Reversed and Opinion filed January 17, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01422-CR

BERRY LEE RICHARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 854,967

O P I N I O N

Berry Lee Richard appeals his conviction in the beating death of Lionel Williams. In two issues, appellant claims that the trial court erroneously admitted autopsy photographs and refused to submit a sudden passion issue at sentencing. We overrule appellant's first issue. We sustain appellant's second issue and remand this cause for a new punishment hearing.

Background

Appellant beat the deceased over the head with a bell, awakening a neighbor in the process. Appellant and the deceased had been friends for years and had lived together on occasion. At the time of the incident, appellant was staying at the home of the deceased. Appellant was awakened from his sleep by the deceased. Appellant testified at trial that the two men argued about whether appellant had said a woman known to both men was a prostitute. After approximately thirty minutes, the argument became violent. Appellant testified that the complainant struck him first, both with his fists and then with the bell. Appellant claimed that the broken nose he received in the fight came from a blow with the bell wielded by the complainant. Appellant further testified that he did not know whether he was going to pass out from blood loss during the fight and that he wasn't sure when he finally quit hitting the complainant. Both men's blood was found on the bell.

The cause of death was not contested at trial. Rather, the only issue at the guilt-innocence phase of trial was self-defense. Nevertheless, the State admitted, over a defense objection, approximately thirty autopsy photographs. While some of the photos are innocuous, seven photos show the complainant's crushed skull in various poses. Four or five more photos show contusions in the skull. The brain is visible through the contusions.

The jury failed to find that appellant acted in self-defense. At sentencing, the trial judge declined to submit a sudden passion instruction under Texas Penal Code Section 19.02(d). Appellant received a thirty-year sentence.

Issues

Appellant initially claims that the trial court erroneously overruled his Rule 403 objection to the admission of autopsy photographs. Second, appellant argues the court erred in declining his request to submit a sudden passion issue to the jury at sentencing. We address each claim in turn.

Autopsy Photographs

Appellant submits that the probative value of seven autopsy photos, State exhibit numbers 73-79, was substantially outweighed by danger of unfair prejudice. *See* TEX. R. EVID. 403. The trial court ruled that the probative value of the photos outweighed the danger of unfair prejudice "given the circumstances of his offense and the burden of proof the State ha[d]."

Admissibility of photographs over challenges are within the sound discretion of the trial judge. *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995). Autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy. *Burdine v. State*, 719 S.W.2d 309, 316 (Tex. Crim. App. 1986). In determining whether the probative value of the photographs is outweighed by their inflammatory nature, we consider the number of exhibits offered, their gruesomeness, detail, size, and color, whether they are close-up, the availability of other means of proof, and the unique circumstances of the individual case. *Salazar v. State*, 38 S.W.3d 141, 152 (Tex. Crim. App. 2001) (citing *Santellan v. State*, 939 S.W.2d 155, 172 (Tex. Crim. App. 1997)). Additionally, relevant criteria include the fact that the ultimate issue was not seriously contested by the opponent; that the State had other convincing evidence to establish the ultimate issue to which the [evidence] was relevant; that the probative value of the evidence was not, either alone or in combination with other evidence particularly compelling; and that the [evidence] was of such a nature that a jury instruction to disregard it for any but its proffered purpose would not likely be efficacious. *Id.* (internal quotation omitted).

At trial, the State argued that the seven photos were needed to show: (1) the severity of the fracture in the skull and the hematomas; (2) the size of the skull fracture; (3) the fracture down inside the skull; and (4) how many fractures there were in the skull. The thrust of the State's argument is that the photos showed that the nature and number of injuries to complainant's skull were inconsistent with appellant's claim of self-defense. Our review of the record indicates that the photos may have been reasonably necessary to achieve

this goal.[1] Appellant cross-examined the State's medical expert regarding whether the head injuries sustained by the complainant were consistent with blows from a hand, rather than a bell. The purpose of this examination appears to have been related to appellant's claim of self-defense and the way one uses one's hands defensively.

Appellant next argues that the photos were unnecessary because appellant did not contest manner in which he had killed the complainant. Other courts have held that the failure to contest the manner of death does not render autopsy photographs irrelevant. *See, e.g. Richards v. State*, 2001 WL 754440 at *8 (Tex. App.—Houston [1st Dist.] July 5, 2001, no pet. h.) (photo of skull with skin pulled back; admissible to prove brain injury not result of stroller accident) (citing *Phipps v. State*, 904 S.W.2d 955, 957-59 (Tex. App.—Beaumont 1995, no pet.) (photo of skull with skin pulled back)).

Finally, appellant argues that the photos were unnecessary because so many other, less gruesome autopsy photos were admitted that the skull photos cannot have aided the jury in any manner. We agree that the probative value of the skull photos in this case was perhaps less than that attributable to similar photos in some reported cases. *Compare, e.g., Salazar*, 38 S.W.3d 141 (shaken baby case - internal organs removed to show injuries that were not externally visible); *Ladner v. State*, 868 S.W.2d 417, 427 (Tex. App.—Tyler 1993, writ ref'd) (skull and brain photo necessary to controvert defense claim that brain injury, which was not externally visible, was not the result of beating); *see also Richards v. State*, *infra*. However, we cannot say that the trial court's Rule 403 ruling was outside the zone of reasonable disagreement. *See Narvaiz v. State*, 840 S.W.2d 415 (Tex. Crim. App. 1992). We hold that the court below did not err in overruling appellant's Rule 403 objection.

Appellant's first issue is overruled.

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[1] Incidentally, we note that the severity of the injuries may be more consistent with appellant's claim of sudden passion than that of self-defense.

Sudden Passion Submission

In his second issue, appellant contends the trial court erroneously denied his request for a sudden passion submission at sentencing under Section 19.02 of the Texas Penal Code. Specifically, appellant argues his trial testimony relating to the fight with complainant included facts sufficient to warrant submission of a sudden passion issue.

Before September 1, 1994, the existence of sudden passion was an element of the offense of voluntary manslaughter (a lesser-included offense of murder), to be determined by the jury at the guilt/innocence stage of trial. *Sanchez v. State*, 23 S.W.3d 30, 34 (Tex. Crim. App. 2000). Now it is submitted as a mitigating defense at sentencing.[2] The shift of application in trial phase has not altered substantive law on the definition of sudden passion. *See Roberts v. State*, 590 S.W.2d 498, 501 (Tex. Crim. App. [Panel Op.] 1979); *Saldivar v. State*, 980 S.W.2d 475, 505 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

Sudden passion is a culpable mental state. *See Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998). As such, it is usually proved by circumstantial evidence. *Id*. Direct evidence is therefore not required. *Id.* Where the evidence fairly raises a sudden passion issue, and the charge is properly requested, the trial court is required to submit the issue to the jury. *Medlock v. State*, 591 S.W.2d 485, 486 (Tex. Crim. App. 1979). Submission is appropriate where the evidence shows "sudden passion" arising from a "legally adequate cause." *Id*.; *see also* TEX. PENAL CODE ANN. § 19.02(D).

Section 19.02(D) defines sudden passion and adequate cause thus:

(a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of

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[2] *Compare* TEX. PENAL CODE ANN. § 19.02(a) with Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 913 (former TEX. PENAL CODE ANN. § 19.04(b), (c)) repealed by Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3614.

anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) "Sudden passion" means 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.

A "sudden passion" issue consists of two parts, one objective (Adequate Cause) and one subjective (Sudden Passion). Here, the contested element is Adequate Cause.[3] On the one hand, circumstances engendering garden-variety fear do not suffice. *See, e.g., Daniels v. State*, 645 S.W.2d 459, 460 (Tex. Crim. App. 1983). However, fear that rises to the level of "terror" generally will. *See Havard v. State*, 800 S.W.2d 195, 216-17 (Tex. Crim. App. 1989). Citing *Daniels*, *inter alia*, the State argues that being struck repeatedly with a bell is not action that would produce the requisite level of terror in a person of ordinary temper. At best, the State argues, the testimony establishes a claim of self-defense, which the jury rejected.

We disagree. Our analysis begins with *Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998). In *Moore*, the Court of Criminal Appeals overruled *Gonzales v. State*, 717 S.W.2d 355 (Tex. Crim. App. 1986) and *Ojeda v. State*, 712 S.W.2d 742 (Tex. Crim. App. 1986). *Gonzales* and *Ojeda* had required direct evidence of sudden passion in order to justify submission of a voluntary manslaughter issue. *Moore* endorsed the dissenting opinion in *Gonzales* as "convincing." *Id.* at 11. That dissent relied upon *Lewis v. State*, 231 S.W.2d 113, 116 (1921), for the proposition that, where self-defense is raised, "[I]t is a rare

[3] We hold appellant's trial testimony to be some evidence of a subjective lack of cool reflection. Specifically, appellant stated he thought he might die or pass out during the hand-to-hand combat. He stated he lost control as a result of seeing all the blood coming from his body after being hit and that he was not thinking rationally. The alleged passion clearly arose at the time of the offense and, according to appellant, was the direct result of provocation by the complainant. For these reasons, we confine the remainder of our discussion to the element of Adequate Cause.

instance where the issue of manslaughter does not also become pertinent." *Gonzales*, 717 S.W.2d at 363. (Clinton dissenting). *Lewis* further advised that, "after all the evidence is in, if it is questionable in the court's mind as to whether the issue of manslaughter is raised, it should be resolved in the defendant's favor, and the matter passed to the jury." *Lewis*, 231 S.W.2d at 115. [4]

The specific question presented here becomes whether an aggravated assault (or similar assault with a dangerous object) may render an ordinary person incapable of cool reflection. We think the answer is yes. Past decisions support this interpretation. For example, an alleged knife attack has been held to be adequate cause. *See Guerra v. State*, 936 S.W.2d 46, 48-49 (Tex. App.—San Antonio 1996, writ ref'd). The use of a knife during a brawl evolving from an attempted robbery is adequate cause. *See Merchant v. State*, 810 S.W.2d 305 (Tex. App.—Dallas 1991, writ ref'd). Being hit with a metal bar during a heated argument has been held to be adequate cause. *See Ray v. State*, 515 S.W.2d 664 (Tex. Crim. App. 1974). Pointing a gun at a person is adequate cause. *Trevino v. State*, 2001 Lexis 4731 at *8-15 (Tex. App.—Dallas, July 12, 2001, no pet h.); *see also Havard v. State*, 800 S.W.2d 195, 216-17 (Tex. Crim. App. 1989). Nearly being run over by a car is adequate cause. *See Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998).

Here, appellant testified that he was struck repeatedly with a deadly weapon by the complainant. A heated argument over a woman thereby became a fight to the death. The weapon had both men's blood on it. The State does not dispute appellant's trial testimony that the blows he received broke his nose, nor that the associated facial laceration required stitches. These facts indicate that appellant was hit very hard. Appellant testified that he was hit in the head several times, that he had yellow spots in his vision, that he was unable to breath, that he was in shock, scared, and frightened because he was losing so much blood. He said he did not know if he was going to die from blood loss. Appellant could not

[4] The First Court of Appeals has also recently addressed *Moore's* reliance on *Lewis* in *Benavides v. State*, 992 S.W.2d 511, 525 (Tex. App.—Houston [1st Dist.] 1999, pet ref'd).

remember exactly when he quit hitting the complainant. He surmised that he quit hitting him when, in essence, the fight ended and he had won. We hold that appellant's testimony to these facts, together with the circumstances of the incident, is some evidence that he was acting under sudden passion arising from an adequate cause. Submission of a sudden passion issue, when raised by the evidence and requested, is mandatory. *Medlock v. State*, 591 S.W.2d 485 (Tex. Crim. App. 1979). Appellant properly objected to the charge submitted to the jury. *See Arline v. State*, 721 S.W.2d 348 (Tex. Crim. App. 1986). For these reasons, we sustain appellant's second point of error.

We remand this case for a new punishment hearing.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed January 17, 2002.
Panel consists of Justices Yates, Edelman, and Wittig.[5]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[5] Senior Justice Don Wittig sitting by assignment.