

Affirmed and Opinion filed February 10, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01325-CR

MARKCUS DEWAYNE MOSLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Court at Law No. 3
Fort Bend County, Texas
Trial Court Cause No. 79077-A**

OPINION

A jury convicted Marcus Dewayne Mosley for assault and the trial court assessed punishment at sixty days' confinement. Mosley's appeal presents three issues: the admissibility of his taped interview, the sufficiency of the jury charge on self defense, and prosecutorial argument. We overrule his points of error and affirm.

A detailed recitation of the evidence is not necessary to determine the issues on appeal. It is sufficient to note that the assault, for which the jury found Mosley guilty, was upon his wife and occurred in his mother's home. The police arrived just as the assault ended and took Mosley outside. One of the officers then recorded a conversation with Mosley's wife in which

she explained what Mosley had done. As trial approached, the State could not locate Mosley's wife in order to subpoena her. Thus, the State played her taped conversation at trial for the jury instead.

ADMISSION OF THE TAPE RECORDING

In his first point of error, Mosley contends that the trial court erred in admitting "the audio recorded out-of-court-statement of the victim whom the state failed to produce during trial." There are two reasons why the admission of the tape was not error. First, the officer who recorded the interview detailed in his testimony without objection Mrs. Mosley's description of the assault. When other like testimony is admitted without objection, any alleged error about the admission of evidence is not reversible. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).

Second, it is clear that the trial court properly admitted the statement as an excited utterance under Rule 803(2) of the Texas Rules of Evidence. There are three requirements for a statement to qualify as an excited utterance: (1) an exciting event must have occurred; (2) the declarant must still be under the emotional and physical stress of the event; and (3) the statement must relate to the event. *McFarland v. State*, 845 S.W.2d 824, 826 (Tex. Crim. App. 1992). The police officer who recorded the conversation testified that Mosley's wife was extremely agitated, excited, talking in a loud voice, and screaming as to what Mosley had done to her. He testified that she had been crying, her face was red, and her eyes were puffy. She showed him fresh bite marks made by Mosley where he bit her on the back. Based upon all of his observations, the officer testified that she was still under the pain of the assault. Thus, it appears that her statement clearly satisfied the requirements for an excited utterance.

Lastly, Mosley's contention that the admission of the recorded statement denied him his constitutional right of confrontation would also fail if we addressed the issue on the merits. The confrontation clause requires a showing that a hearsay declarant is unavailable and that the statement bears adequate "indicia of reliability." *Penry v. State*, 903 S.W.2d 715, 751 (Tex. Crim. App. 1995). *Penry* also teaches that reliability may be inferred where the evidence falls

within a firmly rooted hearsay exception, as is present in this case. The unavailability of Mosley's wife was adequately proven by the State and was not contested. Thus, Mosley's first point of error is overruled.

JURY CHARGE ON SELF DEFENSE

In his second point of error, Mosley complains that the trial court erred "by failing to properly apply the law to the facts" in the jury charge on the issue of self defense. On self defense, the trial court charged the jury that if they believed beyond a reasonable doubt that Mosley committed the offense as alleged, but:

you further find from the evidence, or you have a reasonable doubt thereof, that viewed from the stand point of the Defendant at the time, from the words or conduct, or both, of NATASHA RENEE MOSLEY, it reasonably appeared to the Defendant that his person was in danger of bodily injury and there was created in his mind a reasonable expectation of fear of bodily injury from the use of unlawful force at the hands of NATASHA RENEE MOSLEY, and that acting under such apprehension and reasonably believing that the use of force on his part was immediately necessary to protect himself against NATASHA RENEE MOSLEY's use or attempted use of unlawful force, then you will acquit the Defendant; or if you have a reasonable doubt as to whether or not the Defendant was acting in self defense on said occasion and under said circumstances, then you should give the Defendant the benefit of that doubt and say by your verdict "not guilty."

Mosley, for the first time on appeal, contends the trial court should have specified what acts he performed to which self defense applied and what action his wife took that would have justified his asserted act of self defense. The standard to determine whether sufficient harm resulted from alleged charging error to require reversal depends upon whether the appellant objected. *See Abdnor v. State*, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) and *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986)). Where the error is urged for the first time on appeal, a reviewing court will search for "egregious harm." *Id.* We have examined the entire jury charge, the state of the evidence, and the argument of counsel, *see Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996), and we do not perceive any egregious error such that Mosley was deprived of a fair trial. Accordingly, we overrule point of error two.

STATE'S JURY ARGUMENT

In his third point of error, Mosley contends the trial court erred in failing to instruct the jury to disregard the State's explanation of its burden of proof on the means and manner that the assault was committed. The information alleged that Mosley assaulted his wife by biting, grabbing, pushing, and hitting her. In submitting the case to the jury, the charge authorized a conviction upon a finding of any of the means alleged. In her argument, the prosecutor told the jury that it was unnecessary for the jurors to agree on the manner in which the assault was committed; it was only necessary for them to agree that Mosley committed the assault. Mosley contends that the argument was improper because it could lead to a verdict that was not unanimous.

The Court of Criminal Appeals, in *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), rejected the exact contention made by Mosley. Accordingly, Mosley's third point of error is overruled.

Having overruled all three points of error, we affirm the judgment of the trial court.

Sam Robertson
Justice

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Justices Robertson, Sears, and Cannon.*

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* Senior Justices Sam Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.