of Neville's internal investigation

[1] *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (if employee must choose between self-incrimination and termination, any "waiver" of Fifth Amendment rights by employee is legally coerced and may not be used against that person in a future criminal proceeding). There was no dispute that Neville made a "*Garrity*" statement or that it could not be used against him in his criminal trial.

interview, to the McLennan County District Attorney's Office; and (5) consequently, due to the possession and review of this material, the District Attorney's Office could "formulate their case strategy and their crossexamination (sic) of Neville with the benefit of a statement which was not to have been used…for any purpose." In other words, Neville requested the disqualification of the McLennan County District Attorney's Office because the office had possession of and reviewed the internal investigation materials and could potentially use them in its preparation for the trial against Neville and in formulating the trial tactics to be used. The trial court denied Neville's motion.

For the same reasons stated in his motion to disqualify, Neville contends on appeal that the trial court erred in denying the motion.

The standard of review for disqualification of the prosecutor by the trial court is whether the court abused its discretion. *Landers v. State*, 256 S.W.3d 295, 303 (Tex. Crim. App. 2008). The trial court abuses its discretion only when the decision lies outside the zone of reasonable disagreement. *Id.*; *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005). In reviewing the historical facts upon which the trial court's ruling on a motion to disqualify is based, an appellate court should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Id.*; *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When the defendant contends that the lower court erred in applying the law to the trial court's findings, the review is de novo. *Id.*

"The office of a district attorney is constitutionally created and protected; thus, the

district attorney's authority 'cannot be abridged or taken away'" lightly. *Buntion v. State*, 482 S.W.3d 58, 76 (Tex. Crim. App. 2016) (quoting *Landers v. State*, 256 S.W.3d 295, 303-04 (Tex. Crim. App. 2008)). Article 2.01 of the Code of Criminal Procedure recognizes that a district attorney "shall represent the State in all criminal cases" *except* when a district attorney's employment prior to election would be adverse to the prosecution of a particular case, *i.e.* a conflict of interest. *See* TEX. CODE CRIM. PROC. ANN. art. 2.01; *Id.* Thus, a trial court has the limited authority to disqualify an elected district attorney and his staff from the prosecution of a criminal case and can only do so when a conflict of interest rises to the level of a due process violation. *See Buntion*, 482 S.W.3d at 76; *Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008).

But there may be another avenue for disqualification. It is the "primary duty" of a prosecutor "not to convict, but to see that justice is done." TEX. CODE CRIM. PROC. ANN. art. 2.01. A personal interest which is inconsistent with that duty is a conflict that could potentially violate a defendant's fundamental due process rights, requiring disqualification. *See In re State*, 572 S.W.3d 264, 279 (Tex. App.—Amarillo 2018) (orig. proceeding) (plurality op.) (Pirtle, J., concurring and dissenting); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980) ("a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."). For example, in *In re Ligon*, 408 S.W.3d 888, 896 (Tex. App.—Beaumont 2013, orig. proceeding), the appellate court declined issuing a writ of mandamus against the trial court because the trial court could have reasonably concluded

that the actual and obvious structural conflict of the relator's competing roles, as both district attorney and complainant, amounted to a denial of due process and a legal disqualification. *Id*. at 896. However, requested disqualifications of a district attorney based on claims of perceived overreaching have not been viewed as conflicts rising to a level of a due process violation. *See e.g. In re State ex rel. Warren*, 2017 Tex. App. LEXIS 8663, at *5-6 (Tex. App.—Fort Worth Sept. 12, 2017, orig. proceeding) (mem. op.) (no conflict of interest rising to level of due process violation when DA threatened defendant's wife that, if defendant did not accept fifteen-year offer, he would seek fifty-year sentence at trial); *Fluellen v. State*, 104 S.W.3d 152, 161 (Tex. App.—Texarkana 2003, no pet.) (DA and defendant that had been involved in an altercation where words were exchanged at the time defendant was arrested for the charged offense is not a conflict of interest rising to the level of a due process violation); *Hanley v. State*, 921 S.W.2d 904, 909-10 (Tex. App.—Waco 1996, pet. ref'd) (that defendant had filed grievances against ADA prosecuting his case, insufficient to prove conflict of interest rising to level of due process violation); *State ex rel. Hilbig v. McDonald*, 877 S.W.2d 469, 471-72 (Tex. App.—San Antonio 1994, orig. proceeding) (mere allegations of wrongdoing by the DA insufficient to justify disqualification).

In this case, no testimony was taken at the pretrial hearing on the motion to disqualify. Neville argued, as in his motion, that the District Attorney's Office should be disqualified because:

> …it influence[d] them in their approach toward the case, their cross-examination of the Defendant, in the theory of the case, and someone with the DA's office reviewed the internal affairs file, because they included that

> material early in the 404(b) notice, so we -- our argument is not to dismiss the prosecution, but the DA is tainted by the fact they received this privileged, this privileged, immunized material….

There was no testimony or admissions by the State that the investigation file was used in developing a theory of prosecuting the case. The State informed the trial court that a "*Mirandized*" statement from Neville and an unsolicited email Neville sent to the Assistant Chief of Police were the items upon which the criminal case was based.

Thus, the arguments at the motion to disqualify hearing do not bear out a conflict that rises to the level of a due process violation. Neville only suggested a potential use of the internal investigation file. The State informed the trial court that it was using information learned from Neville's "*Mirandized*" statement and an email written by Neville, not the information found in the internal investigation file. The trial court could have reasonably believed the State. And we give great deference to the trial court's determinations based on credibility and demeanor. As the Fifth Circuit Court of Appeals stated in *United States v. Daniels*, "There may be some cases in which the exposure of a prosecution team to a defendant's immunized testimony is so prejudicial that it requires disqualification of the entire prosecution team. But this is not such a case." *United States v. Daniels*, 281 F.3d 168, 182 (5th Cir. 2002) (where defendant's immunized statements contained no relevant information that was not readily available from legitimate, independent sources, no disqualification of prosecution team necessary).

Accordingly, the trial court did not abuse its discretion in denying Neville's motion to disqualify the McLennan County District Attorney's Office. Neville's first issue is overruled.

SUFFICIENCY OF THE EVIDENCE

Next, Neville contends that since he did not use "excessive force," he cannot be held criminally responsible for Assault or Official Oppression. We take this to mean that because the State did not prove Neville used excessive force against the suspect, the evidence was insufficient to support Neville's convictions.

Neville was charged with and convicted of Assault, a Class A misdemeanor, and Official Oppression, also a Class A misdemeanor. For the offense of Assault, as charged, the State was required to prove that (1) Neville; (2) did then and there intentionally, knowingly or recklessly; (3) cause bodily injury; (4) to the suspect; (5) by applying pressure to the throat or neck of the suspect. *See* TEX. PENAL CODE ANN. § 22.01(a)(1). Likewise, the State was also required to prove for the offense of official oppression, as charged, that (1) Neville; (2) did then and there intentionally; (3) subject the suspect to mistreatment; (4) that Neville knew was unlawful; (5) by applying pressure to the throat or neck of the suspect; (6) and Neville was then and there acting under the color of his employment as a City of Waco Police Officer. *See* TEX. PENAL CODE ANN. § 39.03(a)(1).

The State was not required to prove Neville used excessive force. Nowhere in this issue does Neville attack an element that the State was required to prove. Further, nowhere in this issue does Neville cite to any case relevant to the sufficiency of the evidence in general or to the sufficiency of the evidence in relation to the use of excessive force. Neville primarily cites to civil cases and to one published criminal case which

raised the issue of excessive force in a motion to suppress.[2] Neville did not file a motion to suppress.

In presenting error to this Court, an appellant's brief must contain "argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). The failure to properly brief an issue presents nothing for us to review, and we are not required to make an appellant's arguments for him. *See Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) (*citing Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008)). Accordingly, this issue is inadequately briefed due to Neville's failure to point to any element the State was required to prove as being insufficiently supported by the evidence or to any authority to support his argument that the State was required to prove excessive force in order to obtain a conviction for either Class A Assault or Official Oppression.

Neville's second issue is overruled.

CHARGE ERROR

Lastly, Neville argues the trial court erred in failing to submit Neville's requested defensive instruction to the jury. Specifically, Neville requested that, regarding the charge of Official Oppression, Section 9.51 of the Texas Penal Code be added to the charge as a defense. Section 9.51 provides:

A peace officer, or person acting in the peace officer's presence and at his

[2] Neville also cites to an unpublished opinion by the San Antonio Court of Appeals where the issue in a criminal case was whether the trial court erred in refusing to instruct the jury on the defensive issue of use of force by police in excess of the amount of force permitted by law when a defendant is charged with unlawfully taking an officer's weapon. *See* TEX. PENAL CODE ANN. § 38.14(b),(d). Neville did not request any similar instruction at trial nor did he argue on appeal that the omission from the charge of such an instruction was erroneous.

> direction, is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search or to prevent or assist in preventing escape after arrest, if: (1) the actor reasonably believes the arrest or search is lawful…and (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested."

TEX. PENAL CODE ANN. § 9.51(a).

When an appellant complains of jury charge error, we first determine whether the charge contained error. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *Landrum v. State*, 590 S.W.3d 640, 645 (Tex. App.—Waco 2019, no pet.). If error exists, we then analyze the harm resulting from the error. *Id*. If the error was preserved by objection, any error that is not harmless will constitute reversible error. *Id*.

When determining whether a defensive instruction should have been provided, appellate courts view the evidence in the light most favorable to the request. *Bufkin v. State*, 207 S.W. 3d 779, 782 (Tex. Crim. App. 2006). In general, a defendant is entitled to a jury instruction on a defensive issue if the defensive issue "is raised by the evidence, regardless of the strength or credibility of that evidence." *Farmer v. State*, 411 S.W. 3d 901, 906 (Tex. Crim. App. 2013).

The State argued at trial, as it does on appeal, that there was no evidence Neville had a reasonable belief he was attempting to assist in the arrest or search when he placed his hands on the suspect. After a review of the record, we agree with the State's assertion.

By the time Neville arrived on the scene, the suspect was under arrest. Initially,

the officer making the stop wanted backup to arrive quickly because the suspect was refusing to stop his vehicle. However, that same officer sent another broadcast for backup to slow down because the suspect was in custody. Even as Neville and his partner arrived, the arresting officer signaled to them that the suspect was in handcuffs. Thus, there was no evidence that Neville's assistance to arrest was needed once he arrived on the scene.

Further, there was no evidence that Neville's assistance was needed in searching the suspect. According to video evidence, one officer was holding the suspect's cuffed hands with his left hand while searching the suspect's right pocket with the officer's right hand. An additional officer assisted in searching the suspect's left pocket. Neville was not involved in that search. Further, the officer conducting the search testified that he did not require any assistance with the search. After the search concluded, the suspect and the officers, including Neville, argued with each other about whether the suspect was required to give his name when he had been told he had the right to remain silent. Neville, apparently as an aside, called the suspect a "dumbass." The suspect then turned his head quickly toward Neville and loudly called Neville a "dumbass." Immediately thereafter, Neville grabbed the suspect's throat.

The only evidence presented during trial as to Neville's reasonable belief was evidence that Neville believed he was attempting to protect himself from a headbutt or spit from the suspect. This was Neville's sole theory of his case: that he was defending himself from a potential use of force by the suspect. Even in his videoed statement, Neville said the suspect turned to him as if to headbutt Neville. This is not evidence of

assisting with an arrest or search.

Accordingly, after a review of the record, there is no evidence to support a charge to the jury under section 9.51 of the Texas Penal Code, and the trial court did not err in failing to so instruct the jury.

Neville's third issue is overruled.

CONCLUSION

Having overruled each issue on appeal, we affirm the trial court's judgment.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed July 20, 2020
Publish
[CR25]