TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00567-CR

Arty Price, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 26TH JUDICIAL DISTRICT
NO. 13-1650-K26, HONORABLE BILLY RAY STUBBLEFIELD, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Arty Price guilty of aggravated assault with serious bodily injury involving family violence and made an affirmative deadly-weapon finding. *See* Tex. Penal Code § 22.02(b)(1). The jury then assessed punishment at 65 years' imprisonment and a $10,000 fine. In three points of error, Price contends that the trial court erred in refusing to admit evidence of allegedly exculpatory police reports, that the trial court erred in failing to properly instruct the jury concerning the use of a deadly weapon, and that the trial court abused its discretion in failing to allow a hearing on his motion for new trial and in failing to grant the motion. We will affirm the trial court's judgment of conviction.

BACKGROUND

In August 2013, police responded to an emergency call and found the victim, Migdalia Pena, in the care of her neighbors. Pena had severe injuries requiring immediate medical

attention. At trial, Pena testified that Price, her live-in boyfriend at the time of the offense, caused her injuries by punching, kicking, and choking her, as well as pressing his body weight on top of her. Pena further testified that she managed to escape the house and sought help from her neighbors. Pena's neighbor, Greg White, testified that he and his family found Pena lying on the ground near their garage. White also testified that Price drove up and said, "You need to get her to the hospital," and, "My death is on your hands." The State also presented evidence that Price was later arrested and that a sandal that he was wearing at the time of arrest bore a distinctive pattern that was also found on Pena's face where Price had allegedly kicked her. Price was convicted and sentenced, his motion for new trial was overruled by operation of law, and this appeal followed.

DISCUSSION

Excluded Evidence

At trial, the defense's theory was that Pena's injuries were actually caused by Ezequiel Astacio, who was Pena's husband at the time of the offense but who lived in Philadelphia. To support this theory, Price offered two police reports purportedly showing that the police were called in 2009 and again in 2011 in connection with disturbances involving Pena and Astacio. The trial court sustained the State's objection to the 2009 report and excluded it in its entirety but allowed the defense to ask Pena about the 2011 incident for limited impeachment purposes.

In his second point of error,[1] Price contends that the trial court violated his constitutional right to present his defense by excluding these police reports. The State responds that

[1] We will address Price's points of error in an order different from that in which he presents them.

these reports were neither material nor probative, that Price was able to present his defense despite the trial court's rulings, and that, in any event, Price suffered no harm from the reports' exclusion.

We need not decide whether the trial court committed error, constitutional or otherwise, in excluding the police reports because, even assuming without deciding that the exclusion was constitutional error, we determine beyond a reasonable doubt that the error did not contribute to Price's conviction or punishment. *See* Tex. R. App. P. 44.2(a). In his appellate brief, Price himself acknowledges that the evidence that he caused Pena's injuries was overwhelming:

> The basis of [the defense's trial] strategy was a single statement made by the victim in the hospital that referenced [Pena's] "husband" as the perpetrator, and was later corrected multiple times to state "boyfriend". This was further refuted by the three eyewitnesses other than the victim who saw Appellant at the house moments after the assault, as well as one witness observe him grab the victim prior to the assault. But the most glaring problem was the issue of Appellant's sandal. The victim stated that she was kicked by Appellant, she had distinctive bruising on her face and body which was photographed, and said photos [were] introduced at trial. Appellant, when he was arrested, was wearing sandals. These sandals contained a unique tread pattern which matched the size shape and outline of the bruises on the victim's body. This information was provided in the discovery . . . and the State argued that these were the shoes that Appellant used to strike the victim. In light of this information . . . the defense of "some other dude did it" is farcical.

In light of this overwhelming evidence, Price could not have been harmed by the trial court's decision to exclude the 2009 report and to allow the 2011 report to be used only for limited purposes. At most, the reports show that Pena and her husband Astacio had disagreements several years before this offense and that the police were called in connection with these disagreements. The reports do not indicate that these disturbances involved violence against Pena—indeed, the 2009 report states that the responding officer was advised that the disturbance was verbal only and that

the officer did not observe any injuries, while the 2011 report indicates that Pena did not want to leave when the officer arrived, that the police had no cause to force Astacio to leave, and that no enforcement action was taken. Moreover, at trial, Pena presented uncontradicted testimony that Astacio had never physically abused her.

Because the evidence that Price inflicted Pena's injuries was overwhelming, the only evidence admitted at trial that Astacio was connected with this incident was one statement in a medical record that Pena's "husband" had assaulted her, and the proffered police reports have little or no probative value, we conclude beyond a reasonable doubt that any error the trial court may have committed in excluding the reports was harmless. Accordingly, we overrule Price's second point of error.

Jury Instruction

In his third point of error, Price contends that the trial court erred in denying his request to modify the application paragraph of the jury charge at the guilt or innocence phase of trial. The application paragraph read as follows:

> Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant, Arty Price, on or about the 30th day of August, 2013, in the County of Williamson, and State of Texas, as alleged in the indictment, did then and there intentionally, knowingly or recklessly cause serious bodily injury to Migdalia Pena, a member of Arty Price's family or household, or a person with whom Arty Price has shared a dating relationship, by striking her in the face OR by striking her in the torso or dropping his body weight on her torso, *and used or exhibited a deadly weapon, namely, the Defendant's hand or foot or body, during the commission of the assault*, then you will find the defendant guilty of the offense of Felony Aggravated Assault Family Violence, and so say by your verdict.

(emphasis added). Price objected to the emphasized language "as perhaps being construed by the jury as a comment on the weight of the evidence" and asked the trial court to change the language to read, "and used or exhibited his hand, foot, or body as a deadly weapon, during the commission of the assault." The trial court overruled his objection.[2]

On appeal, Price argues that "[t]he language contained in the charge is in the assertive, meaning it is a statement of fact and not couched as a question. As such it is a comment on the evidence presented at the guilt/innocence phase of trial and should have been modified as requested." Price further argues that the trial court's error in failing to modify the charge harmed him because the trial court's alleged comment on the weight of the evidence "reduce[d] the State's burden of proving guilt beyond a reasonable doubt."

However, Price has not explained how the language he requested is any different from the charge's actual language. Price cites no authority to support his argument that the court's language constituted an improper comment on the weight of the evidence. Moreover, the court's language tracked the indictment more closely than did Price's language. We conclude that the language Price complains of was not a comment on the weight of the evidence. It was not "in the assertive" because, in the context of the entire application paragraph, the language was merely instructing the jury that it was to find Price guilty if it concluded, among other things, that he used or exhibited a deadly weapon, and it specified that the jury could consider Price's hand, foot, or body to be a deadly weapon. Finally, we note that the jury indicated that Price used a deadly weapon not

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[2] We review claims of jury charge error using a two-pronged test. *See Kuhn v. State*, 393 S.W.3d 519, 524 (Tex. App.—Austin 2013, pet. ref'd). We first determine whether charge error exists. *Id.* If there is error, we next evaluate the harm caused by the error. *Id.*

only by finding him guilty of the charged offense, but also by making a separate affirmative deadly-weapon finding.

We conclude that the trial court did not err in overruling Price's objection to the jury charge, and we therefore overrule his third point of error.

Motion for New Trial

In his first point of error, Price contends that the trial court abused its discretion in failing to grant his request for a hearing on his motion for new trial and in overruling his motion for new trial by operation of law. Price's motion for new trial alleges that he had received ineffective assistance from his trial counsel because his trial counsel: (1) failed to communicate with him, (2) failed to comply with Price's instructions regarding trial strategy, (3) "presented a defense to the jury that was directly contradicted by the evidence, and which [Price] told him to stop pursuing right after opening statement," thereby precluding Price's requested mitigation defense, (4) failed to call witnesses requested by Price, and (5) failed to investigate and present a mitigation case to the jury as requested by Price. In support of his motion, Price submitted his own affidavit along with an affidavit of Meledy Price, who was his wife at the time of the offense.

The State responds that the trial court did grant Price a hearing on his motion, although the hearing was by affidavit only. As the State points out, the trial court signed an order entitled "Order Setting Hearing Date," in which the court indicated that a hearing on Price's motion for new trial was to be a "Hearing on Affidavits Only." The State also argues that, in any event, Price was not entitled to a hearing on his motion and the trial court did not abuse its discretion in overruling his motion.

Appellate courts review a trial court's denial of a request for a hearing on a motion for new trial under an abuse-of-discretion standard. *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009). A trial court abuses its discretion in failing to hold a hearing on a motion for new trial if the motion (1) raises matters which are not determinable from the record and (2) establishes reasonable grounds showing that the defendant could potentially be entitled to relief. *See id.* at 338–39; *Kelley v. State*, No. 03-14-00622-CR, 2016 WL 612932, at *3 (Tex. App.—Austin Feb. 11, 2016, pet. ref'd) (mem. op., not designated for publication). When, as here, the appellant's motion for new trial relies on a claim of ineffective assistance of counsel, to be entitled to a hearing on his motion for new trial, the appellant "must allege sufficient facts from which a trial court could reasonably conclude *both* that counsel failed to act as a reasonably competent attorney *and* that, but for counsel's failure, there is a reasonable likelihood that the outcome of his trial would have been different." *Smith*, 286 S.W.3d at 341. We also review a trial court's denial of a motion for new trial for an abuse of discretion. *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). We do not substitute our judgment for that of the trial court, and we view the evidence in the light most favorable to the trial court's ruling. *Id.*

For purposes of this analysis, we will assume without deciding that Price did not receive a hearing on his motion for new trial and that his trial counsel provided deficient performance. We nevertheless conclude that Price was not entitled to a hearing on his motion, because Price failed to allege sufficient facts from which the trial court could reasonably have concluded that there is a reasonable likelihood that the outcome of the trial would have been different but for counsel's ineffective assistance. Price's motion for new trial essentially advances

two arguments. First, Price alleges that his trial counsel did not sufficiently communicate with Price concerning his case. However, the affidavits supporting Price's motion for new trial do not explain how further communications between Price and his counsel would have resulted in a different outcome at trial. *See Harris v. State*, 475 S.W.3d 395, 406 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("Appellant's affidavit on this issue is conclusory and does not state what further communication between him and his counsel would have revealed. Because appellant's statements were conclusory and he failed to state what more visits from his trial counsel would have revealed, the trial court could have reasonably concluded that appellant was not prejudiced.").

Second, Price alleges that his counsel did not follow Price's requested trial strategy and instead pursued a doomed strategy of arguing that Price did not cause Pena's injuries. However, Price's affidavits do not explain what Price's trial strategy would have been—Price merely mentions "a sanity review" and refers to "mitigating evidence." In the absence of more specific allegations concerning Price's preferred strategy and underlying facts concerning the mental-health issues to which he alludes, neither the trial court nor this Court is able to evaluate Price's strategy and determine whether he was prejudiced by the trial strategy pursued by counsel.[3] In other words, although on appeal Price points out weaknesses in the defense's trial strategy, he has not alleged facts showing that his preferred strategy would have led to a better outcome. Because he failed to allege sufficient facts to show prejudice, the trial court did not abuse its discretion to the extent it denied Price's request for a hearing on his motion for new trial. For these same reasons, we also

[3] We note that, during his arraignment outside the presence of the jury, the trial court asked Price, "Have you ever had any mental problems?", to which Price responded, "No, sir, Your Honor." The court then asked Price's counsel whether he believed Price was competent to stand trial, counsel responded in the affirmative, and Price did not indicate that he disagreed with counsel's assessment.

conclude that the trial court did not abuse its discretion in overruling Price's motion for new trial by operation of law. Accordingly, we overrule Price's first point of error.

CONCLUSION

Having overruled Price's points of error, we affirm the trial court's judgment of conviction.

Scott K. Field, Justice

Before Justices Pemberton, Goodwin, and Field

Affirmed

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