Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00389-CR

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JEFFREY LANE BULLOCK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 717798

O P I N I O N

In this appeal from a conviction for aggravated assault, the appellant, Jeffrey Lane Bullock, raises four issues challenging the trial court's evidentiary rulings, probable cause finding, and charge to the jury. We affirm the judgment of the trial court.

INTRODUCTION

The state charged the appellant with aggravated assault after he threatened the complainant, Michael Dowdell, with a shotgun. The appellant pleaded not guilty and

elected to be tried before a jury. After finding the appellant guilty of aggravated assault, the jury assessed punishment at five years confinement with a recommendation of community supervision and a $3000 fine.

BACKGROUND FACTS

On the afternoon of March 13, 1996, the appellant and Dowdell were driving their vehicles on the same road on the outskirts of Houston, Texas. Dowdell was alone in his car. John Hill was a passenger in the appellant's truck. While passing Dowdell's vehicle, the appellant's truck kicked up a rock that cracked the windshield of the car Dowdell was driving. Dowdell followed the appellant's truck to an apartment complex. When both vehicles stopped at the apartment complex security gate, Dowdell rolled down the window of his car and asked the appellant for an apology. The appellant responded by cursing at Dowdell. At that point, the security gate opened, and the appellant proceeded through the gate into the complex. Dowdell, unable to record the appellant's license number because the rear plate was missing, followed the appellant's truck into the complex in order to get the license number from the front of the vehicle.

The two motorists emerged from their vehicles and began arguing. When Dowdell turned to go back to his car, the appellant pulled a shotgun from his truck. Dowdell watched in fear as the appellant inserted shells into the casing of the shotgun. Having heard the angry discourse and seeing Dowdell standing unarmed before the appellant, Hill pleaded with his friend to put the gun down, pointing out that Dowdell only wanted an apology. Laura Carrell, a resident of the apartments who was waxing her car in a nearby parking space, heard Hill entreating the appellant to put the gun down. After a very brief time, the appellant placed the shotgun back in his truck and ran into the apartment complex. The confrontation, although lasting only a minute, was terrifying for Dowdell, who heard the menacing click of the gun after the appellant loaded the shotgun shells, and who stood in

easy range of the angry gunman.

Harris County Sheriff's deputies arrived a short time after the incident and arrested the appellant, charging him with aggravated assault. When the sheriff's deputies arrived on the scene, one of the officers spoke with Hill, who handed the officer the keys to the appellant's truck and gave him permission to search the truck. The officer searched the appellant's truck and found the shotgun behind the seat. After realizing that the appellant, who was the legal owner of the truck, had not given him permission to conduct the search, the deputy returned everything back to the truck and locked it up.

At trial, the appellant asserted that he acted in self defense. He testified that he became frightened on the road when Dowdell was following him, blowing the horn and yelling at him. The appellant also stated that he was frightened during the confrontation because when Dowdell turned to go back to his car, he suspected that he was doing so in order to retrieve some kind of weapon. The appellant claims that this fear prompted him to reach behind the seat of his truck and remove his shotgun in an attempt to protect himself and intimidate Dowdell. The appellant claimed the shotgun was unloaded. Finally, the appellant stated that once he realized that Dowdell did not have a weapon, he returned the shotgun to his truck.

ISSUES ON APPEAL

The appellant challenges various rulings of the trial court by presenting four unrelated issues for this court's review.

Excited Utterance Exception to the Hearsay Rule

In his first issue, the appellant asserts the trial court erred in permitting Dowdell to testify about hearsay statements made by Hill (the passenger in the appellant's truck) prior to and during the incident because the ruling deprived him of his right to confrontation and

cross-examination under the Sixth and Fourteenth Amendments to the United States Constitution as well as the Constitution of the State of Texas. At trial, Dowdell testified that during the confrontation, Hill first tried to persuade the appellant not to take the gun out of the appellant's truck. According to Dowdell, once the appellant pulled the gun from the truck, Hill yelled at the appellant to stop pointing the gun and urged him to put it away. Over the appellant's objection, the trial court admitted Hill's out-of-court statements as an excited utterance exception to the hearsay rule. *See* TEX. R. CIV. EVID. 803(2). The appellant argues that the trial court erred in admitting these statements because: (1) there was no testimony that Hill was excited at the time he made the statements; and (2) there was no testimony as to when the statements were made.

The excited utterance exception to the hearsay rule provides that "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. TEX. R. CRIM. EVID. 803(2). To qualify as an excited utterance under rule 803(2), the statement must meet three criteria:

(i) it must be the product of a startling event;

(ii) the declarant must have been dominated by the emotion, excitement, fear, or pain of the event; and

(iii) the statement must have related to the circumstances of the startling event.

See McFarland v. State, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992). The determination of the admissibility of an out-of-court statement under an exception to the hearsay rule is within the trial court's discretion. *See Lawton v. State*, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995).

The record in this case supports the trial court's decision to admit Hill's statements as excited utterances. Hill had been in the appellant's truck during the initial encounter on

the road and had observed the afternoon's events unfold into a heated argument during which he witnessed his enraged friend threaten Dowdell with a shotgun. The escalation of human emotion, coupled with the deadly possibility that an unarmed man could be killed at the pull of a trigger, would stir panic and fright in virtually any eyewitness. The facts presented here unquestionably qualify the incident as a startling event within the meaning of rule 803(2). Hill's statements clearly related to the event. It is overwhelmingly apparent from the record that Hill was excited at the time that he made the statements,[1] and that he made the statements contemporaneously with seeing the appellant point the gun at Dowdell. Under these circumstances, the trial court was acting well within its discretion in allowing the testimony as excited utterances.

As for the appellant's right to confrontation and cross-examination, the United States Supreme Court has held that if hearsay evidence either "falls within a firmly rooted hearsay exception" or is supported by a "showing of particularized guarantees of trustworthiness," it is admissible under the confrontation clause of the Sixth Amendment. *Idaho v. Wright*, 497 U.S. 805, 817, 110 S. Ct. 3139, 3147 (1990). Because we find that the disputed testimony was properly admitted under the excited utterance exception to the hearsay rule, the appellant was not denied his right of confrontation and cross-examination. The appellant's first issue is overruled.

Probable Cause for a Warrantless Search

In his second issue, the appellant alleges the trial court committed reversible error when it allowed the police officer who investigated the incident to testify about finding the shotgun used in the assault in the appellant's truck. At trial, the appellant argued that the deputy lacked probable cause to search his truck and that no exception to the search warrant

[1] Dowdell testified that Hill was nervous, upset and excited and "was yelling and screaming behind [the appellant]."

requirement existed. After conducting a hearing outside the presence of the jury, the trial court found that the officer had probable cause and that the evidence was admissible.

To justify a warrantless search, the state must show the existence of probable cause at the time the search was made, and the existence of exigent circumstances which made the procuring of a warrant impracticable. *See McNairy v. State*, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991). Where the trial court has heard evidence and ruled on the admission or exclusion of the evidence obtained during the search, we will uphold the trial court's ruling unless the record clearly shows that the court abused its discretion. *See Maddox v. State*, 682 S.W.2d 563, 564 (Tex. Crim. App. 1985). Here, the trial court heard testimony from the police officer as to both probable cause and exigent circumstances before finding the evidence admissible. In his brief, the appellant presents no compelling argument or authority suggesting that the trial court abused its discretion. We therefore find no abuse of discretion.

Additionally, the officer's testimony relating to the finding of the shotgun is admissible because the appellant opened the door to the admission of this evidence at trial. While cross-examining Dowdell, the appellant's attorney asked Dowdell a series of questions about the recovery of the gun—"*Did they recover the gun from the car*?" "*Did they recover it*?" "*Did they take it out of the car*?" By asking these questions, the appellant introduced the matter of the officer's recovery of the gun into the proceeding. Once the appellant opened the door, the state had the right to ask additional questions to fully explain the events to the jury. *See Parr v. State*, 557 S.W.2d 99, 102 (Tex. Crim. App. 1977); *Credille v. State*, 925 S.W.2d 112, 116 (Tex. App.—Houston [14th Dist] 1996, pet. ref'd). The appellant's second issue for review is overruled.

Submission of Self-Defense Instruction in Jury Charge

In his third appellate issue, the appellant complains that the trial court erred in its

submission of the self-defense instruction in the charge to the jury. The appellant asserts that the court's charge required the use of deadly force by the complaining witness (Dowdell) before the appellant could respond in self-defense, rather than merely informing the jury that the appellant was entitled to use self-defense in response only to some use of force and not necessarily deadly force. We disagree.

The court's charge in this case specifically stated:

> You are instructed that 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 person's use or attempted use of unlawful force.

When the requested but refused instruction is substantially the same as or is adequately covered by the instruction the trial court ultimately submitted, there is no harm. *See Moody v. State*, 827 S.W.2d 875, 893 (Tex. Crim. App. 1984). Here, the instruction the appellant requested was virtually identical to the one the trial court gave in the charge. Although the court did go on to also instruct the jury on when the use of deadly force is justified, we see nothing in the charge that could have confused or misled the jury on the issue of when it is proper to act in self defense. Issue three is overruled.

Admissibility of Photographic Evidence of Previous Assault Under Rule 403, Texas Rules of Evidence

In his final issue for review, the appellant argues the trial court erred by allowing the state to admit into evidence a photograph of an individual that the appellant had previously assaulted. During the punishment phase of the trial, the appellant took the stand to establish his eligibility for probation. On cross-examination, the state questioned the appellant about a previous conviction for assault. During this questioning, the state handed the appellant a photograph of the victim of the previous assault and asked the appellant a series of questions regarding the photograph. The appellant admitted that the individual in the photograph was the person he had assaulted and that the photograph depicted the injuries

that he inflicted during that assault. Counsel for the appellant initially objected to the questions because the photograph was not in evidence, at which point the state offered the photograph into evidence. The appellant then objected to the admission of the photograph on the stated grounds that (1) the state had not properly authenticated the photograph, and (2) the probative value of the photograph was substantially outweighed by the prejudicial effect under rule 403, Texas Rules of Evidence. The trial court overruled the appellant's objections and admitted the photograph into evidence.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). An abuse of discretion is established "only when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). Moreover, error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *See* TEX. R. EVID. 103(a). After reviewing the record and viewing the photograph of the previous assault victim, we cannot conclude that the trial court abused its discretion by allowing the photograph into evidence during the punishment phase of the appellant's trial. Issue four is overruled.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed September 9, 1999.
Panel consists of Justices Yates, Fowler and Frost.

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