Affirmed and Opinion filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00650-CR

CARLOS MIGUEL BANKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 833,544

O P I N I O N

Appellant Carlos Miguel Banks challenges his conviction of aggravated assault and his sentence of eight years' imprisonment in the state penitentiary. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November of 1999, Tapatha McClendon offered appellant, a co-worker, the option of renting a bedroom located in her home. Appellant lived with McClendon until January 7, 2000, when she requested that he move out. McClendon testified that her relationship with appellant was not romantic and her primary intention in allowing appellant to live with

her was to lessen appellant's financial problems. McClendon did admit, however, that she and appellant had shared one sexual encounter. After this episode, the relationship became closer than McClendon wished and she asked appellant to leave.

Three days after appellant moved out, on January 10, 2000, appellant showed up at McClendon's home, very irate, suspecting that McClendon was entertaining another man. McClendon told him to leave or she would call the police. Appellant complied. The following day, Cobry Guy, whom McClendon had been dating, went to McClendon's home. Almost simultaneously, appellant arrived and parked behind Guy's vehicle. Appellant got out of his car with a firearm in his hand and fired the weapon through the window of Guy's car, causing Guy to lose a finger and suffer minor injury to his head. Appellant fled the scene.

At trial, Guy testified that he went to McClendon's home on January 11, 2000. He arrived very shortly before appellant. Still in his car, Guy reached into a bag to retrieve his cell phone. At that point, he noticed appellant standing near his vehicle aiming a rifle at him. Appellant then fired the rifle through his car window, striking Guy. Guy testified that he pretended to be dead so appellant would leave. Appellant took the stand at trial and offered a different version of the events.

Appellant testified that when he went over to McClendon's home on January 10, 2000, he noticed that something was strange, and thought that McClendon might have another man over. The following day, on January 11, 2000, appellant called to inform McClendon that he was coming over to pick up his clothes. Appellant stated that he arrived at McClendon's home about the same time Guy arrived. Appellant testified that he locked his car and began to walk toward the house when he saw Guy reaching into a bag on his seat for an object that appellant believed to be a gun. Instead of getting into his car and driving away, appellant claims that he had only enough time to run to the trunk of his car, unlock it, and retrieve a rifle. Once he retrieved the rifle from the car, appellant approached Guy's car and fired once. Appellant testified that after firing the rifle, he ran back to his car, drove

away, and disposed of the rifle in a dumpster.

Appellant was indicted for aggravated assault. Appellant pleaded not guilty. A jury convicted appellant as charged and assessed punishment at eight years' confinement in the state penitentiary.

II. ISSUES PRESENTED ON APPEAL

Appellant presents four points of error for our review: (1) – (2) the State violated his right to remain silent under both the Texas and United States Constitutions when, in attempting to impeach his credibility at trial, the prosecutor commented on his post-arrest silence with the Houston Police Department and the District Attorney's Office; (3) by failing to object to the State's comment on his post-arrest silence, appellant's trial counsel failed to render effective assistance; and (4) the trial court erred in refusing a jury instruction on the defense of necessity.

III. ANALYSIS

A. Comment on Post-Arrest Silence

In his first and second points of error, appellant contends the State improperly commented on his post-arrest silence, in violation of his right to remain silent. In particular, appellant asserts the State attempted to impeach his credibility by questioning him as to why he did not tell his version of the events to the police or the District Attorney's office after he was arrested.

The State's use of an accused's post-arrest, post-*Miranda* silence for impeachment purposes is prohibited as a violation of the defendant's Fifth Amendment right against self-incrimination. *See Sanchez v. State*, 707 S.W.2d 575, 580 (Tex. Crim. App. 1986). However, the defendant can waive his right to remain silent and to not have that silence used against him. *Wheatfall v. State*, 882 S.W.2d 829, 836 (Tex. Crim. App. 1994); *see also Ransom v. State*, 789 S.W.2d 572, 584 (Tex. Crim. App. 1989) (overruling point of error

because trial objection did not comport with appellate complaint regarding use of post-arrest silence). The State contends that, because appellant did not object to the admission of evidence of his post-arrest silence, he has waived any error. We agree.

On direct examination, appellant testified that he shot Guy while acting in self-defense. On cross- examination, the State asked appellant if he had ever told the police or the District Attorney's office his version of the events. The following excerpt from the record shows that appellant voiced no objection to this line of questioning:

> Q:[Prosecutor]: Well, if you were acting in self defense that night, Mr. Banks, if you were truly in fear of your life, why didn't you stick around or go call the police or do something instead of running around and disposing of [the] weapon?
>
> A: [Mr. Banks]: Well, I didn't call the police because I didn't think that the guy had got injured. I just thought I shot the back window out of the car and that was it.
>
> Q: Oh, and it's all right just to shoot out somebody's window?
>
> A: No.
>
> Q: Did you ever tell the police this version of the story?
>
> A: Tell the police what?
>
> Q: This version of the story, Mr. Banks?
>
> A: No.
>
> Q: Did you ever contact anybody in the District Attorney's office and tell them that Mr. Banks or you thought Mr. Banks was pulling a weapon on you that night?
>
> A: I am Mr. Banks.
>
> Q: Excuse me. That Mr. Guy was pulling a weapon on you that night?
>
> A: No.
>
> . . .
>
> Q: The first time we're hearing this story that Mr. Guy was pulling a weapon on you and that you were in fear for your life is here in the courtroom today?
>
> A: Right. Correct.
>
> Q: So, you have had almost three months to come up with this story, haven't you?

A: No.

Appellant acknowledges the lack of objection but maintains that an objection is not necessary because this is a violation of due process which rises to the level of fundamental error. We disagree. This type of error is not fundamental, and appellant waived his rights by failing to object. *See Borgen v. State*, 672 S.W.2d 456 (Tex. Crim. App. 1984); *Boulware v. State*, 542 S.W.2d 677 (Tex. Crim. App. 1976). Because of appellant's failure to voice an objection, we find the error, if any, has not been preserved for our review. Accordingly, we overrule appellant's first and second points of error.

B. Ineffective Assistance of Counsel

In his third point of error, appellant contends he was denied effective assistance of counsel when his trial counsel failed to object to the State's comments on his post-arrest silence.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92. Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound

trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant has the burden to rebut this presumption by presenting evidence illustrating why trial counsel did what she did. *See id.* An appellant cannot meet this burden if the record does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd).

When there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. *See Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.–Beaumont 1995, pet. ref'd.).

Although appellant filed a motion for new trial, there was no hearing held to develop a proper evidentiary record. Moreover, appellant did not raise his ineffective-assistance claim in his motion or otherwise show that his counsel's performance was not based on sound trial strategy. The record is silent with regard to why appellant's trial counsel did not object to the State's line of questioning. The trial record does not contain any direct evidence of trial counsel's reasoning or strategy. The court of criminal appeals has noted that "[a] substantial risk of failure accompanies an appellant's claim of ineffective assistance on direct appeal . . . . In a majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel." *Thompson*, 9 S.W.3d at 813-14. The reason an adequate record is so important in these cases is because in the absence of such a record, the court must apply the strong presumption that counsel's performance was a part of trial strategy, and the court typically will not second-guess a matter of trial strategy. *Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999). Furthermore, when testing whether counsel was ineffective, a failure to object to even *inadmissible* evidence can constitute a plausible trial strategy. *See, e.g., Thompson v. State*, 915 S.W.2d 897, 904 (Tex. App.—Houston [1st Dist.] 1996, no pet.); *Varughese v. State*, 892 S.W.2d 186, 196 (Tex.

App.—Fort Worth 1994, no pet.) (failure to object can be part of trial strategy to be open and honest with the jury).

Whatever trial counsel's reasons may have been for pursuing the chosen course, in the absence of a record identifying these reasons, we must presume they were made deliberately, as part of sound trial strategy. Because we are unable to conclude that defense counsel's performance fell below an objective standard without evidence in the record, we find appellant has failed to meet the first prong of *Strickland.* Accordingly, we overrule appellant's third point of error.

C. Jury Charge

In his fourth point of error, appellant contends the trial court erred by refusing his requested instruction on necessity. In particular, appellant maintains the trial court should have instructed the jury on necessity and not self-defense under Section 9.32 of the Texas Penal Code, because Section 9.32 required him to admit that he intended to shoot Guy and cause bodily injury. TEX. PEN. CODE ANN. § 9.32 (Vernon Supp. 2002). Appellant asserts that with the defense of necessity, he need only have shown that his actions were reasonable. Appellant claims that because he did not intend to cause any bodily injury, the defense of necessity is more appropriate.

Appellate review of alleged charge error is a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). Initially, we must determine whether error occurred. If we find error, then we must evaluate whether sufficient harm resulted from the error to require reversal. *Id*. at 731-32. Appellent claims it was error for the trial court to refuse to charge the jury on the law of necessity. The State counters that appellant was not entitled to the instruction of necessity because the jury was instructed on self-defense. The State contends that because a self-defense instruction was given, the third requirement of the necessity defense cannot be met. We agree with the State.

To raise the defense of necessity, a defendant must admit he committed the offense

and then offer necessity as a justification. *See Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999). The defense of necessity "exonerates a person who commits proscribed conduct in order to prevent an even greater harm." *Acosta v. State*, 660 S.W.2d 611, 614 (Tex. App.—Corpus Christi 1983, no pet.). "Necessity" is a justification defense to a criminal charge if:

> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

TEX. PEN. CODE ANN. § 9.22 (Vernon 1994). In contrast, to raise the issue of self-defense, a person must reasonably believe that deadly force is immediately necessary. TEX. PEN. CODE ANN. § 9.32 (Vernon 1994). Section 9.32 provides that "a person is justified in using deadly force against another:

> (1) if he would be justified in using force against the other under Section 9.31 of this code;
>
> (2) if a reasonable person in the actor's situation would not have retreated; and
>
> (3) when and to the degree he reasonably believes the deadly force is immediately necessary:
>
> (A) to protect himself against the other's use or attempted use of unlawful deadly force . . ."

Id.

Where deadly force in defense of a person is the conduct that is allegedly "immediately necessary" under § 9.22, the defense of necessity does not apply because a legislative purpose to exclude this justification is found in the retreat requirement of § 9.32. TEX. PEN. CODE ANN. § 9.22(3) and § 9.32 (Vernon 1994); *Butler v. State*, 663 S.W.2d 492, 496 (Tex. App.—Dallas 1983), *aff'd*, 736 S.W.2d 668 (Tex. Crim. App. 1987); *Epley v.*

State, 704 S.W.2d 502, 506 (Tex. App.—Dallas 1986, pet. ref'd); *see also Banks v. State*, 955 S.W.2d 116, 118-19 (Tex. App.—Fort Worth 1997, no pet.).; *Hermosillo v. State*, 903 S.W.2d 60, 67 (Tex. App.—Fort Worth 1995, pet. ref'd) (applying the *Butler* rationale to aggravated robbery situation).

Appellant received an instruction on the use of deadly force in self-defense under Section 9.32. Appellant's conduct was the use of deadly force allegedly in self-defense; therefore, Section 9.22(3) has not been satisfied. The defense of necessity does not apply, and thus, it was not error for the trial court to refuse to include an instruction on this defense. Accordingly, we overrule appellant's fourth point of error.

Having found no merit in any of the appellate issues presented for our review, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 10, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
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