Affirmed and Opinion filed January 11, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01319-CR

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REYNALDO SALAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 736,191

O P I N I O N

Over his plea of not guilty, a Harris County jury found appellant, Reynaldo Salas, guilty of murder and sentenced him to ten years' confinement. Appellant appeals the verdict in five points of error, arguing that: (1) the trial court erred in excluding evidence of the decedent's prior assaults; (2) and (3) he was denied effective assistance of counsel; (4) the trial court erred in failing to instruct the jury after the jury's request for additional instructions regarding probation; and (5) the trial court erred in failing to inform him of its communication with the jury in response to the jury's request for a supplemental instruction. We affirm.

BACKGROUND

After purchasing a six-pack of beer, Enrique Lara and the complainant, Raul Macias, drove to a friend's house. When Lara and Macias arrived at their destination, Lara saw five men drinking beer in the driveway. Macias and Lara exited the car and Macias introduced Lara to the five men in the driveway. According to Lara, the five men were already drunk.

At some point, appellant's brother, Chuey Salas, began cursing Macias and pushed him to the ground. Prior to this assault, Macias had done nothing to provoke Chuey's aggression. Macias got up and he and Chuey began wrestling. During their struggle, Macias opened his car door. As he entered his car, Chuey continued to beat him with his fists.

Next, appellant approached the car and began hitting Macias with the butt of a gun. Appellant stopped hitting Macias with the gun and shot him in the back. After he was shot, Macias drove a short distance and hit a post. Macias died as a result of the gunshot.

CONTROVERSY

Exclusion of Evidence

In his first point of error, appellant argues that the trial court erred in excluding evidence of Macias's prior arrests for assault. Appellant contends this evidence was admissible to demonstrate Macias's violent character and to show that he acted in conformity with such character when he allegedly provoked the altercation resulting in his death. We find appellant failed to preserve error on this issue.

Error in the exclusion of evidence may not by urged unless the proponent has perfected an offer of proof or a bill of exceptions. *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999); *Green v. State*, 840 S.W.2d 394, 407 (Tex. Crim. App. 1992); *see Johnson v. State*, 800 S.W.2d 563 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd). Here, appellant questioned Mrs. Macias about Macias's prior arrests, but when the trial court sustained the State's objections to those questions, he did not create a bill of exception. Absent a showing of what such testimony would have been, or an offer of a statement concerning what the excluded evidence would show, nothing is presented for our review. *See Guidry*, 9 S.W.3d at

153; *Stewart v. State*, 686 S.W.2d 118 (Tex. Crim. App. 1984).

Even if error regarding the admission of Macias's alleged assaults were preserved, the trial court did not abuse its discretion in excluding this evidence. Evidence Rule 404 "permits introduction only of evidence of the victim's pertinent character traits." *Fry v. State*, 915 S.W.2d 554, 561 (Tex. App.—Houston [14th Dist.] 1995, no pet.) (citing *Patterson v. State*, 783 S.W.2d 268, 272 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd)); *see* TEX. R. EVID. 404. Before a decedent's bad character is pertinent to show he was the first aggressor, the defendant must offer some evidence of aggression by the victim. *See Fry*, 915 S.W.2d at 561.

Here, there was no evidence of the decedent's prior aggression. The only evidence of Macias's aggression before appellant's assault was elicited from appellant's brother. Appellant's brother testified Macias insulted him twice. In response to these verbal insults, and before Macias touched him, appellant's brother pushed Macias. "Words alone do not constitute an act of aggression which would permit the use of deadly force." *Id.*; *see* TEX. PEN. CODE ANN. § 9.31(b)(1) (Vernon Supp. 2000). Thus, the trial court did not err in excluding the evidence of Macias's character because there was no evidence of any aggression by Macias.

Accordingly, we overrule appellant's first point of error.

Response to the Jury's note

In his second and third points of error, appellant argues he was denied effective assistance of counsel because the trial court did not secure defense counsel's presence before responding to a jury note. In his fifth point of error, appellant argues the trial court violated article 36.27 of the *Texas Code of Criminal Procedure* by allegedly failing to inform him of the court's communication with the jury.

Article 36.27 requires the trial court to use "reasonable diligence" to secure the presence of defendant and defendant's counsel before responding to the jury's note. *See* TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 1981). The jury instructions contained twenty-

two community-supervision conditions, and, following this list, the charge advised the jury, during the punishment phase:

> A defendant who has been placed on community supervision and who subsequently violates his conditions of community supervision shall be brought before the court, and the court, after a hearing without a jury may either continue or revoke community supervision, and if the community supervision is revoked, the court shall proceed to dispose of the case as if there has been no community supervision not to exceed the term of years assessed by the jury.

During the jury's punishment-phase deliberations, the following note was sent to the trial court:

> 1. If [defendant] is given probation/cs [sic] for a term of years and, at some point, violates the terms of his probation/community service, and probation/cs is revoked . . .
>
> a. Does [defendant] then serve the entire sentence in prison, or only the part not already served on probation/cs; or
>
> b. Is it in the discretion of the court.
>
> 2. If the jury makes a recommendation to the Court as to conditions of community supervision, will you consider them.

The trial court responded to the note by writing at the bottom: "Refer to the charge." Appellant contends that neither side was present or consulted before the judge answered the jury foreman's note.

In *Boatwright v. State*, this court was presented with an identical claim and we held the point of error was not preserved for appellate review. 933 S.W.2d 309, 311 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) We stated:

> In order to argue a court's alleged noncompliance with articles 36.27 and 36.28, the appellant must either object or file a formal bill of exception. *Hollins v. State*, 805 S.W.2d 475 (Tex. Crim. App. 1991); *Smith v. State*, 513 S.W.2d 823, 829 (Tex. Crim. App. 1974). When error is not preserved by one of these methods, the actions of the trial court are presumed to be in compliance with the requirements of the statute and the alleged error is waived. *Smith*, 513 S.W.2d. at 829. While we acknowledge that appellant and his attorney were not present to object at the time that the trial court responded to the jury's inquiry, that fact does not alleviate the appellant's duty to preserve error. Appellant is only

> required to object "as soon as the ground of objection becomes apparent." *Hollins*, 805 S.W.2d at 476. In this case, he could have objected when he returned to the courtroom and learned of the judge's action. Alternatively, he could have filed a formal bill of exception. Because he failed to exercise either option, he has presented us with nothing to review.

Boatwright, 933 S.W.2d at 311.

Like *Boatwright*, appellant failed to object or file a bill of exceptions. Thus, because no error was preserved regarding the trial court's alleged noncompliance with article 36.27, we overrule appellant's fifth point of error.

In his second and third point of error, defendant argues that because of his counsel's alleged absence during the proceeding when the court received and answered the jury's note, he was denied effective assistance of counsel.

In reviewing claims of ineffective assistance of counsel, we employ the standard of review set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). *See Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999) (holding the *Strickland* two prong test applies to ineffective assistance claims throughout trial, including punishment). To reverse a conviction based on ineffective assistance of counsel, the appellate court must find: (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U .S. at 695, 104 S. Ct. 2052. Additionally, in the absence of a showing to the contrary in the record, it is presumed that the trial court complied with the provisions of the Code of Criminal Procedure. *See Lindley v. State*, 629 S.W.2d 844, 846 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (citing *McClellan v. State*, 118 Tex. Crim. 473, 40 S.W.2d 87 (1931)).

The defendant bears the burden of proving an ineffective assistance of counsel claim by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). Allegations of ineffective assistance of counsel will be sustained only if they are firmly grounded and affirmatively demonstrated in the appellate record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Failure to make the required showing of

either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Absent both showings we may not conclude the conviction resulted from a breakdown in the adversarial process rendering the result unreliable.

Here, appellant has failed to affirmatively demonstrate in the appellate record both deficient performance and sufficient prejudice. Thus, because appellant has failed to affirmatively demonstrate in the record his ineffective assistance claim, we overrule his second and third points of error.

Jury Instruction

In his fourth point of error, appellant argues the trial court erred by failing to instruct the jury on the entire content of article 42.12, section 23 of the *Texas Code of Criminal Procedure*, after the jury sent out a note requesting further information on the consequences of a revocation of community supervision. After the charge is read to the jury, it can be supplemented if requested by the jury. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981). However, because appellant did not make any objection to the trial court's actions, he has not preserved this error for our review. *See* TEX. R. APP. P. 33.1(a); *see Webber v. State*, 29 S.W.3d 226, 231 (Tex. App.—Houston [14th Dist.] 2000, pet. filed); *see also Herrera v. State*, 848 S.W.2d 244, 248 (Tex. App.—San Antonio 1993, no pet.).

Accordingly, appellant's fourth point of error is overruled. Having overruled each of appellant's points of error, we affirm the trial court's judgment.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed January 11, 2001.

Panel consists of Justices Robertson, Sears and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.