

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7666
Summary Calendar

ROEL TANGUMA,

Petitioner-Appellant,

VERSUS

JAMES M. COLLINS,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
CA C 91 201

May 6, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Roel Tanguma appeals the denial of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Tanguma was convicted by a jury of murder and was sentenced to a term of imprisonment of fifty years. Tanguma v. State, 721 S.W.2d 408, 409 (Tex. App. -- Corpus Christi 1986). Tanguma's conviction and sentence were affirmed on direct appeal. Id. at 414. He filed an application for post-conviction relief, which was denied without a written order on November 20, 1990.

Tanguma filed an application for federal habeas relief, which was denied by the district court. He filed a notice of appeal and a request for the issuance of a certificate of probable cause, which the district court granted.

II.

A.

Tanguma argues that there was no evidence presented at trial that he intentionally and knowingly caused the death of the victim, Ricky Morin. Tanguma argues that the evidence reflected that he acted out of sudden passion and in self-defense.

In evaluating whether a state conviction is supported by sufficient evidence, we must view the evidence in the light most favorable to the prosecution and then determine whether a rational trier of fact could have found the petitioner guilty beyond a reasonable doubt. Isham v. Collins, 905 F.2d 67, 69 (5th Cir. 1990). This standard must be applied with reference to the substantive elements of the criminal offense as defined by state law. Id.

The elements of murder under Texas law are that the defendant (1) intentionally or knowingly (2) caused (3) the death of an individual. Texas Penal Code Ann. § 19.02(a)(1) (West 1989). "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." Id. § 6.03(b). "Intent and knowledge can be inferred from acts, words, and conduct of the accused." Brown v. State, 704 S.W.2d 506, 507 (Tex. App. 1986) (citation omitted). The intent or knowledge may be inferred from the methods used and the wounds inflicted. Womble v. State, 618 S.W.2d 59, 64 (Tex. Crim. App. 1981).

A person who commits murder "under the immediate influence of sudden passion arising from an adequate cause" is guilty of voluntary manslaughter and is not guilty of murder. Tex. Penal Code Ann. § 19.04(a) (West 1989). "'Sudden passion' means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." Id. § 19.04(b). "'Adequate cause' means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Id. at § 19.04(c).

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. § 9.32. Section 9.31 provides that the use of force against another is justified when and to the degree a person reasonably believes the force is immediately necessary to protect himself.

The use of force against another is not justified . . . if the actor provoked the other's use or attempted use of unlawful force, unless: (A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and (B) the other nevertheless continues or attempts to use unlawful force against the actor.

Id. § 9.31(b)(3) and (4).

Tanguma and his brothers-in-law, Darold and Danny Gotcher, arrived at a convenience grocery store on the night of January 1, 1982, and parked in a space in front of the store. Morin, Thomas Maldonado, and his wife, Guadalupe Cantu, ran out of gas in Maldonado's camper truck, and the men pushed the truck into the store lot near the gas pump island. Tanguma knew Morin, and Maldonado and introduced Darold Gotcher to Maldonado. Tanguma walked with Morin and Maldonado to the gas pump, and Darold Gotcher remained near his car and spoke with some friends who drove up in the lot.

Tanguma and Morin became involved in a dispute over sixty dollars that Morin owed Tanguma on a football bet, and Tanguma cursed at Morin. Maldonado, who characterized Morin as a "little drunk" and Tanguma as "more drunk than Ricky," offer to pay Tanguma the money. Morin argued that the money wasn't due yet and told Maldonado that he would take care of it. Morin walked away, but Tanguma followed and hit Morin in the fact. Maldonado saw Darold Gotcher approaching with a gun, hid behind the truck door, and

stabbed Gotcher as he ran by the door. Maldonado testified that Tanguma grabbed him and that Maldonado stabbed him and pushed him away. Maldonado then hid under the truck and subsequently jumped into the back of the camper.

Tanguma had a knife while the men were fighting, and Morin was not armed. After a certain point in the fight, Tanguma agreed to quit fighting, and Morin got into the truck to leave. According to Guadalupe Cantu, Tanguma snatched the gun from Gotcher and shot Morin as Morin opened the truck door.

Tanguma's version of the incident is that he approached the truck where Maldonado and Morin were standing and began a conversation. Tanguma stated that when he said "Que paso" to Morin, Morin gave him a dirty look and told Tanguma not to talk to him. Tanguma stated that he questioned Morin about what was wrong, and Morin pushed at him. Tanguma testified that they discussed fighting later but that Morin pushed him again, and Tanguma took a swing at him and hit him.

Tanguma testified that he felt Maldonado grab him from behind but believed his brother-in-law pulled Maldonado off of him. Tanguma stated that he did not see Maldonado after that point and did not know where he was. Tanguma did not realize that he had been stabbed by Maldonado.

Tanguma testified that he and Morin continued to fight on the ground and that Darold Gotcher tried to push Morin off of Tanguma. Tanguma admitted that he had a knife in his pocket but contended that he didn't use it. Tanguma testified that Morin had a knife

and that he could not get it away from him. Tanguma reported that his brother-in-law pushed them apart, and Tanguma stepped back.

Tanguma testified that he saw the gun belonging to his brother-in-law on the ground and retrieved it and that he, Tanguma, fired the first shot in the air and that Morin, who was three or four feet away, took another step or two toward him. Tanguma stated that within seconds he lowered the gun and fired another shot with the intention of hitting Morin. Gotcher grabbed Tanguma, and they ran toward their car. The men drove at a high rate of speed without their headlights on to Gotcher's house. The police had been notified of the incident and arrested them at the time of their arrival at the house.

Dr. Joseph Rupp performed an autopsy of Morin that revealed a left black eye that had been recently inflicted, no defense wounds to the hands, and a blood alcohol level of 0.151, indicating that Morin was intoxicated at the time of death. The victim had sustained a gunshot wound to the chest, which caused his death. There was no carbonaceous material or powder stippling surrounding the entrance wound, indicating that the barrel of the gun was more than two feet away from the body when the shot was fired.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that Tanguma provoked the fight, that he chose to continue the fight after Morin disengaged, that Tanguma chose not to retreat, and that Tanguma shot Morin in the chest knowing that it was possible that

such act could result in his death. There was sufficient evidence to support the verdict of murder.

B.

Tanguma argues that, because he was also attacked by Maldonado, the state trial court erred in not giving his requested instruction on the defense of self-defense against multiple assailants. Tanguma argues that he is entitled to an instruction on every defense raised by the evidence.

If a petitioner is collaterally attacking his conviction on the basis of the trial court's failure to give a jury instruction, the question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, . . . not merely whether the instruction is undesirable, erroneous, or even universally condemned." Sullivan v. Blackburn, 804 F.2d 885, 887 (5th Cir. 1986) (internal quotations and citations omitted), cert. denied, 481 U.S. 1019 (1987). "An omission, or an incomplete instruction is less likely to be prejudicial than a misstatement of the law." Id. (citations omitted). The failure to instruct the jury on a defense is not a violation of due process "if the evidence is insufficient as a matter of law for the defendant to prevail on that theory." Id. (citation omitted).

The Texas appellate court, in determining that the trial court had not erred in refusing the charge, held that "[a] defendant is entitled to a charge on his right to defend against multiple

assailants if there is evidence, viewed from the accused's standpoint, that he was in danger from an unlawful attack or a threatened attack at the hands of more than one assailant." Tanguma, 721 S.W.2d at 411 (internal quotation and citation omitted). The court found that Tanguma "stated repeatedly that he did not see or hear Maldonado at the time he fired the pistol, nor had he been aware of Maldonado for some time prior to the shooting." Id. at 411-12. The court concluded that Tanguma's testimony reflected that he did not fear anyone but Morin at the time he fired the gun. Id. at 412.

The factual findings of the state appellate court that are supported by the record are entitled to a presumption of correctness. 28 U.S.C. § 2254(d); Dispensa v. Lynaugh, 847 F.2d 211, 219 (5th Cir. 1988). The state court's recital of Tanguma's testimony is supported by the record. Because the evidence did not support the theory of self-defense against multiple assailants, the failure to give the charge did not result in a violation of due process.

C.

Tanguma argues that the state trial court erred in failing to give his requested instruction on his right to continue shooting. Tanguma argues that under Smith v. State, 411 S.W.2d 548 (Tex. Crim. App. 1967), he was entitled to the charge, because Morin came toward him after Tanguma fired the first shot, and he did not fire the shots in rapid succession.

The ruling in the Smith case was made prior to the enactment of the 1974 Texas Penal Code and no longer is applicable. See Philen v. State, 683 S.W.2d 440, 445 (Tex. Crim. App. 1984). In Philen, the court held that the charge requested by Tanguma, even if applicable, is unnecessary if the trial court instructs the jury on the law of self-defense. Contrary to Tanguma's assertion in his brief, the trial court did instruct the jury on the defense of self-defense and included, in the charge, the portion of the charge given in the Philen case. See Philen, 683 S.W.2d at 445. Thus, the refusal to give the instruction on the right to continue shooting did not result in a denial of Tanguma's due process rights.

AFFIRMED.