Affirmed and Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00412-CR

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MICHAEL PARKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 813,316

O P I N I O N

A jury found, appellant, Michael Parker ("Parker"), guilty of the felony offense of aggravated assault, and assessed punishment at forty years' confinement in the Texas Department of Criminal Justice, Institutional Division. Parker appeals, asserting that 1) the trial court erred in failing to charge the jury on the lesser included offense of assault; 2) the trial court erred in excluding evidence of the complainant's prior conviction for unlawfully carrying a weapon; and 3) the trial court erred in providing Parker's attorney a reasonable time to review the jury charge. We affirm.

On May 15, 1999, Parker went to a concert at G's Ice house in Deer Park accompanied

by his friends Bob and Debbie Battarbee. Also in attendance at the concert was the complainant, David Carlson ("Carlson"), his fiancee Beverly Harrison, and friends Roy and Kathy Guthrie. The record reflects that, while at the concert, Parker placed his hand on Beverly Harrison. What happened next following this contact is disputed. Carlson asserts that he confronted Parker, removing Parker's hand from his fiancee's back and told him to get away from his girlfriend. Parker's reaction was to back away and walk back toward his friends. According to Roy and Kathy Guthrie, Parker came over to where Carlson was standing and began striking him. Carlson turned around and began punching Parker. Parker, in return, began stabbing Carlson. Eventually, the two ended up on the floor.

Parker disputes this account, asserting that Carlson attacked him when Carlson approached to confront him about putting his hand on Carlson's fiancee. Parker asserts that Carlson first struck him in the face and then put him in a headlock. According to Parker, he has two fused vertebrae in his neck that, if damaged, could cause paralysis or even death. At this point in the altercation, Parker freely admits that he pulled out his knife and began stabbing Carlson. Regardless of which version of events is accurate, the undisputed testimony at trial is that Parker stabbed Carlson a number of times.

Carlson had stab wounds to his arm, head, back and stomach. Seabrook Police Officer Ken Mayes arrived and separated the two men. As this was happening, Parker flung his knife under a vending machine. Dear Park Police Officer Larry Martin arrived after Parker had been taken into custody. Officer Martin observed multiple stab wounds and blood on Carlson, and called for medical attention. Carlson was eventually persuaded to go to the hospital. Charlie Sherwood Cryer, the owner of G's Ice House, recalled the medics attending to Carlson being concerned that his liver or other organ had been punctured by the knife, and that he could die.

Parker, in his first point of error, complains that the trial court erred in failing to charge the jury on the lesser included offense of assault. We disagree.

A defendant is entitled to a jury instruction on a lesser included offense when, 1) the lesser included offense is included within the proof necessary to establish the offense charged,

and 2) some evidence exists that if the defendant is guilty, he is guilty only of the lesser offense. *Penry v. State*, 903 S.W.2d 715, 755 (Tex. Crim. App. 1995); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993); *Bui v. State*, 964 S.W.2d 335, 340 (Tex. App.—Texarkana 1998, pet. ref'd). If evidence from any source raises the issue of a lesser included offense, a charge on that offense must be included in the court's charge. *Penry*, 903 S.W.2d at 755; *Bui*, 964 S.W.2d at 340.

There are two ways in which the evidence may raise the issue of a lesser included offense. *Bui*, 964 S.W.2d at 341; *Thomas v. State*, 919 S.W.2d 810, 812 (Tex. App.—Houston[14th Dist.] 1996, pet. ref'd). First, there may be evidence which refutes or negates evidence of the greater offense. *Bui*, 964 S.W.2d at 341. Second, there may be evidence subject to different interpretations implicating the lesser included offense. *Id*.

There is no dispute that assault is a lesser included offense of aggravated assault.[1] Parker argues that because he did not intend to cause serious bodily injury or death, and did not use the knife in a manner to cause serious bodily injury, the knife used during the assault did not constitute a deadly weapon.

A deadly weapon is defined as either "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury," or "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon 1994); *McCain v. State*, 22 S.W.3d 497, 501 (Tex. Crim. App. 2000). "The provision's plain language does not require that the actor actually intend death or serious bodily injury; an object is a deadly weapon if the actor intends a use of the object in which it would be capable of causing death or serious bodily injury." *McCain*, 22 S.W.3d at 503.

The evidence is undisputed that Parker used the knife in such a way that the knife was

[1] The difference between a simple assault and an aggravated assault is that a person must cause serious bodily injury to another or use or exhibit a deadly weapon during the commission of the assault for it to be an aggravated assault. TEX. PEN. CODE ANN. § 22.02 (Vernon 1994); *Bui*, 964 S.W.2d at 340.

capable of causing death or serious bodily injury. Parker admits that he stabbed Carlson several times, and the record reflects that Carlson had numerous stab wounds. Officer Mayes testified that the knife used by Parker was capable of causing serious bodily injury or death, and testimony at trial indicated that the medics treating Carlson had some concern that Carlson might have received a punctured liver or other organ. It defies logic for Parker to suggest that a knife stabbed into another's head, arm, stomach, and back was not capable of causing death or serious bodily injury.

As a result, we find that the record does not contain evidence which would permit a jury to rationally find that Parker did not use a deadly weapon. Accordingly, Parker was not entitled to a charge on the lesser included offense of assault. We overrule Parker's first point of error.

In his second point of error, Parker complains that the trial court erred by failing to admit Carlson's prior conviction for unlawfully carrying a weapon. Specifically, Parker asserts that Carlson "opened the door" to this conviction coming into evidence by his response on direct examination that "I don't carry no weapon." We disagree.

When attacking the credibility of witnesses, evidence of prior criminal convictions shall be admitted only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value outweighs its prejudicial effects to a party. TEX. R. EVID. 609; *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993); *Lewis v. State*, 933 S.W.2d 172, 177 (Tex. App.—Corpus Christi 1996, pet ref'd). An exception to this general rule applies when a witness makes statements concerning his past conduct that suggest he has never been arrested, charged, or convicted of any offense. *Delk*, 855 S.W.2d at 704; *Lewis*, 933 S.W.2d at 177. Where the witness creates a false impression of law abiding behavior, he "opens the door" on his otherwise irrelevant past criminal history and opposing counsel may expose the falsehood. *Delk*, 855 S.W.2d at 704; *Lewis*, 933 S.W.2d at 177. This exception, however, is not broadly construed. *Lewis*, 933 S.W.2d at 179. Rather, it is generally limited to those instances in which a witness makes assertions about his past which are patently untrue, or extremely misleading. *Id*. For example, the Court of Criminal

Appeals in *Theus v. State* stated that "in order to 'open the door' to the evidence of prior crimes, the witness must do more than just imply that he abides by the law—he must in some way convey the impression that he has never committed a crime." 845 S.W.2d 874, 879 (Tex. Crim. App. 1993).

At trial, Carlson was asked "Did you have a weapon?" Carlson responded "I don't carry no weapon." We must determine whether such a response by Carlson makes assertions about his past which are patently untrue, or extremely misleading. It is undisputed that Carlson had a prior conviction for unlawfully carrying a weapon. However, the language "I don't carry no weapon" seems to speak more to Carlson's present conduct, than his past conduct. The statement was made in response to a question inquiring whether Carlson was carrying a weapon on the night he was stabbed. Moreover, a person saying that he does not carry a weapon, does not necessarily mean that the person never carried a weapon in the past.

Accordingly, we hold that Carlson's statement, "I don't carry no weapon" was not a patently untrue or extremely misleading statement so as to "open the door" to his prior conviction for unlawfully carrying a weapon. We overrule Parker's second point of error.

Lastly, in Parker's third point of error, he contends that the trial court erred in failing to give his attorney a reasonable time to review the jury charge. We disagree.

Articles 36.14 and 36.15 of the Texas Code of Criminal Procedure provide that the defendant or his counsel shall have a reasonable time to examine the charge. TEX. CODE CRIM. PROC. ANN. Art. 36.14 (Vernon Supp. 2001); TEX. CODE CRIM. PROC. ANN. Art. 36.15 (Vernon Supp. 2001). Moreover, article 36.16 of the Texas Code of Criminal Procedure affords the defendant or his counsel the opportunity to make further objections if the court has changes in the jury charge after the initial round of objections. TEX. CODE CRIM. PROC. ANN. Art. 36.16 (Vernon 1981).

Parker contends that his counsel was not provided a reasonable time to examine the charge. The record, however, reflects that Parker's counsel attended a charge conference in which she made objections to the charge, all of which were denied. Moreover, when Parker's

counsel asked the trial court for a moment to look over the self-defense issue, the trial court responded "Yeah, go ahead and look at the charge." Parker has provided this Court with no evidence to suggest that his counsel was ever denied a reasonable opportunity to examine the charge. Parker argues that his counsel should have been permitted to examine the charge again before it was submitted to the jury. This would only be proper under article 36.16 if the trial court made changes after the initial round of objections. *See* TEX. CODE CRIM. PROC. ANN. Art. 36.16 (Vernon 1981). Parker, however, presents no evidence that the charge was changed.

Accordingly, Parker has failed to demonstrate any error by the trial court in its handling of the charge conference. Parker's third point of error is overruled.

We affirm the judgment of the trial court.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed June 7, 2001.
Panel consists of Justices Edelman, Frost, and Murphy.[**]
Do Not Publish TEX. R. APP. P. 47.3(b).

[**] Senior Chief Justice Paul C. Murphy sitting by assignment.