NUMBER 13-15-00589-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

NEIL EYMAN, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 148th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

By four issues, which we will address as two, appellant Neil Eyman challenges his conviction for manslaughter. *See* TEX. PENAL CODE ANN. § 19.04 (West, Westlaw through Ch. 49, 2017 R.S.). Eyman alleges that he was: (1) he was denied effective assistance of counsel when his trial counsel failed to request a defensive jury instruction, failed to object to violations of "the Rule," and failed to object to different judges presiding over voir

dire and trial; and (2) he was denied due process relating to his requested jury charge. We affirm.

I. BACKGROUND

Eyman was charged by indictment with the murder of Justin Camp. *See id*. § 19.02 (West, Westlaw through Ch. 49, 2017 R.S.). At a trial on the merits, the State put on multiple witnesses to describe the events surrounding the stabbing of Camp outside Neptune's Bar in Port Aransas, Texas.

Christopher Eddings, Camp's friend, testified that he, Camp, and Geremy Scharein were in town working on a construction project and had finished work early that day. They went to the beach on October 20, 2012 and then to Neptune's. While at Neptune's, Eddings stated that Eyman came up to their group and "got into" Camp's face. When he next saw Camp, Eddings observed Camp bleeding, and then Camp collapsed in front of him. Eddings stated he did not believe Camp had a knife on him, and they did not know Eyman prior to the altercation.

Bar patrons Bruce and Julie White testified that they witnessed a scuffle inside Neptune's between Eyman, Camp, and Camp's friends. The Whites testified that bar owner, Monty Sirman, Jr. asked both Eyman and Camp to leave following their fight. According to the Whites, Camp re-entered the bar holding his neck and realized he was bleeding from his neck area. The Whites heard Camp state, "he stabbed me." Bruce testified that he ran outside and saw Eyman in his truck, peeling out of Neptune's parking lot.

Sirman, Mary Graph, and Monica Williams also testified. Sirman was the owner of Neptune's, Williams was the bartender, and Graph was standing with Camp and his friends when the altercation took place between Eyman and Camp. Both women stated that Eyman pushed his way through Camp's group of friends, even though the bar was not crowded. Graph felt that Eyman was looking for trouble, while Williams said that Eyman was acting in a disrespectful manner towards Camp and his friends. After Camp and Eyman entered into a pushing match, Sirman noticed the scuffle and asked both parties to leave. Sirman stated he told Eyman to leave first and told Camp to leave later, as to avoid any problems in the parking lot. All three witnesses attempted to help Camp when he came back inside Neptune's and was bleeding. Williams ran outside the bar to call 911, saw Eyman in his truck, and gave a description of Eyman and his truck to the 911 operator.

Bar patron Milagros "Haiti" Paulson testified that after the scuffle between Eyman and Camp, she saw Eyman leave, walk back into Neptune's, whisper something in Camp's ear, and leave again. She said Camp followed Eyman outside. Paulson testified she was a certified emergency medical technician (EMT) and Camp suffered injuries to his airway after the fight. Camp told Paulson "he stabbed me" while she attempted to stabilize him before the first responders arrived. On cross examination, Paulson stated she believed that Camp's friend, Scharein, never went outside into the parking lot with Camp.

Ashley Vint encountered Eyman in the parking lot of Neptune's, according to her testimony. Vint stated Eyman walked up to her parked vehicle, introduced himself, told her he had gotten thrown out of the bar, and she asked if it was due to his intoxication. Vint then saw two males walk out of the bar, later identified as Camp and Scharein. She

testified that they walked to the side of Eyman's truck together. Vint testified that she saw Eyman rush at Camp, throw him against the side of Eyman's truck, and then their heads disappeared from her view. Vint stated she then saw Scharein go towards Eyman and Camp, heard a thud sound against the truck, and saw Eyman over Camp. Vint said she next saw Camp running into Neptune's. After Camp ran into Neptune's, Vint looked at Eyman, who was getting into his truck and felt he looked panicked. Vint testified she did not believe Eyman was acting in self-defense based on her view of the incident.

The State also called multiple law enforcement officers to testify during its case in chief. Nueces County Precinct Four Deputy Constables Edward Garcia and Lenore Magee located Eyman's truck and later Eyman and detained him. The deputies arrested Eyman and located a wet knife in his back pocket. Garcia also stated he observed cuts on Eyman's hands.

Detective Mike Hannon with the Port Aransas Police Department testified that Eyman had minor injuries to his chest and body and his behavior went from agitated, frantic, and crying to normal and then back to being agitated. Hannon testified that after Eyman's arrest, he read Eyman his *Miranda* warnings[1] and Eyman agreed to talk further, giving a statement. As Eyman was speaking to Hannon, Hannon observed Eyman show him a downward stabbing motion. Hannon also testified that blood appeared to be present in Eyman's truck and on Eyman's clothes found in his hotel room. Additionally, Hannon recovered a surveillance video from a local business that showed Camp exiting Neptune's with Scharein immediately after Eyman. Hannon further described Camp running towards

[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Neptune's about four minutes after exiting; two minutes after Camp re-entered, multiple people exited Neptune's.

Two of the State's final witnesses were Lisa Harmon Baylor, a forensic scientist with the Texas Department of Public Safety (DPS), and Dr. Ray Fernandez, the Nueces County Medical Examiner. Baylor testified that she conducted DNA analysis on the items submitted and found Camp's blood on Eyman's knife, jeans, shoes, and the samples from inside Eyman's truck. She also stated that Eyman's jeans had three potential DNA samples, but only two known samples were provided to the DPS lab. Dr. Fernandez testified that Camp's carotid artery was severed and Camp also had multiple sharp force injuries on his body that lead to his death.

After the State rested, Eyman testified in his own defense. He stated he had a "misunderstanding" inside Neptune's with Camp and his friends. Upon leaving Neptune's, Eyman said he was hit in the head in the parking lot and attacked by multiple people. Eyman admitted to having the knife and displaying it in an effort to defend himself. Eyman stated he had no intent to stab Camp, but worried for his safety and just wanted to go to his hotel.

The jury convicted Eyman of a lesser-included offense of manslaughter and sentenced him to twenty years' imprisonment in the Texas Department of Criminal Justice–Institutional Division. *See id*. § 19.04. Eyman filed a motion for new trial, which was denied by the trial court. This appeal followed.

II. NO INEFFECTIVE ASSISTANCE OF COUNSEL

By his first issue, Eyman alleges that trial counsel was ineffective by not asking for a jury instruction regarding self-defense involving multiple assailants, not presenting

testimony when it was alleged that State's witnesses were violating "the Rule," and by not objecting to two different judges presiding over the voir dire and guilt-innocence portion of the trial.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, the defendant must meet the heavy burden of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must show by a preponderance of the evidence 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. *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (en banc) (citing *Strickland*, 466 U.S. at 694); *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi 2006, no pet). A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Allegations of ineffectiveness must be "firmly founded in the record." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A "convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. We look to "the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel." *Thompson*, 9 S.W.3d at 813. If the appellant fails to prove one prong of the test, we need not reach the other prong. *See Strickland*, 466 U.S. at 697; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

In evaluating the first prong of *Strickland*, counsel's competence is presumed and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action could not have been based on sound strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). "A vague inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent." *Bone*, 77 S.W.3d at 836. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id*.

B. Applicable Law and Discussion

1. Jury Instruction

Eyman first complains that his trial counsel should have requested a self-defense instruction relating to multiple assailants. The record shows that the trial court included the following instruction regarding self-defense:

> Upon the law of self-defense, you are instructed that a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force.
>
> A person is justified in using deadly force against another if he would be justified in using force against another under the preceding paragraph, and when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.
>
> . . . .
>
> When a person is attacked with unlawful deadly force, or he reasonably believes he is under attack with unlawful deadly force by another, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury at the hands of such assailant, then the law excuses or justifies such person in resorting to deadly force by any means at his command to the degree he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself from

such attack or attempted attack. It is not necessary that there be an actual attack or attempted attack, as a person has a right to defend his life and person from apparent danger as fully and to the same extent as he would had the danger been real, provided that he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force was immediately necessary to protect himself against the use or attempted use of unlawful deadly force by his assailant.

. . . .

You are further instructed that in determining the existence of real or apparent danger, it is your duty to consider all of the facts and circumstances in evidence in the case before you and consider the words, acts, and conduct, if any, of Justin Camp, at the time of and prior to the time of the alleged incident, if any, and in considering such circumstances, you should place yourselves in the Defendant's position at that time and view them from his standpoint alone.

Therefore, if you find from the evidence beyond a reasonable doubt that, on the occasion in question, the Defendant did kill or assault Justin Camp by stabbing him with a knife as alleged, but you further find from the evidence, or you have a reasonable doubt thereof, that, viewed from the standpoint of the Defendant at the time, from the words or conduct, or both, of Justin Camp, if any, it reasonably appeared to the Defendant that his person and life were in danger and there was created in his mind a reasonable expectation or fear of death or serious bodily injury from the use of unlawful deadly force at the hands of Justin Camp, and that acting under such apprehension, he reasonably believed that the use of force on his part was immediately necessary to protect himself against Justin Camp's use or attempted use of unlawful deadly force, and the Defendant did stab and kill or assault Justin Camp with a knife, then you will acquit the Defendant on the grounds of self-defense, or if you have a reasonable doubt as to whether the Defendant was acting in self-defense on the occasion and under the circumstances, then you should give the benefit of that doubt to the Defendant and find him not guilty.

If you find from the evidence beyond a reasonable doubt that at the time and place in question the Defendant did not reasonably believe he was in danger of death or serious bodily injury, or that the Defendant, under the circumstances did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against Justin Camp's use or attempted use of unlawful deadly force, if any, as viewed from the Defendant's standpoint, at the time, then you must find against the Defendant on the issue of self-defense.

The trial court "must give a requested instruction on every defensive issue that is raised by the evidence." *Dugar v. State*, 464 S.W.3d 811, 816 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). A defensive issue is raised by the evidence if there is some evidence, regardless of its source, on each element of a defense that, if believed by a jury, would support a rational inference that the element is true. *Id*. The defendant is entitled to an instruction on a defense where there is legally sufficient evidence to raise the defense, regardless of whether the evidence supporting the defense is weak or contradicted, and even if the trial court is of the opinion that the evidence is not credible. *Id*. at 816–17. When there is evidence, viewed from the standpoint of the defendant, that he was in danger of an unlawful attack or a threatened attack at the hands of more than one assailant, the trial court should instruct the jury that the defendant had a right to protect himself against the multiple assailants. *See id.* at 817; *see also Frank v. State*, 688 S.W.2d 863, 868 (Tex. Crim. App. 1985).

However, the court of criminal appeals has held that a trial court is not required to *sua sponte* instruct a jury on defensive issues, and it has recognized that "which defensive issues to request are strategic decisions generally left to the lawyer and the client." *Posey v. State*, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998) (en banc); *see Mahavier v. State*, No. 04-10-00414-CR, 2011 WL 2150429, *2 (Tex. App.—San Antonio 2011, pet. ref'd.) (mem. op., not designated for publication). "An appellate court will not speculate about the reasons underlying defense counsel's decisions." *Stults v. State*, 23 S.W.3d 198, 209 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). This case, similar to *Mahavier*, is not one in which trial counsel did not obtain any defensive instruction, but successfully obtained a detailed self-defense instruction relating to the deceased. *See Mahavier*, 2011

WL 2150429 at *2 (holding that a silent record will not rebut the presumption of reasonable effective assistance). Because the record is silent regarding trial counsel's reasons or strategy for not requesting a multiple assailant self-defense instruction, the presumption of reasonably effective assistance has not been rebutted. *See Thompson*, 9 S.W.3d at 813. We overrule Eyman's first complaint.

2. Violation of "the Rule"

Eyman next complains that his trial counsel was ineffective for not objecting to testimony by the State's witnesses who were alleged to have violated "the Rule."

The exchange Eyman complains of included the following:

> Trial Counsel: Mr. Eyman's mother has been out in the hall because she was under the Rule, too, and she says all the witnesses out there have been talking about the case and their testimony to each other, so – I don't have any specifics on it, but apparently it's a problem.
>
> Trial Court: Do you want to put some evidence on on the point?
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> Trial Counsel: Just a second.
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> . . . .
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> Trial Counsel: Well, I guess not at this time. I just wanted the Court to be aware of it.
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> Trial Court: All right. The Rule has been invoked. I believe the State invoked the Rule. Please caution your witnesses not to discuss the case with each other and if they can't help but talk, then keep them separate so that – so that the Rule will not be violated. We don't want to taint this trial. We don't want to do this all over again. So I'm going to give you one minute to go out and talk to your witnesses and tell them to not discuss the case with each other.
>
> State: Judge, we will do that, and I wanted to inform the Court for the record that we that yesterday morning with the witnesses who were here at that time also, so we'll do it again this morning.

Trial Court: Well, call up all your witnesses and those who are not here and tell them the same thing, because they need to know now the Rule has been invoked and they cannot talk to each other about the case.

Texas Rule of Evidence 614 provides for the exclusion of witnesses from the courtroom during trial. *See* TEX. R. EVID. 614. The purpose of the Rule is to prevent testimony of a witness from influencing the testimony of another witness, consciously or not. *Russell v. State*, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005). Once invoked, the trial court instructs witnesses that they cannot converse with each other or any other person about the case without permission from the court. *See Martinez v. State*, 186 S.W.3d 59, 65 (Tex. App.—Houston [1st Dist.] 2005, pet ref'd.); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.06 (West, Westlaw through Ch. 49, 2017 R.S.); *Townes v. State*, No. 04-10-00796-CR, 2012 WL 566000, *2 (Tex. App.—San Antonio 2012, pet. ref'd) (mem. op., not designated for publication). "Once it is invoked, a witness should not be allowed to hear any testimony in the case or talk to any other person about the case without the court's permission." *Potter v. State*, 74 S.W.3d 105, 110 (Tex. App.—Waco 2002, no pet.).

On this record, we cannot hold that Eyman's trial counsel's failure to put on testimony regarding the alleged violation of the Rule was not trial strategy and that trial counsel's decision fell below an objective standard of reasonableness or was contrary to the prevailing professional norms found within the legal profession. *See Hernandez*, 726 S.W.2d at 55; *Thompson*, 9 S.W.3d at 813. We overrule Eyman's second complaint.

3. Two Judges During Trial

By his third sub-issue, Eyman complains his trial counsel was ineffective because he did not object to a retired judge hearing the guilt-innocence and punishment portion of his trial.

On the first day of trial, which included voir dire and opening arguments of both parties, presiding judge of the 148th District Court, Guy Williams, was present. The following day, Judge Williams had a family emergency and was unable to continue with the trial. Retired Judge Manuel Bañales, who was a visiting judge, was asked to preside over the trial proceedings for Judge Williams. There was no objection from either party on the record, and prior to the start of evidence on the second day, Judge Bañales explained to the jury why he was present and would be presiding over the trial.

Eyman has pointed us to no authority, and we find none, that states a visiting retired judge cannot preside over a portion of the trial. In *Clay v. State*, the case Eyman relies upon, a substitute judge took the place of the presiding judge due to illness the day of the charge conference and closing argument and denied a continuance requested by the defense. *See* 390 S.W.3d 1, 14–15 (Tex App.—Texarkana 2012, pet ref'd.). The court of appeals held that there was no abuse of discretion when the substitute judge denied the continuance and heard the closing arguments and charge conference. *Id*. Here, Judge Bañales was asked to preside over the trial prior to the beginning of evidence and continued as the presiding judge through the completion of punishment. He heard all of the evidence presented by Eyman and the State, and Eyman directs us to no specific complaints regarding rulings or any other issue affecting trial.

Again, on this record, we cannot hold that Eyman's trial counsel's lack of objection was not trial strategy or that the presumption of reasonable effective assistance has been rebutted. *See Thompson*, 9 S.W.3d at 813. We overrule Eyman's third complaint.

4. Summary

Since Eyman did not raise all of his complaints in his motion for new trial, trial counsel has not had an opportunity to respond to the allegations and "the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-making as to overcome the presumption that counsel's conduct was reasonable or professional." *Bone*, 77 S.W.3d at 833. "Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation." *Id*. "Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003) (citing *Bone*, 77 S.W.3d at 836). A writ of habeas corpus could be the better method for submitting these allegations; then, trial counsel can adequately respond. *See Rylander*, 101 S.W.3d at 111; *see also Mahavier*, 2011 WL 2150429 at 2. Eyman's first issue is overruled.

III. NO DUE PROCESS VIOLATION

By his second issue, Eyman also asserts a violation of his due process rights relating to the absence of a multiple assailants self-defense instruction in the jury charge. Eyman alleges he had an "absolute right" to the multiple assailant self-defense instruction.

A. Applicable Law and Discussion

A defendant must request the particular claim he wants to address or it can be determined to have been procedurally defaulted by appellate courts. *See Posey*, 966 S.W.2d at 60–62. Article 36.14 mandates that a trial court submit a charge setting forth the "law applicable to the case." *Id*. at 62. However, article 36.14 does not impose a duty on the trial court to *sua sponte* instruct the jury on unrequested defensive issues. *See id*. "Decisions as to the defensive theory of the case should be left to the defendant and his lawyer." *Id*. This is also "consistent with Article 36.14's mandate permitting a defendant to request various charges at the risk of procedural default by his silence." *Id*.

In his brief, Eyman recognizes that an "absolute right" is distinct from a "forfeitable right that must be requested." *See Marin v. State*, 851 S.W.2d 275, 278–80 (Tex. Crim. App. 1993). Eyman cites no authority, and we find none, to support his allegation that a jury charge containing an instruction on self-defense against multiple assailants is an "absolute right." Such a theory would be contrary to the court of criminal appeals's holding that a trial court has no duty to *sua sponte* instruct the jury on unrequested defensive issues. *See Posey*, 966 S.W.2d at 62; *see also Mahavier*, 2011 WL 2150429 at *1. If the right to have a defensive issue submitted in the jury charge were "absolute," it would follow that the trial court would have a duty to include the defensive issues in the charge. However, "under *Posey*, a party can forfeit the right to complain about the omission of a defensive issue because the defensive issue must be requested before the trial court has a duty to place it in the charge." *Williams v. State*, 273 S.W3d 200, 223 (Tex. Crim. App. 2008); *see Mahavier*, 2011 WL 2150429 at *1. The right to a defensive issue is a "forfeitable" right, and because he did not request an instruction on multiple assailants self-defense at trial, Eyman forfeited any right to have this defenseive issue submitted to the

jury. *See Williams*, 273 S.W.2d at 223. Eyman's second issue is overruled.

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
24th day of August, 2017.