Affirmed and Opinion filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00830-CR

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NICOMEDES SANTIBANEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 769,768

O P I N I O N

Over his plea of not guilty, a jury found appellant, Nicomedes Santibanez, guilty of murder. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). The jury assessed punishment at life imprisonment in the Texas Department of Criminal Justice, Institutional Division. Appellant appeals his conviction, arguing that the trial court erred in excluding certain hearsay testimony. We affirm the judgment of the trial court.

FACTUAL BACKGROUND

Several witnesses were at the same street intersection one morning, when they heard gunshots. They saw the complainant, Cleofas, lying on the ground with a blood stain in his back and appellant standing over him in a "shooter stance." Appellant fired down into Cleofas several times, then got into a parked car with appellant's two brothers and drove away. After a short chase, the police arrested appellant and his brothers and found weapons inside the vehicle.

At trial, appellant testified on his behalf. Appellant said that he was with two of his brothers when they were murdered years earlier. About a week before the shooting, Victor Borjas told appellant that Cleofas was one of the assailants who killed his brothers, and that Cleofas wanted to "finish [him and his brothers] off." On the day of the shooting, appellant and his brothers took three fully loaded guns to the intersection where they knew they could find Cleofas. Appellant testified that he only intended to talk to Cleofas, so that Cleofas would not hurt him or his brothers.

Once at the intersection, appellant and one of his brothers got out of the car, and appellant approached Cleofas with his gun at his waist. Cleofas shouted several insults to appellant, and after Cleofas appeared to duck behind a car, appellant believed that Cleofas reached for a gun in his shirt. However, Cleofas then turned and ran away from appellant, and appellant chased him across three lanes of traffic. Appellant said that he "lost his head at that moment," and shot Cleofas at least nine times, emptying his gun into Cleofas. After he shot Cleofas, appellant reloaded his pistol in his car. Appellant never actually saw a gun on Cleofas, and Cleofas did not have a weapon on him.

During trial, the trial court prohibited one of the arresting officers from testifying about statements appellant made after the shooting, explaining why he shot Cleofas. The court also prohibited Borjas from testifying about threats Cleofas made against appellant and his brothers a week before the shooting. The trial court excluded the testimony from both witnesses as

inadmissible hearsay, and appellant perfected a bill of exceptions for each of the witnesses' testimony.

DISCUSSION AND HOLDINGS

Admissibility of Hearsay Testimony from Appellant

In his first and second points of error, appellant argues that the trial court erred in excluding hearsay statements he made to one of the arresting officers explaining why he shot Cleofas. On direct examination, the officer who transported appellant in the patrol car after he was arrested, testified that appellant told him, "He [appellant] did it." However, on cross-examination by appellant, the trial court did not allow the officer to testify about appellant's other statements, that Cleofas had threatened him and his living family members and was responsible for killing two of his brothers a few years earlier.

Appellant argues that the trial court erred in excluding the officer's testimony because his statements to the officer were admissible for the following reasons: (1) they were relevant to his claim of self-defense; (2) they were relevant to show his state of mind under article 38.36(a) of the Texas Code of Criminal Procedure[1]; (3) they were *res gestae* of his arrest; and (4) they were admissible under the rule of optional completeness. We will first address whether appellant's statements to the officer were relevant to his theory of self-defense. As we explain below, because we find that appellant's statements were not relevant to his theory of self-defense, the trial court did not err in excluding the testimony on relevancy grounds.

A trial court's ruling on the admissibility of evidence is subject to reversal only if the trial court abused its discretion in admitting or excluding the evidence. *See Osby v. State*, 939 S.W.2d 787, 789 (Tex. App.—Fort Worth 1997, pet. ref'd). An abuse of discretion occurs

[1] Article 38.36 allows a defendant in a prosecution for murder to offer testimony showing the previous relationship between him and the deceased, together with other relevant facts and circumstances showing the accused's state of mind at the time of the offense. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.36 (a) (Vernon Supp. 2000).

when a decision is so clearly wrong and unjust that it "lies outside the zone within which reasonable persons might disagree." *Sneed v. State*, 955 S.W.2d 451, 453 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd).

Under the self-defense statute, a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. *See* TEX. PENAL CODE ANN. § 9.31(a) (Vernon 1994). That person may be justified in using *deadly* force against another if he satisfies the following elements: (1) if he would be justified in using force against the other under the self-defense statute; (2) if a reasonable person in his situation would not have retreated; and (3) when and to the degree he reasonably believes deadly force is *immediately* necessary to protect himself against the other's use or attempted use of unlawful deadly force. *See* TEX. PENAL CODE ANN. § 9.32(a) (Vernon 1994) (emphasis added); *Hughes v. State*, 719 S.W.2d 560, 563 (Tex. Crim. App. 1986). A showing of apparent danger is imperative to a theory of self-defense. *See Brooks v. State*, 548 S.W.2d 680, 684 (Tex. Crim. App.1977). An individual has a right to defend from apparent danger to the same extent as he would against an actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him at the time. *See Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984).

Here, appellant argues that his statements to the officer explaining that Cleofas threatened him and his family and killed two of his brothers were relevant to his theory of self-defense. Cleofas' acts, he argues, created an imminent danger of the use of deadly force against him. However, the evidence does not show that appellant was justified in using deadly force in self-defense against Cleofas. Appellant testified that Cleofas threatened him about a week before the shooting, and killed his brothers years earlier. Appellant also testified that on the day of the shooting, Cleofas shouted insults to him and appeared to pull out a weapon. However, appellant admitted that Cleofas turned and ran away from him, and that he did not retreat when Cleofas ran away. Instead, appellant chased Cleofas across three lanes of traffic and "lost his head" as he emptied his gun into Cleofas.

Based on these facts, we cannot conclude that appellant could have reasonably believed that deadly force was immediately necessary to protect himself against Cleofas' use or attempted use of unlawful deadly force. Appellant's hearsay statements explaining why he shot Cleofas are not relevant to his theory of self-defense because they do not show that deadly force was *immediately* necessary to protect appellant when Cleofas was running away from him. Appellant did not have a reasonable apprehension of apparent danger once Cleofas ran away, and a reasonable person in his situation would have retreated. Consequently, we hold that the trial court did not abuse its discretion in excluding the hearsay testimony from appellant on relevancy grounds.

Turning to appellant's other arguments - that his statements to the officer were admissible under article 38.36 of the Code of Criminal Procedure, as *res gestae* of his arrest, and under the rule of optional completeness - we find that any error was rendered harmless.

A trial court's ruling to exclude evidence is not reversible error unless the exclusion was harmful to the accused, and his substantial rights were affected. *See* TEX. R. APP. P. 44.2(b); *Guerra v. State*, 942 S.W.2d 28, 32 (Tex. App.—Corpus Christi 1996, pet. ref'd). When evidence is excluded, an accused is harmed when it is reasonably probable that the absence of the evidence might have contributed to the accused's conviction or affected his punishment. *See Guerra*, 942 S.W.2d at 33; *Jefferson v. State*, 900 S.W.2d 97, 102 (Tex. App.—Houston [14th Dist.] 1995, no pet.). Inadmissible testimony can be rendered harmless if the same or similar evidence is admitted without objection at another point during the trial. *See Womble v. State*, 618 S.W.2d 59, 61 (Tex. Crim. App.1981).

Here, any error was rendered harmless when substantially the same evidence was conveyed to the jury during trial. While on the stand, appellant testified about his brothers' murders. Victor Bojas told appellant a week before the offense that Cleofas was one of the individuals who shot his brothers. On the day of the shooting, appellant went to talk to Cleofas because he thought Cleofas was going to harm him and his surviving brothers. During closing argument, appellant argued that Cleofas had bragged about being involved with the brothers'

murders, and that the jury should consider that appellant acted reasonably because his brothers were killed, and he received threats from a person who had bragged about being involved in their death. In its closing, the State argued that appellant heard rumors indicating Cleofas was responsible for his brothers' deaths, and that appellant heard Cleofas would "finish him [appellant] off."

Substantially the same evidence was admitted during appellant's testimony at trial and during closing arguments as would have been admitted during the officer's testimony. Thus, the trial court's decision to exclude the hearsay testimony from the officer based on article 38.36, *res gestae*, or the rule of optional completeness did not contribute to appellant's conviction or punishment, and any error was rendered harmless.[2]

Admissibility of Hearsay Testimony from Victor Borjas

In appellant's next three points of error, he argues that the trial court erred in excluding hearsay testimony from Victor Borjas. Borjas testified that he told appellant something that scared him [appellant], but the trial court did not allow Borjas to testify as to what he told appellant. During an offer of proof, Borjas testified that a week before the shooting he told appellant about threats Cleofas had made against appellant's life. Appellant argues that Borjas' testimony was admissible for the following reasons: (1) it was probative to his claim of self-defense; (2) it was probative as evidence of sudden passion to support a conviction for manslaughter instead of murder; and (3) it was admissible as evidence of his state of mind at the time of the shooting.

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[2] We reach this result in spite of the cases appellant cites on the issue of the rule of optional completeness. *See Khoury v. State*, 669 S.W.2d 731, 734 (Tex. Crim. App. 1984); *Westbrook v. State*, 522 S.W.2d 912, 915 (Tex. Crim. App. 1975). These cases are distinguishable from this case because they involved viable claims of self-defense in which the defendants responded to immediate perceived threats to kill them. Had the defendants not used deadly force, they themselves would have been severely injured or killed. For example, in *Khoury*, the deceased, who was in Khoury's apartment, brandished a knife and threatened to "cut [Khoury] in half" and "cut maps on his face." *Khoury*, 669 S.W.2d at 734. In *Westbrook*, the deceased and Westbrook were engaged in heated argument when the deceased started toward him with a knife in his hands and threatened to kill him. *See Westbrook*, 522 S.W.2d at 914-15. In contrast, here, there were no threats made immediately before the shooting and, as noted, the deceased was fleeing with his back to appellant.

We find that appellant has not preserved these complaints on appeal. During trial, he did not offer any of the above reasons in response to the State's hearsay objection, nor did he offer the reasons after making his offer of proof. Consequently, he has waived any error and presents nothing for review. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Long v. State*, 800 S.W.2d 545, 548 (Tex. Crim. App. 1990) (holding that once an objection to hearsay is raised, the burden shifts to the non-objecting party to show the evidence is admissible pursuant to an exception to the hearsay rule). Appellant's points of error three through five are overruled.

Cumulative Effect of the Exclusion of the Hearsay Testimony

In his sixth point of error, appellant argues that the cumulative effect of excluding the hearsay testimony from the officer and Borjas denied him a substantial right to present his defense. However, "an allegation that the cumulative effect of two or more errors by the trial court denied appellant a fair trial is not a proper ground of error and presents nothing for review." *Lape v. State*, 893 S.W.2d 949, 953 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). Moreover, we already have held that appellant waived his complaints regarding the excluded testimony. Appellant's sixth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed June 29, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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