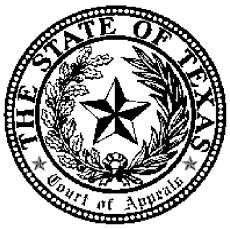
Affirmed and Opinion filed September 27, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00291-CR

JOHNNIE EARL McKISSACK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Cause No. 12,965

O P I N I O N

Appellant, Johnnie McKissack, was convicted by a jury of the felony offense of aggravated assault. The jury assessed his punishment at 19 years in the Institutional Division of the Texas Department of Criminal Justice. Appellant claims the trial court erred in: (1) admitting a prior written statement of a witness; (2) allowing the State to elicit expert testimony from a witness who was not qualified to render such an opinion; (3) denying appellant's request for inclusion of a charge on self-defense; and (4) allowing the testimony of three witnesses not on the witness list provided to the defense. We affirm.

The record reflects that on November 17, 1998, appellant and his girlfriend, Jennifer Fisher, met James Powell and Tena Hernandez at a bar and invited them to come back to appellant's house after the bar closed. Appellant and Powell planned to go to work together the next day. At the house, appellant and Fisher got into an argument and appellant fired a pistol at the floor near her feet. Fisher left with Hernandez in Hernandez's truck. After the women had left, Powell went outside and discharged appellant's gun for no particular purpose other than to shoot it. Neighbors apparently summoned police, and an officer questioned appellant and Powell regarding the gunfire.

Late that evening, Fisher and Hernandez returned to the house, but slept outside in the truck. The next morning, Adam Knight arrived at appellant's house to drive appellant and Powell to the construction site where they were working. After Powell woke the women in the truck, appellant and Fisher resumed their argument. Appellant stood in front of the truck and dared Fisher to run him over. When she did not, he walked over to Knight's car, took a gun from his lunch cooler and loaded it. He walked to the passenger side of the truck and fired five shots into the truck, hitting Fisher twice. The two women drove to a hospital; the three men went to the construction site where appellant was subsequently arrested.

In his first issue, appellant contends that the trial court erred in admitting Powell's written statement into evidence since Powell had not been impeached. A witness's prior consistent statement is inadmissible except when offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive. See TEX. R. EVID. 613(c), 801(e)(1)(B). Here, appellant attempted to impeach Powell's testimony that he was alone when he stepped outside to fire appellant's handgun. Appellant's counsel suggested that in his written statement, Powell had said that he *and* appellant stepped outside to fire the weapon. The State then offered Powell's statement into evidence to permit the jury to read his comments in context. Because defense counsel attempted to impeach Powell, the State was properly allowed to place the prior statement into evidence to rebut the allegations of inconsistent testimony. Appellant's first issue is overruled.

In his second issue, appellant contends the trial court erred in allowing the State to elicit expert testimony from a witness who was not qualified to render such an opinion. Under Rule 702 of the Texas Rules of Evidence, the trial court, before admitting expert testimony, must be satisfied that three conditions are met: (1) that the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) that the subject matter of the testimony is an appropriate one for expert testimony; and (3) that admitting the expert testimony will actually assist the factfinder in deciding the case. TEX. R. EVID. 702; *Alvarado v. State*, 915 S.W.2d 199, 215-16 (Tex. Crim. App. 1995). The trial court's judgment regarding expert qualifications and the admissibility of expert testimony is subject to an abuse of discretion standard of review. *Lagrone v. State*, 942 S.W.2d 602, 616 (Tex. Crim. App. 1997); *Joiner v. State*, 825 S.W.2d 701, 708 (Tex. Crim. App. 1992). If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. TEX. R. EVID. 701; *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997).

The record reflects that counsel for the defense objected to Investigator Allan Ruemke testifying as an expert witness in ballistics. We need not address whether Ruemke was properly qualified as an expert witness because the State did not attempt to elicit expert testimony from Ruemke. While counsel objected that Ruemke was not qualified to testify as an expert on whether the bullet came from a .380 caliber weapon or a .22 caliber weapon, the State's question was only whether the slug was a metal jacketed bullet. Ruemke stated in response that the slug was a jacketed bullet and that he could see both the lead and the metal jacket on the bullet. Simple observations of this type do not require expert testimony. Since the State did not elicit expert testimony from Ruemke, appellant's second issue is overruled.

In his third issue, appellant contends the trial court erred in denying appellant's request for inclusion of a charge on self defense. An accused is entitled to an instruction on every defensive issue raised by the evidence. *Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987). In determining whether the evidence raised self-defense, we look to whether the defendant reasonably believed the use of deadly force was immediately necessary and whether the defendant's assessment of the situation reasonably indicated he could have retreated. *See* TEX. PEN. CODE ANN. § 9.31 (Vernon 1995); *Fielder v. State*, 756 S.W.2d 309, 319 (Tex. Crim. App. 1988). If the evidence viewed in a favorable light does not establish a case of self-defense, an instruction is not required. *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). Here, the evidence was not sufficient to raise the issue of self-defense. Appellant argued with the victim while she was seated inside the truck. He stood in front of the truck and dared her to run him over. When she did not, he walked away from the truck and to another car, terminating the confrontation. He then retrieved a gun from his lunch kit and loaded it. He walked to the opposite side of the truck and shot into the window five times, hitting the victim twice. These events do not suggest that deadly force was necessary or that appellant could not have retreated from the confrontation; thus, the issue of self-defense was not raised and the charge was properly excluded. Appellant's third issue is overruled.

In his last three issues, appellant contends the trial court erred in allowing the State to present the testimony of three witnesses who were not included on a witness list provided to the defense before the trial. Notice of the State's witnesses must be given to the defense upon request. *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993). When a witness who is not listed on the State's witness list is allowed to testify, the decision of the trial court is reviewed under the abuse of discretion standard. *Nobles v. State*, 843 S.W.2d 503, 514-515 (Tex. Crim. App. 1992). The factors considered in determining whether there was an abuse of discretion are whether the State's actions in failing to disclose were in bad faith and whether the defense could have reasonably anticipated that the witness would testify although his or her name was not included on the witness list. *Id.*; *Hightower v. State*,

629 S.W.2d 920, 925 (Tex. Crim. App. 1981). The first of the three objectionable witnesses was the jailer from the Sheriff's Department who testified as to the jail's procedure for handling inmate mail. Defense counsel raised the issue of the authenticity of letters sent from appellant to Hernandez while in jail and this witness was called to establish their authenticity. The second was a county probation officer who testified as to her knowledge of the victim's status as a probationer who had absconded. During cross-examination, defense counsel questioned three of the state's witnesses about the last time they had seen the victim and their knowledge of the victim's whereabouts. The third witness, an assistant district attorney, testified as to her handling of a separate criminal charge pending against Hernandez. During cross-examination of Hernandez, defense counsel raised the issue of whether she was testifying in exchange for leniency in a criminal case pending against her in the county. There was no showing nor allegation that the State acted in bad faith. The appellant could have reasonably anticipated the testimony of the three witnesses in response to issues he raised in cross-examination. Had appellant needed additional time to prepare for cross-examination of these witnesses, he could have asked for a recess or a continuance. He did not do so. Therefore, the trial court did not abuse its discretion in allowing the testimony of these three witnesses. Appellant's fourth, fifth and sixth issues are overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 27, 2001.
Panel consists of Justices Anderson, Hudson, and Seymore.
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