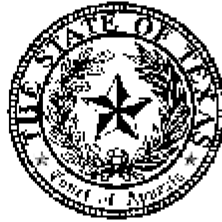
**Affirmed and Opinion filed June 28, 2001.**



**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-00131-CR**

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**JERMAINE FORD, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 183rd District Court**
**Harris County, Texas**
**Trial Court Cause No. 821,732**

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## O P I N I O N

Jermaine Ford, appellant, was charged by indictment with the felony offense of murder for the burning of his girlfriend, Jamika Williams. A jury found appellant guilty as charged in the indictment, and assessed his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for life, and a fine of $10,000.00. Appellant brings five points of error on appeal. We affirm.

## FACTUAL BACKGROUND

During the early morning of April 24, 1999, Jonas Konan, a Cypress Creek EMS paramedic, responded to an "emergency situation" call at an address in the Rushwood subdivision of Harris County, Texas. Konan arrived on the scene within seven minutes. He noticed a person walking to the ambulance. To Konan, this person appeared to have a drape over her body. When she stepped into the light, Konan realized that what he had seen over her body was actually her skin peeling off. Konan immediately called for a helicopter to transport the woman, who was later identified as Jamika Williams. Williams had suffered massive burn injuries over ninety-five percent of her body. The only areas spared were the top of her head, the bottoms of her feet, and a small area on the upper mid back. In fact, Konan stated that the only place on her body where he could administer an I-V of pain medication was "between her big toe and the small toe."

Williams told the paramedics and the police officers on the scene that she had an argument with her boyfriend, who told her he was going to kill her. She explained that her boyfriend poured gasoline on her. She never told the officers the name of the person who did this to her. However, as the police investigated the crime, they quickly learned that appellant was the person to whom she referred.

Police arrested appellant and took him to a police substation where he gave a written statement. The written statement included the following,

> . . . I had brought paper from the top of my dresser to help start the fire; and I had my cigarettes and my lighter, also. Jamika was wearing a white T-shirt, her work pants, (dark blue), bra, (unhooked), and no shoes with the white socks. . . .
>
> We then walked around the corner because I wanted to go to a grassy area and do it. When we got past Morning Dew on Delphi, I made her lie down; and I poured gas on her. I made a little puddle of gas by her side and put gas on the paper I had brought. . . . I then lit the paper on fire with my lighter and dropped it on the puddle. The gas immediately flamed and she was on fire. She jumped up and started screaming. I went to pour gas on myself, and there was none left. I panicked and ran to my cousin Ken's house. I knocked on the front door and

> no one answered and I went to the back and no one answered. I sat in the back for about 15 or 20 minutes, and I could still hear her screaming.

A friend of appellant's, Omar Currie, testified that appellant asked him for help in burning Williams's house down on April 20th and again on April 23rd.

A helicopter transported Williams to Hermann Hospital, where she was treated in the emergency room. Later, the doctors transferred her to the burn care unit. Doctors made advances in her treatment, and, by June 25, 1999, had reduced her wound from covering ninety-five percent of her body to covering only about thirty percent. During this period, Williams suffered from sepsis, commonly known as "blood poisoning." This condition ultimately resulted in the colonization of bacteria within her heart valves. Her doctors believed that this condition was a "rapidly progressing[,] life-threatening" one, so they attempted valve replacement surgery on July 1, 1999. Williams died during surgery on July 2, 1999, at 3:12 am.

## DISCUSSION AND HOLDINGS

Appellant brings five points of error to this Court. In his first point of error, appellant claims the trial court committed an abuse of discretion in admitting inadmissible hearsay evidence under the guise of impeachment testimony. In his second point of error, appellant complains of charge error. Appellant complains of ineffective assistance of counsel in his third point of error. In his fourth and fifth points of error, appellant complains of insufficiency of the evidence.

### I. Impeachment Testimony

Appellant's first point of error alleges that the trial court abused its discretion in allowing the State to impeach its own witness with prior inconsistent statements as a subterfuge to get otherwise inadmissible hearsay evidence before the jury. Appellant also complains that the probative value of the evidence admitted was substantially outweighed by the danger of unfair prejudice. As we explain below, appellant failed to preserve error for our review because his complaint on appeal is different from the one made at trial.

The State called Andre McCoy, appellant's brother, as a witness to provide information about certain events that led up to Williams' murder. The State asked McCoy a series of specific "do you remember" questions about statements that McCoy had allegedly made to the police. In each instance, McCoy claimed that he did not remember making any of the statements to the police. Later, during its case-in-chief, the State called Deputy Pamela Klim who interviewed McCoy on April 24th. She described the contents of the statements that McCoy denied remembering that he had made.

At trial, appellant objected to Deputy Klim's testimony, stating "the witness never denied saying those things." The court overruled his objection. He then made a running objection to "this line of questioning." On appeal, however, appellant has a different objection. He complains both that the State was attempting, through impeachment, to use otherwise inadmissible hearsay evidence and that the probative value of the evidence admitted was substantially outweighed by the danger of unfair prejudice. Appellant correctly points out that "impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible." *Whitehurst v. Wright*, 592 F.2d 834, 839 (5th Cir. 1979); *Pruitt v. State*, 770 S.W.2d 909, 911 (Tex. App.—Fort Worth 1989, pet. ref'd). This complaint on appeal does not comport with appellant's objection at trial. Thus, because the issue is not preserved for our review, we will not review the decision of the trial court to admit the impeachment testimony. TEX. R. APP. P. 33.1(a); *see Barley v. State*, 906 S.W.2d 27, 36-37 (Tex. Crim. App. 1995). Appellant's first point of error is overruled.

## II. Jury Charge

When presented with the jury charge, appellant made an objection to the charge and requested the trial court to include an instruction regarding the voluntariness of appellant's written statement which he gave to the police. Appellant correctly points out that, when conflicting evidence is presented as to the voluntariness of a statement, a judge must make a finding, in the absence of the jury, regarding its voluntariness. TEX. CODE CRIM. PROC. ANN.

art. 38.22 § 7 (Vernon 1979). Upon finding the statement voluntary, the judge is to instruct the jury that, unless it believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider the statement, or any evidence obtained because of the statement, for any purpose. *Id*.

Appellant does not cite to any portion of the record where voluntariness is raised. He merely states that the instruction should have been given because a jury could have chosen to disbelieve the testimony of the police officer that no force, no coercion, and no threats were ever used, and no promises were ever offered to the appellant. Our review of the record reveals that all of the evidence before the jury suggested that the statement was voluntary. Raising an issue of voluntariness means that some evidence must be presented to the jury that the confession was not voluntary. *Hernandez v. State*, 819 S.W.2d 806, 812-13 (Tex. Crim. App. 1991). No such evidence was raised here. As a result, no jury instruction was required. *Id*. Therefore, we overrule appellant's second point of error.

**III. Ineffective Assistance of Counsel**

Appellant complains, in his third point of error, that he received ineffective assistance of counsel at trial because his attorney failed to object to the State's evidence that, four days prior to the murder, appellant threatened to burn down Williams' home. We disagree.

To prevail on a claim of ineffective assistance, appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for his trial counsel's errors, a different outcome would have resulted. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The review of counsel's representation is highly deferential and we must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable representation. *McFarland*, 928 S.W.2d at 500. Appellant bears the burden of overcoming that presumption. *Id*. Appellant must not only identify the acts or omissions allegedly constituting ineffective assistance and prove that these acts fall below the professional norm

for reasonableness, but appellant must also affirmatively prove prejudice. *Id*.

If this evidence were objected to, the trial court would not have abused its discretion by finding the evidence to be admissible. Under Rule 404(b) of the Texas Rules of Evidence, evidence of extraneous crimes, wrongs, or acts is not admissible to prove propensity, but may be used to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. TEX. R. EVID. 404(b). Evidence of threats or altercations between the victim and the accused are admissible in a murder case to show relevant facts and circumstances surrounding the offense, such as motive. TEX. CODE CRIM. PROC. ANN. art. 38.36 (Vernon Supp. 2001); *Bisby v. State*, 907 S.W.2d 949, 958-59 (Tex. App.—Fort Worth 1995, pet. ref'd). Counsel's failure to object to admissible evidence cannot constitute ineffective assistance. *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992). Appellant's third point of error is overruled.

## IV. Sufficiency of the Evidence

In his fourth and fifth points of error, appellant complains that the evidence at trial was legally and factually insufficient to prove beyond a reasonable doubt that the April 24th burning of the complainant led to complainant's death on July 2nd. We find that the record contains legally and factually sufficient evidence to support appellant's murder conviction.

We apply different standards when reviewing the evidence for legal and factual sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this Court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision.

When conducting a factual sufficiency review, we do not view the evidence in the light

most favorable to the verdict, and we set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of the evidence used to establish an element of the offense by claiming that evidence supporting the adverse finding is "so weak as to be factually insufficient." *Id*. at 11. We are mindful, however, that we must give appropriate, but not absolute, deference to the judgment of the fact finder so as to not supplant the fact finder's function as the exclusive judge of the weight and credibility given to witness testimony. *Id*. at 7.

Death is imputable to the wound as long as there is no evidence of gross neglect or improper treatment. *Jones v. State*, 582 S.W.2d 129, 133-34 (Tex. Crim. App. 1979). Our review of the record reveals no such evidence. On the contrary, the record shows that Williams died during a surgical procedure made necessary by the wound. The doctor's intent in performing this surgical procedure was to replace her infected heart valves. Her heart valves became infected because her body struggled with several bouts of bactermia. Bactermia occurred in Williams because the bacteria from the burns was eating up Williams' valves. In other words, bacteria entered Williams' bloodstream through the open burn wounds, which in turn allowed the bacteria to colonize in her heart, causing a cardiac disfunction. The doctors tried to remedy this through surgery. During that surgery, Williams died. The record, in short, does not show neglectful or improper treatment. It confirms the State's contention that Williams died despite the fact that she received proper medical care.

Viewing this evidence in the light most favorable to the prosecution, we believe that any rational trier of fact could have found the essential elements of the offense of murder. Accordingly, we overrule appellant's fourth point of error.

Furthermore, we do not find evidence in the record that greatly outweighs the evidence supporting the trial court's judgment. In conducting a factual sufficiency review, we only exercise our fact jurisdiction to prevent a manifestly unjust result. *Clewis*, 922 S.W.2d at 135. No such result obtains under this evidence. We conclude that the evidence is factually sufficient to support appellant's conviction for murder, and overrule his fifth point of error.

Having overruled appellant's five points of error, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed June 28, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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