D-1-DC-21-900007

THE STATE OF TEXAS,	)	
	)	**IN THE 147TH JUDICIAL**
Plaintiff,	)	
	)	
v.	)	**DISTRICT COURT**
	)	
DANIEL PERRY,	)	
	)	**TRAVIS COUNTY, TEXAS**
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR NEW TRIAL

Pursuant to Tex. R. App. P. 21, Defendant Daniel Perry hereby moves this Court for a new trial based upon the grounds, either separately or collectively, set forth below.[1]

I. The Court Erroneously Excluded Key Evidence to Establish Garrett Foster and the Protestors, and not Sgt. Perry, were the "First Aggressor."

A. Law

Case law from the Court of Criminal Appeals makes clear that, when a defendant's case relies upon the justification of self-defense, he must be allowed to present evidence that the Complainant, in this case Garrett Foster, was the "first aggressor." This is done by showing specific instances of the Complainant's conduct to explain the Complainant's state of mind, intent, or motive. For example, the Court

[1]While new trial motions normally are filed after sentencing, defense counsel believed it was important to bring the "outside influence" facts to the Court's attention as soon as they were learned.

of Criminal Appeals explained in *Torres v. State*, 71 S.W.3d 758, 761-62 (Tex. Crim. App. 2002):

> When a defendant claims that the deceased was the first aggressor, prior specific acts of violence relevant to the ultimate confrontation may be offered to show a deceased's state of mind, intent, or motive. We have not required that the specific, violent acts be directed against the defendant to be admissible. In fact, we have found error in excluding such acts where they were directed towards third parties. For purposes of proving that the deceased was the first aggressor, the key is that the proffered evidence explains the deceased's conduct. As long as the proffered violent acts explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only, prior specific acts of violence may be admitted even though those acts were not directed against the defendant.

Indeed, Tex. R. Evid. 404(a)(3)(A) allows the admission of such specific instances when they are used to show, for example, a Complainant's intent, motive for an attack on a defendant, or hostility. *Ex Parte Miller*, 330 S.W.3d 610, 620 (Tex. Crim. App. 2009)

Moreover, a defendant need not have known of the Complainant's prior acts at the time of the incident in question.

> Appellant's purpose in offering Glen's testimony was not to prove Rackley's character, but rather to prove Rackley's intent or motive to cause him harm on the night in question. Thus, the evidence of this *uncommunicated* threat by Rackley, allegedly made only a month or two before Rackley's death, had relevance beyond its tendency to demonstrate Rackley's character. A reasonable jury could have believed this evidence shed light upon Rackley's state of mind when he arrived at appellant's house on the night in question, and, as long as it was

> otherwise admissible, appellant possessed the right to present it for the jury's consideration. The proffered evidence tended to make the existence of a consequential fact more probable." (emphasis added)).

Tate v. State, 981 S.W.2d 189, 193 (Tex. Crim. App. 1998) [2]

It also must be noted that this case was a "multiple assailants" case.[3] In light of that fact, evidence regarding prior acts of Mr. Foster's fellow protestors would be admissible under Tex. R. Evid. 404 and 406 to the extent it helped explain their intent or motive in approaching and attacking Sgt. Perry's car on July 25, 2020, and to show habit.

B. Excluded Evidence

During the trial of this matter, Sgt. Perry attempted to introduce evidence to show Mr. Foster's motive, state of mind, and intent on July 25, 2020, by putting forth other incidents in which he was the first aggressor and during which he unlawfully scared other drivers who he believed might interfere with his objective to "take the

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[2] *Garza v. State*, 2005 WL 395442 (Tex. Crim. App. 2005) ("When such evidence is offered to show that the deceased was the first aggressor, the defendant need not have knowledge of the specific violent acts at the time of the homicide. 'The proper predicate for the specific violent prior act by the deceased is some act of aggression that tends to raise the issue of self-defense, which the violent act may then help clarify.' The key is that the proffered evidence explains the deceased's conduct." (footnotes omitted)

[3] *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020) ("When the evidence viewed from the defendant's standpoint shows an attack or threatened attack by more than one assailant, the defendant is entitled to a multiple assailants instruction. *Frank v. State*, 688 S.W.2d 863, 868 (Tex. Crim. App. 1985). The issue may be raised even as to those who are not themselves aggressors as long as they seem to be in any way encouraging, aiding, or advising the aggressor.").

streets." Sgt. Perry also attempted to introduce a video recording of Mr. Foster in which he admitted that he carried his assault rifle as a means to intimidate "puss[ies]" who did not share his beliefs.

The defense attempted to introduce three other incidents during which Mr. Foster attempted to stop cars on the public streets using his girlfriend's wheelchair and during which protestors then surrounded the cars.

One incident occurred on July 4, 2020, and involved a driver by the name of Joe Sanchez. Mr. Sanchez was attempting to travel down the I-35 frontage road that was open to vehicle traffic. Sgt. Perry attempted to introduce a picture of an incident involving Mr. Sanchez as well as a video.[4] Sgt. Perry also made an offer of proof of Mr. Sanchez's testimony. During that incident, Mr. Foster blocked Mr. Sanchez's car from proceeding on the public street by standing in front of it with his girlfriend in a wheelchair, and then protestors swarmed Mr. Sanchez's car. Mr. Sanchez was prepared to testify that Mr. Foster attempted to intimidate him and that he was terrified by Mr. Foster's actions as well as the actions of Mr. Foster's fellow protestors.

A second incident occurred on June 27, 2020, and involved Logan Bucknam

[4] *See* Defendant's Exhibit 38 (Picture) (also attached hereto as Attachment A) and Defendant's Exhibit 41 (video).

who was driving as a Door Dash driver. Sgt. Perry attempted to introduce a picture of the incident as well as a video and wanted to call Mr. Bucknam as a defense witness.[5] In that incident, Mr. Bucknam was driving on a public street outside the Austin Police Department Headquarters, but, when he passed Mr. Foster who was attempting to block the street by using his girlfriend's wheelchair, the protestors swarmed Mr. Bucknam's car. Mr. Bucknam was so terrified that he pulled a handgun he kept in his vehicle. When the protestors stopped their assault on Mr. Bucknam's vehicle as a result of him being forced to display his handgun, Mr. Bucknam drove to the safety of the Austin Police garage with protestors running after his car and surrounding the outside of the garage.

Another exhibit Sgt. Perry had attempted to introduce at trial was a picture of Mr. Foster, taken on June 27, 2020, where Mr. Foster blocked a black SUV from proceeding on a public street by standing in front of it with his girlfriend in a wheelchair.[6]

In addition to these incidents, Sgt. Perry attempted to introduce a video from June 27, 2020, in which a black truck attempted to make a right-hand turn from the

[5] *See* Defendant's Exhibit 37 (Picture) (also attached hereto as Attachment B) and Defendant's Exhibit 40 (video).

[6] *See* Defendant's Exhibit 39 (attached hereto as Attachment C).

I-35 frontage road onto a street near Austin Police Department Headquarters.[7] Rather than allowing the truck to turn onto the public street, Jeremy Lett, who admittedly kicked Sgt. Perry's car on July 25, 2020, attacked the grill of the truck with a flag pole.

Finally, Sgt. Perry repeatedly attempted to introduce Defendant's Exhibit 1 which was a video recording of Mr. Foster conducted by Hiram Garcia on the early morning hours of July 25, 2020.[8]

> Garcia: What about your gun again?
>
> Foster: Uh, it's a AK 47.
>
> Garcia: Why do you got it out tonight?
>
> Foster: They don't let us march in the streets anymore, so I gotta practice some—some of our rights.
>
> Garcia: Do you feel like you'll need to use it?
>
> Foster: Na. I think the uh-- I mean if I use it against the cops, I'm dead. I think all the people that hate us, and you know, wanna say shit to us are too big of a pussy to stop and actually do anything about it.
>
> Garcia: Why'd you start carrying?
>
> Foster: Well, my roommate got arrested and they stopped letting us

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[7] *See* Defendant's Exhibit 18.

[8] Sgt. Perry also attempted to introduce evidence of yet a fourth incident, also on June 27, 2020, in which Mr. Foster successfully blocked a silver car from traversing the streets using his girlfriend's wheelchair. *See* Exhibit 42 (video).

march anywhere, so I started carrying.

C. Discussion

Throughout the trial of this case the government repeatedly argued that Sgt. Perry was the first aggressor regarding the incident at issue and that Mr. Foster simply reacted naturally to Sgt. Perry driving into a crowd of Mr. Foster's fellow protestors, including Whitney Mitchell and Jeremy Lett. In other words, the government argued that Sgt. Perry, by allegedly being the first aggressor, provoked the incident. Indeed, the idea that Sgt. Perry, and not Mr. Foster, was the first aggressor was the very crux of the State's case. In addition, the State introduced testimony at trial through several protestors that the July 25, 2020 protest was "typical" of other protests in that they were allegedly peaceful and in that, in these other protests, Mr. Foster and his fellow protestors did not engage with those seeking to traverse the public streets in Austin.

Sgt. Perry submits that he was entitled, under the holdings of the Court of Criminal Appeals in *Torres* and *Tate*, as discussed above, as well as Tex. R. Evid. 404(a)(3)(A), to introduce evidence of the prior acts of Mr. Foster and his protestors to show that they routinely harassed vehicles that attempted to interfere with their efforts to "take the streets." **Put another way, these incidents show that Mr. Foster and his fellow protestors were not the intimidatees when dealing with cars on the public streets, but, rather, they were the intimidators.** In other words, the

protestors did not swarm Sgt. Perry's car because they were intimidated by Sgt. Perry's car, but rather to intimidate Sgt. Perry just like they attempted to intimidate motorists on June 27, 2020, and July 4, 2020. Likewise, the excluded evidence would have helped show that Sgt. Foster did not approach Sgt. Perry's car to protect his fellow protestors, but rather, approached Sgt. Perry to attempt to intimidate him just like he attempted to intimidate Joe Sanchez and others.

In addition, the excluded evidence also would have corrected the false impression left by several protestor witnesses, including Hiram Garcia, that the protest in question was typical of prior protests which they painted as peaceful protests where Mr. Foster and his fellow protestors did not seek engage with unwary motorists. The State "opened the door" to this evidence regarding Mr. Foster's and the other protestors' conduct (including the conduct of Jeremy Lett) at other protests when it attempted to portray the July 25, 2020 protest as typical of earlier protests where Mr. Foster and his fellow protestors allegedly always acted peacefully.

In sum, the excluded evidence, collectively and individually, was admissible because it showed Mr. Foster's motive, intent, and state of mind when he approached Sgt. Perry's car on July 25, 2020. It also shows the motive, intent and state of mind of the "multiple assailants" from that night. The excluded evidence could have shown that Mr. Foster and the other protestors did not approach Mr. Perry's car

because they were intimidated, just as they did not approach Mr. Sanchez's car or Mr. Bucknam's car or the black truck or the black SUV because they were intimidated. They swarmed Sgt. Perry's car, just as they swarmed Mr. Sanchez's car and Mr. Bucknam's car and the black truck and the black SUV, with the motive and intent, and state of mind to intimidate motorists who they believed were "puss[ies] interfering with their mission to "take the streets."

II. The Court Erred by Not Allowing the Defense to Introduce the Police Report into Evidence

After his very lengthy investigation, Detective Fugitt in this case prepared a police report (the "Report") of more than 900 pages. In the end, he concluded:

> BASED ON THE TOTALITY OF THE CIRCUMSTANCES, THE AVAILABLE EVIDENCE SUPPORTS THE ASSESSMENT THAT DANIEL SCOTT PERRY HAD THE RIGHT TO BE ON THE PUBLIC ROADWAY, IN THE INCORPORATED CITY LIMITS OF AUSTIN, TRAVIS COUNTY, TEXAS, DID NOT PROVOKE AN ARMED ENCOUNTER WITH GARRETT FOSTER OR ENGAGE IN CRIMINAL ACTIVITY OTHER THAN A TRAFFIC VIOLATION [RAN A RED LIGHT] AND REASONABLY ACTED IN SELF-DEFENSE UNDER TEXAS PENAL CODE SEC. 9.23-DEADLY FORCE IN DEFENSE OF PERSON. **JUSTIFIED HOMICIDE**

Report at 413.

Sgt. Perry unsuccessfully attempted to introduce this Report into evidence at trial.

A. Law

Both court and commentators have concluded that, while the State may not offer a police report into evidence under Tex. R. Evid. 808(a), a defendant may do just that.

The premier treatise on the Texas Rules of Evidence states:

> In criminal cases, Rule 803(8) contains two special limitations: the "matters observed" type of record or report, subparagraph (A)(ii) is inadmissible if it reports or records "matters observed by police officers or other law enforcement personnel", and a "factual findings" type of record or report, subparagraph (A)(iii) is not admissible against the accused. *The exclusions do not apply if the recorder or report is offered by the accused rather than by the State.*

Steven J. Goode & Olin Guy Wellborn, III, *Guide to the Texas Rules of Evidence: Civil and Criminal*, at 293 (4th ed. 2016). These commentators also note:

> Although on its face the limitation in subpart (A)(ii) would appear to bar evidence offered by either the prosecution or the accused, it has been interpreted, in light of its legislative history, only to restrict evidence offered by the prosecution. *See United States v. Smith*, 521 F.2d 957, 968 n.24 (D.C. Cir. 1875); *Jefferson v. State*, 900 S.W.2d 97, 101-02 (Tex. App.–Houston [14th Dist.] 1995, no pet.); Graham, *Handbook of Federal Evidence* § 803.8 (7th ed.); Mueller and Kirkpatrick, *Federal Evidence* § 8.90 (4th ed.)

Id. at 293 n. 25.

Goode & Welborn cite the Texas Court of Appeals case of *Jefferson v. State*, 900 S.W.2d 97, 101-02 (Tex. App.–Houston [14th Dist.] 1995, no pet.). In that case, the trial judge would not allow the defendant to introduce the offense report from his

case into evidence and only permitted him to offer "specific part [s] of the report that might be used for impeachment purposes by the officer who made the report." *Id*. at 101. The Court of Criminal Appeals held this was error: "[W]e find the trial judge erred in refusing appellant's request to admit the police report under the business records exception contained in Rule 803(6) [sic.] of the Texas Rules of Criminal Evidence." *Id*. at 802.

Similarly, in *Perry v. State*, 957 S.W.2d 894, 898 (Tex. App. --Texarkana 1997), the Court of Appeals held that investigative type of reports "may be admitted by the defendant against the State but not vice versa."

Finally, "investigative reports are not limited to only factual findings as the rule might suggest" and they may contain opinions or conclusions. *Id*. at 898, *citing, Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988). *See also*, *McRae v. Echols*, 8 S.W.3d 797, 800 (Tex. App.– Waco 2000).

B. Discussion

At the trial in this matter, the State attempted to make a point that items, such as Sgt. Perry's social media, were missing from Detective Fugitt's 900+ page report and also challenged the thoroughness of Detective Fugitt's investigation.[9] Yet, this

[9]The Report did reference at least one of Sgt. Perry's social media posts as well as social media posts made by Garrett Foster.

full report details the full scope and breadth of Detective Fugitt's investigation. Nevertheless, despite the authority cited above, Sgt. Perry was denied the opportunity to have jurors review the Report and determine for themselves what was missing and what was included. By referencing the contents of the Report, the State certainly put the contents of Detective Fugitt's Report squarely before the jury and, as such, Sgt. Perry should have been allowed to introduce that Report into evidence under Tex. R. Evid. 803(8).

III. The Jury Was Subject to "Outside Influence"

A. Law

The Texas Court of Criminal Appeal discussed the concept of "outside influence" on a jury and when such an "outside influence" amounts to reversible error. *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012). In *McQuarrie*, the Court of Criminal Appeals held that Tex. R. Evid. 606(b) allows post-trial juror affidavits regarding "outside influences" on jurors. *Id*. at 150. The Court noted that " 'an outside influence is something outside of both the jury room and the juror.'" *Id*. at 151, *citing*, *White v. State*, 225 S.W.3d 571, 574 (Tex. Crim. App.2007).

In *McQuarrie*, the Court of Criminal Appeals found an "outside influence" where, as here, a juror conducted his own internet research:

> The internet research occurred outside of the jury room and outside of deliberations—the juror conducted a private investigation at her home

> during an overnight break. In addition, the information obtained originated from a source on the internet, a source other than the jurors themselves. The internet research constituted an "outside influence."

Id. at 154.

Nevertheless, the *McQuarrie* Court also concluded that, once an "outside influence" is shown, a juror cannot testify as to whether that "outside influence" actually affected his or her verdict. *Id*. Thus, once an "outside influence" is shown, there must be "an objective determination" made " as to whether the outside influence likely resulted in injury to the complaining party." *Id*. To do this, a court must make "an objective analysis to determine whether there is a reasonable possibility that [the outside influence] had a prejudicial effect on the "'hypothetical average juror.'" *Id*. at 154-55 (citations omitted).

B. Discussion

Attached hereto as Attachment D is an affidavit from Juror [Name Redacted] ("Juror Aff.").[10] In that affidavit, [Name Redacted] recounts as follows:

> During the trial, another Juror, [Name Redacted] , arrived in the jury room and stated words to the effect of "You know guys, I like to research things." [Name Redacted] further informed me and other jurors that he printed out a document from the internet that he claimed was taken from the "Texas Penal Code." [Name Redacted] then went on to tell me and other jurors that, based on this document he printed from the

[10]Jurors names have been redacted in the interests of privacy. An unredacted affidavit will be filed under seal.

internet, the "defendant has to prove or show" he acted in self-defense. Juror Aff. at ¶ 4.

Clearly, a juror doing outside research on the Texas Penal Code and sharing that research with one or more jurors constitutes an "outside influence" as that term has been interpreted by the Court of Criminal Appeals in *McQuarrie*. Then, because Tex. R. Evid. 606 does not allow evidence regarding whether a particular juror was influenced by the "outside influence," the only question that remains under *McQuarrie* is whether that "outside influence" may have had a prejudicial effect on a "hypothetical average juror." *McQuarrie*, 380 S.W.3d at 154-55. Certainly, a juror doing outside research and concluding that the burden of proving self-defense is on the defendant and sharing that outside research with one or more jurors could have had a prejudicial effect on the "hypothetical average juror."[11] Indeed, based on the outside research one or more "hypothetical average juror[s]" would have been left with a completely wrong view of the law of self-defense as it relates to the burden of proof.

[11]It also bares noting that misinterpreting the burden of proof is the part of the "outside research" that we now know that the juror shared with one or more of his fellow jurors. One is left to wonder what other portions of the outside research the researching juror gained from his internet search.

IV. Tex. R. Crim. P. Art. 36.22 Was Violated.

A. Law

Tex. R. Crim. P. Art. 36.22 provides:

> No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court.

Although the Texas Court of Criminal Appeals, has not yet decided whether the presence of alternate jurors in the jury room violates this statutory provision,[12] the Austin Court of Appeals has held that there is no violation of the provision where there is no indication in the record that the alternate jurors participated in the jury deliberations. *Castillo v. State*, 319 S.W.3d 966 (Tex. App. – Austin 2010).

The Court will recall that Sgt. Perry lodged an objection, pursuant to Tex. R. Crim. P. Art. 36.22, to the alternative jurors in this case being allowed to be in the jury room with the twelve jurors who would decide this case.

B. Discussion

In her affidavit, [Name Redacted] also recounts:

> Alternate Juror [Name Redacted] participated in deliberations to the extent that I knew she was adamant that Daniel Perry was guilty. She was very vocal about her feelings. While she did not actually talk during deliberations, she did snort, huff, gasp and make other noises expressing her displeasure with juror comments that were inconsistent

[12] *Laws v. State*, 640 S.W.3d 227, 231 (Tex. Crim. App. 2022)

> with finding Mr. Perry guilty. For example, when I suggested that Mr. Perry's social media postings were taken out of context, she gasped to indicate to me and other jurors that she did not possibly understand how I or anybody else could possibly believe that....

Juror Aff. at ¶ 6. [Name Redacted] also explains: "When the jury was polled about whether either of the alternates participated in the deliberations, I did not realize that [Name Redacted]'s non-verbal expressions of displeasure regarding comments relating to a "not guilty" finding could constitute 'participation.'" *Id.*[13]

To the extent the Austin Court of Appeals believes the Court of Criminal Appeals would, in violation of Tex. R. Crim. P. Art. 36.22 and over a defendant's objection, allow outsiders in the jury room (other than the twelve jurors actually called upon to decide the case), allowing the outsider to attempt to influence the jurors through huffs, gasps, and other noises, stretches *Castillo* to its breaking point. Indeed, the purpose of Tex. R. Crim. P. Art. 36.22 is to shield the twelve jurors deciding the case from "outside influence." Nevertheless, in addition to the "outside influence" noted in Section III *supra*., the twelve jurors in this case were subject to expressions of support or derision from an "outside source" in the form of the alternate juror. This is exactly what Tex. R. Crim. P. Art. 36.22 was designed to guard against.

[13]The alternate juror referred to in the affidavit has been quite vocal about her belief in Sgt. Perry's guilt having appeared on radio shows expressing her opinions following the verdict.

V. Conclusion

Based on the foregoing, Defendant Daniel Perry respectfully requests this Court grant a new trial on Count 1 of the indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on April 11, 2023, I caused the foregoing document to be served by electronic filing on the Travis County District Attorney's Office.

/s/ F. Clinton Broden
F. Clinton Broden

ATTACHMENT A

ATTACHMENT B

ATTACHMENT C

ATTACHMENT D

AFFIDAVIT

1. My name is [redacted] I am over the age of 21 and competent to make this affidavit. I am providing this affidavit voluntarily. My statements in this declaration are true and correct based on my recollections while serving as a juror.

2. I served on the jury during the trial of *State of Texas vs. Daniel Perry*. My juror number was [redacted].

3. During the trial, another Juror, [redacted] arrived in the jury room and stated words to the effect of 'You know guys, I like to research things.' [redacted] further informed me and other jurors that he printed out a document from the internet that he claimed was taken from the "Texas Penal Code." [redacted] then went on to tell me and other jurors that, based on this document he printed from the internet, the "defendant has to prove or show" he acted in self-defense. To me this indicated he felt, based on his own research that the defense had the burden of proof regarding self-defense and this is what he conveyed to me and other jurors.

4. In addition, [redacted] obviously knew that Detective Fugitt had made an allegation against the District Attorney's Office. I didn't understand his comments at the time, but now that I have read media coverage it is clear to me that [redacted] knew about this fact and that it influenced his deliberations. His obscure comments made it clear that he knew something from outside sources that the rest of us jurors didn't know.

5. Alternate [redacted] participated in deliberations to the extent that I knew she was adamant that Daniel Perry was guilty. Based upon her body language, it was obvious how she felt. She was very vocal about her feelings. While she did not actually talk during deliberations, she did snort, huff, gasp and make other noises expressing her displeasure with juror comments that were inconsistent with finding Mr. Perry guilty. For example, when I suggested that Mr. Perry's social media postings were taken out of context, she gasped to indicate to me and other jurors that she did not possibly understand how I or anybody else could possibly believe that. When the jury was polled about whether either of the alternates participated in the deliberations, I did not realize that [redacted] non-verbal expressions of displeasure regarding comments relating to a "not guilty" finding could constitute "participation."

[redacted]
AFFIANT

Sworn and subscribed to before me, this the 11th day of April, 2023.

Signature of Notary

Katherine Mayer, Notary. My commission expires

NOTARY PUBLIC • STATE OF TEXAS •
Katherine M Mayer
My Commission Expires
12/06/2023
ID No 129888246