# YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas



## Evidence was both legally and factually sufficient to support aggravated assault conviction. [Scott v. State](05-2-31)

**On April 14, 2005, the Eastland Court of Appeals held that evidence in murder trial was sufficient to support charge on law of parties and jury's verdict on lesser offense of aggravated assault.**

05-2-31. Scott v. State, No. 11-03-00338-CR, 2005 Tex.App.Lexis 2844, (Tex.App.– Eastland 4/14/05).

Facts: Sherrod Dewayne Scott was charged with murder. The jury convicted him of aggravated assault, found that a deadly weapon was used, and assessed his punishment at confinement for 15 years. We modify the judgment and affirm.

Issues on Appeal

Appellant has briefed five points of error. In his first and second points, appellant contends that the evidence is both legally and factually insufficient to support the conviction. In his third point, appellant argues that he was denied a fair trial and due process of law when the trial court limited his cross-examination of Friendswood Police Detective Michael Cordero. Appellant contends in his fourth point that the instruction on the law of parties was not raised by the evidence. Finally, appellant argues that the trial court abused its discretion by failing to discharge the jury when it became hopelessly deadlocked.

Held: Affirmed as Modified

Opinion: It is undisputed that Jarrad "Curtis" White, the 22-year-old victim, died as a result of a single blunt force injury to the back of his head. It is further undisputed that the injury occurred during a confrontation involving the victim and his girlfriend's older brother on one side and Antoine Adams, Cameron Guina, and appellant on the other. What is disputed is who struck the victim.

Krysta Hext testified that the victim was her boyfriend and that she was 17 at the time of his death. The victim, Hext, and four other girls were on their way to a party at the beach when they stopped at Bobby Dean's house to buy some Xanax. The victim, Hext, and two of the other girls had money to purchase the pills. They bought 12 pills for $ 40. After they drove off, they realized that Dean had only given them nine pills.

When they went back to Dean's house, Dean had gone inside, and Adams was outside shooting a basketball. Dean came outside and gave them the other three pills. One of the girls in the car got into a fight with Dean's girlfriend. The two were punching each other. Dean and Adams ran over to separate the girls; the victim did not. Hext stated that she went inside with Dean's girlfriend and asked her to stay

inside. Hext said that she told Dean's girlfriend that they had not "come over to do all this."

Hext testified that, when she came out of Dean's house, Dean and the victim were arguing. No blows were exchanged. Some other guys joined in the argument. Hext testified that neither Guina nor appellant were there. Hext got in between Dean and the victim and told them, "Hey, we are leaving." A guy named Derrick hit her in the face as she got into the car. Hext pushed him away and got out of the car. Derrick ran and got a baseball bat. He hit the car and broke a window. They drove off before he could break any more windows.

Hext testified that they drove to Fancy Food Store (a convenience store) where she called her mother. Then, they went to her home.

At her home, they told her brother Kyle Oates about what had happened. Oates and the victim became mad and were looking for a car to "go back over there." No one would give them car keys, and Oates and the victim finally left on foot. Hext's mother drove off after them, and they all returned after about 10 or 20 minutes. Oates and the victim "kind of calmed down" and stayed at the home for about 30 or 45 minutes. Hext testified that, when she went to use the restroom, Oates and the victim left. Hext's mother called the Friendswood Police who told her to meet them at the Fancy Food Store. They saw Oates and the victim near Fancy Food, and they met one police officer at the store.

Oates testified that he and his fiancee had gone over to his mother's house around 4:30 p.m. The victim and Oates's sister left about 6:00 p.m. Oates's mom answered the phone a little while later and became "hysterical." Oates heard his mother ask, "Who hit you?" He grabbed the phone from his mother and heard his little sister say that someone had hit her and beaten the car with a baseball bat. A few minutes later, his sister came home.

Oates stated that Hext had a bruise on her face. The victim was mad. Oates said that he became upset as his sister was telling what had happened. He and the victim left on foot to go to Dean's house. They stopped at the Fancy Food Store. At this time, neither Oates nor the victim were armed. They saw Adams, and the victim started talking to Adams. The victim was upset and asked Adams, "What is up with your friends?" When Adams responded that he did not have anything to do with it, the victim "open-handed like shoved [Adams's] face." Adams ran off, and the victim and Oates went back to Oates's mother's house.

When they left Oates's mother's house the second time, the victim and Oates took hammers from the garage. The victim took a claw hammer, and Oates took a hatchet hammer. They put the hammers in a pocket in their pants. They walked past the Fancy Food Store and down toward an elementary school. As a car approached them, the driver "slammed the brakes" and locked up the wheels. Adams, Guina, and appellant were passengers in the car. Appellant jumped out of the car. Oates testified that, as appellant was approaching them, appellant saw the hammers in their pockets and got back in the car. (132). The car drove off and then returned a few minutes later.

This time, Adams, Guina, and appellant jumped out of the car. Oates testified that appellant had what looked like a cane in his hand. Guina had something wrapped around his hand. Oates did not see anything in Adams's hands. Oates testified that he heard the three say things like "Now what?" and "Let's do this." The victim and Oates ran; Adams, Guina, and appellant chased them. The victim and Oates ran along a drainage ditch, through a hole in a fence, and into an apartment complex.

Oates testified that he saw the victim throw his hammer down and put his hands up. He saw first Guina, then appellant, and finally Adams approach the victim. Guina immediately picked [*8] up the victim's hammer. Oates walked up, and Guina told him to drop his hammer. Oates did. Words were exchanged.

Oates testified that he was saying things like "Somebody hit my sister," "We don't have anything with y'all," and "Hey, calm down, we don't want trouble, we are sorry." Adams started "doing this stuff in front of [the victim's] face...kind of bowing up to him." Adams was acting like a boxer and acting "like he was about to hit him." The victim had his hands up and was saying, "I don't want any trouble, we are sorry." Appellant came up and put the victim and Oates "up against" the fence. Appellant asked Oates for his wallet, and Oates told him "to go screw himself." Appellant swung his cane at Oates. It was a dark, cherry-wood-type cane with a brass ring. Oates ducked, and the cane hit him on the back of his head. Something hit Oates on the foot. Oates tripped and fell.

When he stood up, Oates saw that Adams, Guina, and appellant had "swarmed" the victim. Oates testified that he saw appellant hit the victim in the head with the cane. The victim "pretty much just dropped real quick." Oates grabbed one of the guys and tried to pull him off of the victim. First, appellant ran. Then, Guina ran followed by Adams. Oates followed them and saw them throw or drop what they had been carrying in their hands in the ditch. Oates ran out of breath, stopped chasing them, and returned to the victim.

A "kid" in his early twenties was standing over the victim who was on his back. Oates picked up the victim. The victim's eyes were open. He was "kind of blinking" and was looking at the sky. The victim was hyperventilating. Oates knew that the victim was hurt. While he saw "a lot of blood," Oates could not tell where the victim was injured. The victim did not communicate with him.

On cross-examination, Oates testified that he had been mistaken in his first statement to the police when he said that appellant had had a baseball bat. He further testified that he saw appellant hit the victim in the head with the cane.

John Elliott testified that he was out on his apartment balcony smoking a cigarette when he heard "yelling and screaming." Elliott saw "a guy...backing up" toward the fence with his fists up and "three other gentlemen were chasing him." Elliott heard someone say, "Don't be f-ing with my sister." When all three of the men reached the victim, Elliott saw two of the men hit him. The victim was in a defensive position. One man had what looked like a claw hammer; the other man had an object that was three or three and half feet long and looked like a bat or a stick. When the bat-like or stick-like object hit the victim's head, it sounded like a glass bottle was breaking over the victim's head. The victim fell to the ground, and the three men ran off. Elliott saw Oates chase the three and then return.

Elliott went downstairs to check on the victim. The victim was on his back. He was bloody, and he was shaking. Elliott tried to talk to the victim, but the victim did not say anything.

Adams testified that he was 16 years old at the time of trial. Adams stated that he had been charged with the murder of the victim and had been certified to be tried as an adult. Adams had entered into a deal with the State where, in exchange for his testimony, the State would reduce the charges to aggravated assault. At the time of the trial, Adams had entered his plea of guilty and was waiting to be sentenced.

Adams stated that he had gone to Dean's house and was outside shooting hoops when Hext, the victim, and some girls came over to buy Xanax from Dean. They left without counting the pills and returned when they discovered that Dean had shortchanged them three pills. One of the girls began arguing with Dean. The girl pushed Dean in the chest, and Dean's girlfriend started to fight her. Adams broke up the fight. Hext was screaming, and the victim was just standing there. Derrick Jones was the person who "fronted" Dean the Xanax, and he asked who was "messing with his partner." Adams pointed toward the victim, and the victim pulled a knife. Adams testified that Derrick and the victim got out in the middle of the street and "squared up." There was "a whole bunch of screaming going on," and Adams left on foot.

Later on, Adams saw the victim and Hext's brother at the Fancy Food Store. The victim asked him, "Where your homeboys at now?" Adams answered, "They at the house." Hext's brother then grabbed him, and the victim hit him in the jaw. Adams "got loose" and ran home.

Guina, Guina's girlfriend, and appellant were at Adams's house when he got home. Adams was holding his jaw when he walked in. He told them that he "got jumped by two boys." Guina wanted to go back and find the guys. At first, Adams said no. Later, Adams agreed, and they all left in Guina's girlfriend's car. Guina's girlfriend drove.

They saw the victim and Oates near the elementary school and pulled over. Adams testified that he hopped out of the car and asked, "What's up now?" Appellant and Guina also got out of the car. When Oates and the victim pulled out their weapons (the hatchet and hammer), all three of them got back in the car; and Guina's girlfriend drove away. They went to the school parking lot where Adams grabbed a leatherman's tool. They drove back to where the victim and Oates were. All three of them jumped out of the car and chased the victim and Oates. Adams testified that he was the first out of the car.

Adams chased the victim and Oates down the ditch and through a hole in the fence. The victim and Oates separated. The victim was leaning over breathing hard when Adams reached him. The victim "popped" up, and Adams hit him three or four times. Adams did not remember the victim having anything in his hands at this time. Guina was right behind Adams and was swinging a set of jumper cables at Oates.

The victim bent over after Adams hit him. Adams saw appellant raise his cane in the air. The cane had a bird on the end of it. Appellant hit the victim in the back of his head with the cane hard enough that it sounded like glass breaking. The victim looked up and then fell face down. Blood "went everywhere." The victim's blood splattered on Adams and on the fence. The victim did not get back up. Adams testified that he screamed, "Why you do it?"

Appellant ran through the hole in the fence first. He still had the cane in his hand. Guina went through the fence next with the jumper cables, and Adams followed. They ran back through the ditch toward the car. When they reached the car, Guina still had the jumper cables; but appellant did not have the cane. Adams testified that he had dropped the leatherman's tool somewhere between the ditch and the fence line.

Adams stated that Guina and Guina's girlfriend dropped him off at his house and that he fell asleep. About 3:30 or 4:00 a.m., the police came and arrested him. When Adams came home later that morning, appellant asked him if he had told the police anything. Adams said no. Adams testified that appellant then said, "Man, I didn't mean to kill him" and "I didn't know I killed him."

On cross-examination, Adams testified that he was mad at the victim for hitting him, that he wanted a "one-on-one" with the victim, and that Guina and appellant were coming along to keep Oates away. He also stated that a leatherman's tool was something like a Swiss Army knife and that he had seen it inside Guina's girlfriend's car.

Friendswood Police Detective Michael Cordero arrived at the scene after the victim had been transported. There was "a massive amount of blood in one area." Detective Cordero found a leatherman buck tool with the knife extended in a grassy area near the fence. He also found a claw hammer and a cane in the ditch. Most of the cane was submerged in "mud/water." Ten days later, a hatchet and the top of the cane - the brass bird's head - were found in the ditch. The hatchet was embedded in the mud, and the brass bird's head was under about two foot of water.

Dr. Morna Gonsoulin, M.D., testified that she was the assistant medical examiner who performed the autopsy on the victim. The victim had a large wound to the back of his head where his skull had been fractured and fragments of his skull had lodged in his brain causing bleeding. His injury was consistent with being hit in the head with a cane topped with a metal bird head, a claw hammer, or a hatchet. Dr. Gonsoulin testified that the weapon used had a handle and was capable of penetrating the skull. The victim also suffered abrasions on his face, elbow, and thumb; bruises at the base of his neck, near his armpit, on his foot, and on his upper arms; and a "busted" lip. The cause of death was the blunt force injury to the back of his head.

Friendswood Criminal Investigator Eric Price testified that, when he went to arrest appellant, appellant was "kind of leaving [through] one of the rear windows" as Investigator Price was "trying to go in the front door." Investigator Price took appellant's statement in which appellant said that he heard the cane break when Guina hit the victim with it. Appellant's statement was read to the jury.

Appellant testified that, at the time of the incident, he had been staying with Adams and Adams's mother. Appellant stated that he was watching Adams's younger siblings for Adams's mother. Guina and his girlfriend came over. Adams was not home at the time. Appellant stated that, out of respect for Adams's mother and because there were younger children in the house, they went into the backyard to smoke marihuana. Adams came home and told them that he had been "jumped."

When Guina asked if Adams wanted to go back and get them, Adams answered, "Yeah." Guina, Adams, and appellant rode in the car while Guina's girlfriend drove. When they saw the victim and Oates, Adams and appellant got out of the car. Adams asked them why they jumped him. The victim and Oates pulled out their weapons, and Adams and appellant got back into the car.

Appellant testified that Guina told his girlfriend to drive around the corner. Guina opened the trunk and took out a knife and cane. He gave the knife to Adams and the cane to appellant. Guina did not have a weapon. They drove back to find the victim and Oates.

They found the victim and Oates, and they got out of the car and chased them. Adams asked the victim why he jumped him. The victim put his hammer down on the ground, put his hands up in a defensive blocking motion, and said, "I don't want to do nothing." Adams ran up and started hitting the victim with his fists. Oates came up and dropped his hammer. Guina picked up Oates's hammer. Appellant still had the cane in his hands and asked Oates for his wallet. Oates refused and ran off. Appellant stated that he took off after Oates. He swung and hit Oates with the cane. Oates fell, and the cane broke when it hit the ground.

Appellant testified that his back was turned to the victim and Guina and that he did not see what happened. Appellant stated that he did not hit the victim with the cane. After the victim was on the ground, appellant ran. He had both the cane and the brass bird head top of the cane. Appellant stuck the brass bird head and the cane in the mud in the ditch when he tried to catch his balance as he was running.

Appellant testified that he was not sure why he asked Oates for his wallet or why he picked up the brass bird head after it broke off of the cane. Appellant was not sure why he even swung his cane at Oates. He thought that Adams and Guina carried the hammers away from the scene. Appellant also testified that there was no plan or conspiracy between Guina, Adams, and himself to hurt or kill anyone.

C. Analysis

Appellant argues that the evidence is insufficient to establish either that he hit the victim with the cane or

that he was involved as a party to the offense. We disagree.

While appellant adamantly denied hitting the victim with the cane and stated that Guina struck the victim, Oates and Adams repeatedly testified that they saw appellant hit the victim in the back of his head with the cane, that appellant was the only one to hit the victim with the cane, and that only appellant had the cane during the confrontation. Elliott saw the incident from his second story apartment balcony and did not know any of the people involved. Elliott testified that he saw Adams and appellant with weapons: one had a hammer, the other had the bat-like or stick-like object. Elliott testified that either Adams or appellant struck the victim with the bat-like or stick-like object and that Guina did not strike the victim with the object. Adams and Elliott testified that, when the cane or stick-like object hit the victim's head, it sounded like glass breaking.

It is undisputed that Guina, Adams, and appellant left together, that they rode around together looking for Oates and the victim, that they found Oates and the victim, that they left and retrieved a cane and a leatherman's tool or knife, that they searched and found Oates and the victim a second time, that they got out of the car and together chased Oates and the victim, and that they confronted Oates and the victim near Elliott's apartment. Both appellant and Adams testified that there was no expressed agreement to act together. However, through his behavior, appellant encouraged, directed, aided, or attempted to aid in the commission of the offense. *TEX. PEN. CODE ANN. § § 7.01 & 7.02* (Vernon 2003).

A rational fact finder could have found the essential elements of the offense of aggravated assault. The evidence is legally sufficient. When all the evidence is reviewed in a neutral light, we find that the evidence supporting guilt is not so weak that the verdict is clearly wrong and unjust and that the evidence contrary to the verdict is not so strong that the beyond-a-reasonable-doubt standard could not have been met. The evidence is factually sufficient. The first and second points are overruled.

Cross-examination of Detective Cordero

At the conclusion of the cross-examination of Detective Cordero, the following occurred:

> Q: Okay. Now, at some point, Antoine Adams had bragged that he had killed Jarrad White, didn't he?
> [PROSECUTOR]: Objection to hearsay, Your Honor.
> THE COURT: Sustained.
> [DEFENSE COUNSEL]: May we approach, Your Honor?
> THE COURT: Yes.
> (At the Bench, [*20] on the record)
> THE COURT: Unless this witness was sworn for that to take place --
> [DEFENSE COUNSEL]: I thought it was an exception to the hearsay rule. It's a declaration against interest, Your Honor.
> THE COURT: If this witness heard that.
> [DEFENSE COUNSEL]: Well, actually, the material that I was given indicated that this witness took a statement from someone that Antoine Adams had told that.
> [PROSECUTOR]: That is double hearsay.
> THE COURT: That's not going to work.
> [DEFENSE COUNSEL]: It's not hearsay to him.
> THE COURT: I am going to sustain the objection
> [DEFENSE COUNSEL]: I was trying to give you a clarification on why I thought it was an exception.
> THE COURT: Not with this witness.
> (Open court, defendant and jury present)

[DEFENSE COUNSEL]: I pass the witness, Your Honor.
THE COURT: [PROSECUTOR]
[PROSECUTOR]: Nothing further.
THE COURT: You may step down, sir.

Later, when appellant called Detective Cordero as a witness, the following occurred:

Q: Officer Cordero, I want to ask you one question. Back on November 8th of 2002, did you interview a young man, a juvenile named Chad Campbell?
A: Yes, sir, I did.

[DEFENSE COUNSEL]: No further [*21] questions.

Appellant argues on appeal that the trial court erred in limiting his cross-examination because Adams's statement was admissible under *TEX.R.EVID. 803(24)* as a statement against interest. The State contends that appellant has waived any complaint because an offer of proof was not made. We agree.

The record before this court is silent concerning what statement, if any, was made about Adams bragging that he had killed the victim. Therefore, the complaint has not been preserved for appellate review. *TEX.R.APP.P. 33.1* & *33.2*. The third point is overruled.

Court's Charge

Appellant was indicted for murder. During the trial, the State explored several theories of how the offense occurred, including a conspiracy theory. At the charge conference, the trial court stated that it was going to "take out self defense" and "the regular law of parties." After some discussion, the trial court decided to "leave in the law of parties, leave in conspiracy, [and] take out self defense." Appellant objected to the inclusion of "the law of parties."

In his fourth point, appellant complains that the trial court erred by submitting a charge on the "regular" law of parties. Appellant contends that the instruction was not supported by the evidence and that its inclusion was a comment on the weight of the evidence. Therefore, the trial court's charge violated *TEX. CODE CRIM. PRO. ANN. art. 36.14* (Vernon Supp. 2004 - 2005) and denied appellant a fair trial and due process of law. We disagree.

The law of parties is defined by *TEX. PEN. CODE ANN. § 7.01* (Vernon 2003) and provides:

(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

(b) Each party to an offense may be charged with commission of the offense.

(c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.

*TEX. PEN. CODE ANN. § 7.02* (Vernon 2003) provides that a person is criminally responsible for the conduct of another when he acts "with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense."

Appellant's argument that there was insufficient evidence that he acted as a party to the offense has been discussed previously and rejected. While both Adams and appellant testified that there was no expressed agreement to act together, appellant encouraged, directed, aided, or attempted to aid in the commission of the offense through his behavior of looking for, pursuing, and confronting the victim.

The evidence supported the trial court's charge. Therefore, the trial court did not err; the provisions of *Article 36.14* were not violated; and appellant was not denied his right to a fair trial and due process of law. The fourth point is overruled.

Jury Deliberations

In his fifth point, appellant contends that the trial court abused its discretion by not discharging the jury pursuant to *TEX. CODE CRIM. PRO. ANN. art. 36.31* (Vernon 1981) when it was "hopelessly deadlocked." We disagree.

The record before this court reflects that, after almost three days of testimony, the jury began deliberating guilt/innocence at 3:00 p.m. on July 23, 2003. The court recessed for the day at 5:32 and reconvened the next morning at 8:40 a.m. The jury deliberated until 12:40 p.m. The jury resumed deliberations at 2:00 p.m. and reached a verdict at 2:57 p.m.

During its deliberations, the jury sent out five requests on the first day and one request on the second day. The first day, the jury also sent out a note stating that it was deadlocked. The trial court responded with an *Allen* charge. n1 Appellant objected and moved for a mistrial. The trial court overruled the objection and denied the mistrial.

n1 *Allen v. United States, 164 U.S. 492, 41 L. Ed. 528, 17 S. Ct. 154 (1896)*.

In the present case, the *Allen* charge did not pressure the jury to reach a particular verdict and did not convey the trial court's opinion of the case. *See Howard v. State, 941 S.W.2d 102, 125 (Tex.Cr.App. 1996)*; *Calicult v. State, 503 S.W.2d 574, 576 n.2 (Tex.Cr.App. 1974)*; *Arrevalo v. State, 489 S.W.2d 569 (Tex.Cr.App. 1973)*; *West v. State, 121 S.W.3d 95, 107-08 (Tex.App. - Fort Worth 2003, pet'n ref'd)*. The record does not support appellant's claim that the trial court abused its discretion. The fifth point is overruled.

Modification of Judgment

While the record reflects that the jury convicted appellant of aggravated assault, the judgment states the offense as murder. The judgment is modified to reflect that appellant was convicted of the offense of aggravated assault.

Conclusion: As modified, the judgment of the trial court is affirmed.