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HOUSTON, TEXAS
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DEBORAH M. YOUNG
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Cause No. 14-24-00073-CR

In the

Fourteenth Court of Appeals

of Texas

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
Clerk of The Court

Antonio E. Batres, ***Appellant***

v.

The State of Texas, ***Appellee***

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause Number 1767163

APPELLANT'S BRIEF

Oral Argument Not Requested

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NOTICE OF ALL INTERESTED PARTIES

Pursuant to TEX. R. APP. P. 38.1(a), the following persons are interested parties:

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant was charged by indictment with the felony offense of murder. (CR 61). Appellant pled not guilty and proceeded to a jury trial. (RR III 10). The jury found appellant guilty of murder as charged in the indictment, and the trial judge subsequently sentenced him to 35 years in prison. (CR 327, 332; RR V 8, VI 50).

Appellant timely filed a written notice of appeal. (CR 340). The trial court certified the defendant's right of appeal. (CR 338). This Court has jurisdiction pursuant to Tex. R. App. Proc. 26.2.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument in this case.

POINTS OF ERROR

1) The evidence is legally insufficient to support the jury's verdict that appellant is guilty of murder. The evidence in this case is legally insufficient since no rational factfinder would have found against appellant on the self-defense issue beyond a reasonable doubt.

2) Appellant's trial counsel failed to provide effective assistance of counsel at the punishment phase of the trial for failing to argue that appellant caused the death of the complainant under the immediate influence of sudden passion arising from an adequate cause. Counsel's representation fell below an objective standard of reasonableness, and but for counsel's errors, the result of the proceedings would have been different.

STATEMENT OF FACTS

Appellant Batres testified that he shot Mr. Odom in self-defense. (RR III 153). Appellant had been working at The Family Dollar Store for only three months when he noticed the complainant stealing from the store. Items were stuffed into Mr. Odom's pants, and appellant tried to stop him from leaving the store. (RR II 158-159). Appellant told him "[s]ir can you please take out items that you're stealing." The complainant responded "[g]o fuck yourself. You can't touch me." (RR III 160). So, appellant tried to restrain the complainant for stealing items from the store. (RR III 160). That is when the complainant intentionally struck appellant in the face with his elbow during a struggle and also slammed appellant down on the back of his head and jumped on top of appellant. (RR III 161, 163). At this point, appellant was in pain but continued to struggle with the complainant. (RR III 161, 162). Appellant continued to attempt to detain the complainant for shoplifting as part of his responsibilities working for Family Dollar. (RR III 166). Appellant was concerned that he would be fired if he did not attempt to stop the shoplifting. (RR III 167). Prior to exiting the store, the complainant was threatening appellant telling him that complainant was in a gang. The complainant threatened to murder both appellant and the store manager, Devan Pickens. (RR III 170). Appellant

believed that the complainant could carry out that threat of murder. (RR III 170). Appellant explained to the jury that when the struggle went outside, and Mr. Odom turned, appellant believed that the complainant had a weapon. (RR III 167, 168). Appellant had a gun on him. He had bought it eight months prior to this incident. (RR III 168-169). Appellant indicated that the complainant tried to take the gun out of appellant's holster. (RR III 170). After the complainant lunged at appellant in an attempt to get appellant's gun, appellant pointed the gun at the complainant. (RR 171-172). At this point, appellant only begins to shoot at the complainant since the complainant was yelling that he did not have to leave and turned around towards appellant with a "chrome or shiny-like object near his hands." (RR III 173). Appellant testified that he only shot Mr. Odom after Mr. Odom turned toward appellant. (RR III 173). It was this movement by Mr. Odom that caused appellant to be in fear that the complainant was pulling a weapon on him when appellant first begin shooting. (RR III 175). Appellant shot the complainant numerous times since he remained in fear that the complainant would use his weapon. (RR III 176). But appellant explained it wasn't his intent to kill Mr. Odon, only to stop the eminent threat that he perceived. (RR III 178-179). Appellant indicated that Mr. Odom had already "slammed me to my head and tried to take [my weapon] from me." (RR III 183). Appellant told the jury "at the same time as (the complainant) was turning is the

same time I shot." (RR III 197-198). Even after the complainant had been shot, appellant did not approach him out of fear that the complainant still would shoot appellant. (RR III 178).

The State presented a single scene eyewitness in its case-in-chief, Ms. Othelia Jackson. (RR III 13). She explained to the jury how she was at the Family Dollar store and noticed a fight between appellant and the "guy that was trying to steal" from the store. (RR III 17). She told the jury that the complainant had his back turned and walking away when appellant shot him. (RR III 22). In rebuttal, the State called witness Aidalee Rodriguez. (RR IV 6). Ms. Rodriguez was present at the Family Dollar store during this incident on Easter day. She explained that a person came in the store "to rob and then after that a fight started." (RR IV 8). She explained that she saw the worker with a weapon while he and the other person were in between the two doors of the store, but that she only heard the gunshots. She did not actually see appellant shoot the complainant. (RR IV 9, 16).

SUMMARY OF ARGUMENT

Appellant challenges the jury's rejection of his claim of self-defense. The evidence in this case is legally insufficient since no rational factfinder would have found against appellant on the self-defense issue beyond a reasonable doubt. Appellant successfully presented evidence to support the defense of self-defense, but the State failed in their burden of persuasion to disprove the raised issue of self-defense beyond a reasonable doubt. After viewing all the evidence in the light most favorable to the prosecution, no rational factfinder would have found against appellant on the self-defense issue beyond a reasonable doubt. The verdict should be overturned since it is irrational and unsupported by proof beyond a reasonable doubt.

Furthermore, appellant's trial counsel failed to provide effective assistance of counsel at the punishment phase of the trial. The facts and circumstances surrounding the shooting and killing of the complainant surely give rise to an argument that appellant caused the death of the complainant under the immediate influence of sudden passion arising from an adequate case. Appellant proved this issue in the affirmative by a preponderance of the evidence. However, since trial counsel never once raised or argued the issue of sudden passion during the punishment phase of the trial, counsel's representation

fell below an objective standard of reasonableness, and but for counsel's errors, the result of the proceedings would have been different.

POINT OF ERROR NO. 1

Appellant challenges the jury's rejection of his claim of self-defense. The evidence in this case is legally insufficient since no rational factfinder would have found against appellant on the self-defense issue beyond a reasonable doubt.

The due-process guarantee of the Fourteenth Amendment requires that a conviction be supported by legally sufficient evidence. *Braughton v. State*, 569 S.W.3d 592, 607 (Tex. Crim. App. 2018); *see also Jackson v. Virginia*, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In assessing the sufficiency of the evidence to support a criminal conviction, this Court should "consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318-19); *see also Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). Courts measure the evidence by the elements of the offense as defined by the hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Specific to self-defense, the Court of Criminal Appeals has explained

that the defendant bears the burden to produce evidence to support the defense, while the State bears the burden of persuasion to disprove the raised issues beyond a reasonable doubt. *Braughton v. State*, 569 S.W.3d at 608. We look not to whether the State presented evidence that refuted appellant's self-defense evidence, but to whether after viewing all the evidence in the light most favorable to the prosecution, any rational factfinder would have found the essential elements of murder beyond a reasonable doubt and would have found against appellant on the self-defense issue beyond a reasonable doubt. *Id.* at 609 (citing *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991)). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

The Texas Penal Code provides that deadly force used in self-defense or in defense of another is a defense to prosecution for murder if that use of force is "justified." *See* Tex. Penal Code Ann. § 9.02. The Code sets forth the substantive requirements for establishing a claim of self-defense. Tex. Pen. Code §§ 9.31-9.33. Penal Code section 9.31 provides that, subject to certain exceptions, a person is justified in using force against another "when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful

force." Tex. Penal Code Ann. § 9.31(a). The use of force is not justified in response to verbal provocation alone, or if the actor provoked the other's use or attempted use of unlawful force. Tex. Penal Code Ann. § 9.31(b). A "reasonable belief" in this context is defined as "one that would be held by an ordinary and prudent man in the same circumstances as the actor." Tex. Penal Code Ann. § 1.07(a)(42). Furthermore, a person is justified in using deadly force against another (1) if he would be justified in using force against the other under section 9.31, and (2) "when and to the degree the actor reasonably believes the deadly force is immediately necessary: (A) to protect the actor against the other's use or attempted use of unlawful deadly force, or (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery." Tex. Penal Code Ann. § 9.32(a).

In this case, appellant had no previous motive or reason to want any harm upon the complainant. The initial confrontation between complainant and appellant was solely caused by the complainant stealing items from the store where appellant was working. Appellant explained to the jury that appellant had been working at The Family Dollar Store for only three months when he noticed the complainant stealing from the store. Items were stuffed into Mr. Odom’s pants, and appellant tried to stop him from leaving the store.

When appellant tried to restrain the complainant for ste**a**ling items from the store, the complainant intentionally struck appellant in the face with his elbow during a struggle and also slammed appellant down on the back of his head and jumped on top of appellant. Appellant explained to the jury that when the struggle went outside, and Mr. Odom turned, appellant believed that the complainant had a weapon. (RR III 173-175). Prior to exiting the store, the complainant was threatening appellant and telling him that complainant was in a gang. The complainant threatened to murder both appellant and the store manager, Devan Pickens. Appellant believed that the complainant could carry out that threat of murder. After the complainant lunged at appellant in an attempt to get appellant's gun, appellant pointed the gun at the complainant. At this point, appellant only began to shoot at the complainant since the complainant turned around towards appellant with a "chrome or shiny-like object near his hands." (RR III 173). Appellant only shot Mr. Odom after Mr. Odom turned toward appellant. It was this movement by Mr. Odom that caused appellant to be in fear that the complainant was pulling a weapon on him when appellant first began shooting. Appellant shot the complainant numerous times since he remained in fear that the complainant would use his weapon. (RR III 173-176). But appellant explained it wasn't his intent to kill

Mr. Odom, only to stop the eminent threat that he perceived. (RR III 178-183).

POINT OF ERROR NO. 2

Appellant asserts that trial counsel did not provide effective assistance in the punishment phase of the trial since he failed to request the trial judge to consider if the murder had been committed under the immediate influence of sudden passion arising from an adequate cause to limit appellant's sentence to 20 years. Tex. Pen. Code § 19.02(d). The facts and circumstances surrounding the shooting and killing of the complainant surely give rise to an argument that appellant caused the death of the complainant under the immediate influence of sudden passion arising from an adequate cause. *Id*. Appellant proved this issue in the affirmative by a preponderance of the evidence presented in the guilt-innocence phase of the trial. However, trial counsel indicated to the court that the language of § 19.02(d) "does not allow (the defense) to raise the issue of sudden passion." (RR VI 4). Appellate counsel disagrees. Trial counsel could have and should have raised and argued the sudden passion issue to limit appellant's sentence. Counsel's representation fell below an objective standard of reasonableness, and but for counsel's errors, the result of the proceedings would have been different.

In an ineffective assistance claim, appellant must show: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *Hernandez v. State,* 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). The reasonableness standard in *Strickland* requires analyzing the attorney's performance based on the "totality" of the representation. *Strickland v. Washington,* 466 U.S. at 690, 104 S. Ct. at 2069. The defendant must overcome the presumption that the challenged action of counsel might be considered sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

If a defendant proves by a preponderance of the evidence that he acted under the immediate influence of sudden passion arising from an adequate cause, the offense is a second degree felony with a range of punishment from 2-20 years in prison, not a first degree felony with a range of 5-99 years or life in prison. Tex. Pen. Code §§ 12.32, 12.33, 19.02(c), (d). Sudden passion is defined as passion directly caused by and arising out of provocation, by the individual killed or another acting with the person killed, which passion arises at the time of the offense and is not solely the result of former provocation. Tex. Pen. Code § 19.02(a)(2). Adequate cause is defined as a cause that would commonly

produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Tex. Pen. Code § 19.02(a)(1). Sudden passion is a mitigating circumstance considered at the punishment phase of a murder trial. *Benavides v. State,* 992 S.W.2d 511, 523 (Tex. App.--Houston [1st Dist.] 1999, pet. ref'd). Furthermore, sudden passion and self-defense are not mutually exclusive. A jury's rejection of self-defense at the guilt/innocence phase does not preclude submission of a sudden passion issue at the punishment phase. *Beltran v. State*, 472 S.W.3d 283, 291 (Tex. Crim. App. 2015).

Appellant testified at trial and explained to the jury the facts and circumstances surrounding why he shot and killed the complainant. Appellant contends evidence of the complainant stealing items from the store where appellant worked, and the ensuing verbal argument and physical confrontation with the deceased sufficiently raised the issue of sudden passion pursuant to § 19.02(d). The evidence shows that appellant was just trying to do his job at Family Dollar. Appellant did not know Mr. Odom. Appellant did not have any reason or motive to want to shoot or kill him. The reason that appellant pulled his gun and shot Mr. Odom was because of Mr. Odom's actions: stealing items from appellant's store, verbally threatening appellant, physically assaulting appellant, and, in appellant's mind, beginning to turn around to use a weapon

on appellant. (RR III 153-198). The entire incident happened very quickly. Appellant had to make a split-second decision to protect his own life.

The facts surrounding the actions of the complainant and the responsive actions of appellant surely give rise to an argument that appellant was entitled to consideration for a lesser punishment pursuant to § 19.02(d). The trial court did not consider giving appellant the benefits of § 19.02(d) since trial counsel told the court that § 19.02(d) was not applicable under the facts of this case. (RR VI 4-5). However, if counsel had requested the trial court to consider sudden passion in the punishment phase of the trial, the facts presented in the record of this trial surely were sufficient for the court to consider and find in appellant's favor and assess a maximum sentence of 20 years. § 19.02(d). There is no plausible reason for appellant's trial counsel to not raise and argue the benefits of sudden passion on the punishment phase of the trial. It only could help appellant lessen his range of punishment and lessen his actual sentence. Appellant was clearly harmed since he received a higher sentence of 35 years in prison. Therefore, trial counsel was ineffective for not raising and arguing the issue of sudden passion in the punishment phase of the trial. Counsel's representation fell below an objective standard of reasonableness, and but for counsel's errors, the result of the proceedings would have been different.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Appellant prays that this Court reverse the conviction and acquit appellant of murder based on Point of Error No. 1 or reverse the conviction and remand the case back to the trial court for a new trial on punishment based on Point of Error No. 2.

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_____

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CERTIFICATE OF COMPLIANCE

I, Jerald K. Graber, do certify that this brief is in compliance with Rule 9 since the entire document consists of 3,572 words and is typed using 14-point font.

Jerald Graber

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Jerald K. Graber

CERTIFICATE OF SERVICE

I, Jerald K. Graber, do certify that a true and correct copy of this Appellant's Brief was served on the Harris County District Attorney's Office by eFile.

Jerald Graber

_____

Jerald K. Graber

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