Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00977-CR

JEREMIAH DONTRAY RUSSELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 828,903

O P I N I O N

Appellant entered a plea of not guilty to the offense of capital murder. He was convicted and the jury assessed punishment at life in prison. In seven points of error, appellant challenges the trial court's ruling on his motion to suppress, the admission of extraneous offense evidence, and the sufficiency of the evidence to support his conviction. We affirm.

Background Facts

On October 23, 1999, Officer R. K. Butler of the Houston Police Department was working as a security guard at the AMC theater on Dunvale in Houston. At approximately 10:00 p.m., he heard a car alarm and noticed a person, whom he later identified as appellant, exiting a vehicle in the parking lot. Officer Butler asked appellant to stop, but appellant ran. Appellant fled from the parking lot, leapt over a fence, and ran into a nearby apartment complex. Officer Butler was unable to catch appellant, but saw him drive out of the apartment complex in a silver Buick or Oldsmobile. Officer Butler recognized appellant in the car because he was wearing a gray hooded sweatshirt. The vehicle appellant burglarized belonged to Sergeant Harold L. Preston of the Houston Police Department (HPD). When Sergeant Preston returned to his vehicle, he found appellant had taken his loaded revolver, driver's license, police identification, his wife's cellular telephone, and some cash. Sergeant Preston's revolver was loaded with Nyclad bullets.

At 10:45 p.m. on the same night, Sherry Helms, who lived in a townhome complex on Tanglewilde not far from the movie theater, heard a girl's frightened scream followed almost immediately by a gunshot. Debbi Adams, who lived in the same complex, heard the gunshot then heard the sound of a car's tires squealing as it sped away from the complex. Helms called 911, but the police officer who responded to her call could not determine where the scream or the gunshot had originated. Later that night, another resident discovered the body of the complainant in a common area of the complex.

Houston Police Officer Tony Tomeo found the body in the apartment complex courtyard with a gunshot wound to the head. The complainant was dressed in the clothes she had worn to work, but her pants were down around her ankles and her underwear was pulled down to her knees. The complainant's employer testified that the complainant left work on the night of the offense carrying a black purse. However, no personal belongings, such as a purse or wallet were recovered. A bullet was recovered near the complainant's body. The bullet was a lead round with a nylon coating known as a Nyclad bullet.

After midnight that night, a gas station surveillance camera recorded appellant in his Buick as he attempted to use the complainant's credit card to purchase merchandise and gas. The surveillance photos showed that appellant was accompanied by Stacey Moss. Moss testified appellant picked her up between 10:30 and 11:00 p.m. that night. She testified that appellant showed her a "cop gun, a badge, a wallet, [and] a cell phone." According to Moss, appellant was wearing a "little gray sweater with a hood and a zipper." Moss identified Sergeant Preston's police identification and driver's license as those that appellant displayed to her that night.

Later on November 7, 1999, Officer F. W. Lawrence of the Jersey Village police department observed a vehicle pulling out of a parking lot at a high rate of speed. Officer Lawrence identified appellant as the person who was driving the vehicle. Officer Lawrence stopped the vehicle and asked appellant for his driver's license and proof of insurance. Appellant answered that the state would not issue him a driver's license because he had seizures. Officer Lawrence then conducted a pat-down search of appellant and found a wallet, which contained Sergeant Preston's Houston Police Department badge and driver's license along with complainant's credit card. During the course of his investigation, Lawrence learned that appellant had eight outstanding traffic warrants, which led him to turn the investigation over to the Houston Police Department. Houston police officers arrested appellant and a subsequent investigation led to his indictment for the murder of the complainant.

Motion to Suppress

In his first point of error, appellant claims the trial court erred in overruling his motion to suppress the evidence seized when he was stopped for speeding. When appellant failed to present a driver's license and proof of insurance, Officer Lawrence called for another officer to assist him and asked appellant to place his hands on the steering wheel until the other officer arrived. Once the back-up officer arrived, Officer Lawrence conducted a pat-down search of appellant. As noted above, Lawrence recovered a wallet, which contained

Sergeant Preston's driver's license, an HPD badge, and the complainant's credit card.

In his motion to suppress, appellant argued he was not under arrest at the time Officer Lawrence conducted the pat-down search; therefore, the evidence was seized in violation of the Fourth Amendment to the United States Constitution; article 1, section 9 of the Texas Constitution; and article 38.23 of the Texas Code of Criminal Procedure.[1] In a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). In reviewing the trial court's decision, an appellate court views the evidence in the light most favorable to the trial court's ruling. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The reviewing court may not disturb supported findings of fact absent an abuse of discretion. *Etheridge v. State*, 903 S.W.2d 1, 15 (Tex. Crim. App. 1994).

An officer must have probable cause to arrest a defendant without a warrant. *Anderson v. State*, 932 S.W.2d 502, 506 (Tex. Crim. App. 1996). Probable cause for an arrest exists where, at that moment, facts and circumstances within the knowledge of the arresting officer, and of which he has reasonably trustworthy information, would warrant a reasonably prudent person in believing that a particular person has committed or is committing a crime. *Guzman*, 955 S.W.2d at 90. Once an officer has probable cause to arrest, he may search the accused incident to the arrest. *Rogers v. State*, 774 S.W.2d 247, 264 (Tex. Crim. App. 1989). It is irrelevant that the arrest occurs immediately before or after the search, as long as sufficient probable cause exists for the officer to arrest before the search. *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999).

Here, Officer Lawrence had probable cause to arrest appellant when appellant did not produce his driver's license and proof of insurance. *See Atwater v. City of Lago Vista*, 534

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[1] Because the Texas Constitution affords appellant the same rights as does the United States Constitution, and appellant does not brief whether his rights under the Texas Constitution are different than those under the federal Constitution, we will not separately address appellant's constitutional claims. *See Busby v. State*, 990 S.W.2d 263, 270 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1081 (2000).

U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Because Officer Lawrence had probable cause to arrest appellant, the search did not violate the Fourth Amendment or article 1, section 9 of the Texas Constitution. The trial court did not err in denying appellant's motion to suppress. Appellant's first point of error is overruled.

In his second point of error, appellant claims the trial court erred in overruling his motion to suppress the search of his car. Approximately one week after appellant's arrest, the investigating officers learned that appellant's Buick was parked at 8519 Bird Run, appellant's grandmother's home. Officer L. D. Garretson testified that he had information that led him to believe evidence involved in the shooting of the complainant was in the vehicle. After obtaining consent from appellant's grandmother, Officer Garretson had the Buick impounded and towed. Officer Garretson obtained a search warrant and searched the vehicle. The officers recovered, among other items, a gray hooded sweatshirt, an unfired Nyclad bullet, and the telephone calling card of Shannon McCabe, the complainant in an extraneous offense.

Appellant first contends the seizure of the vehicle was unlawful because the police officers did not have a warrant and did not have proper consent to search. For an impoundment to be lawful, the seizure of the automobile must be reasonable under the Fourth Amendment. *Benavides v. State,* 600 S.W.2d 809, 811 (Tex. Crim. App. 1980). There must be some logical connection between the vehicle and the offense. *Wynne v. State,* 676 S.W.2d 650, 654 (Tex. App.—Fort Worth 1984, pet. ref'd). Officer Garretson testified that appellant's impounded Buick matched the Buick depicted in the gas station surveillance photos, which were taken shortly after the shooting when appellant attempted to use the complainant's credit card. Further, Officer Garretson testified that he had information that led him to believe evidence involved in the offense was in the vehicle. Thus, there existed both a connection between the vehicle and the crime, and reason to believe evidence of the

crime might be in the vehicle. Therefore, the impoundment of appellant's vehicle was proper. *See Gandy v. State*, 835 S.W.2d 238, 243 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

After the vehicle was impounded, the investigating officers obtained a warrant to search the vehicle for (1) a firearm, (2) ammunition for a firearm, (3) a purse containing property belonging to the complainant, (4) any paperwork relating to, issued to, or belonging to the complainant, (5) a gray sweatshirt or jogging suit with an attached hood, (6) paperwork indicating ownership or possession of the vehicle, (7) latent fingerprints from the interior and exterior of the vehicle, and (8) photographs of the interior and exterior of the vehicle. One of the items seized from the vehicle was a telephone calling card, which belonged to McCabe. Because the calling card was not listed on the search warrant, it was obtained outside the scope of the warrant. Consequently, the calling card was, in effect, seized without a warrant. *See State v. Wood*, 828 S.W.2d 471, 475 (Tex. App.—El Paso 1992, no pet.).

Once a defendant has established that a search or seizure occurred and that no warrant was obtained, the burden of proof shifts to the State to prove the reasonableness of the search or seizure. *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). The record reveals that during the search for the items listed in the warrant, the officers discovered the calling card on the back seat of the vehicle. If an article is found in plain view, neither its observation, nor its seizure involves an invasion of privacy. *Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 2306 (1990). The "plain view" doctrine requires that (1) law enforcement officials have a right to be where they are, and (2) it be immediately apparent that the item seized constitutes evidence, that is, there is probable cause to associate the item with criminal activity. *Walter v. State*, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000). In determining whether the officer had a right to be where he was, the Supreme Court requires that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton*, 496 U.S. at 136, 110 S. Ct. at 2308.

Here, because the investigating officers properly impounded the vehicle and obtained a valid search warrant, they had a right to be where they were. Further, the discovery of a telephone calling card belonging to someone other than appellant is sufficient to show probable cause to associate the item with criminal activity. Therefore, although the calling card was seized outside the scope of the warrant, it was legally seized under the plain view doctrine. *See Walter,* 28 S.W.3d at 541. Appellant's second point of error is overruled.

Extraneous Offense

In his third, fourth, and fifth points of error, appellant claims the trial court erred in admitting evidence of an extraneous offense. During its case-in-chief, the State offered evidence of the aggravated robbery and sexual assault of Shannon McCabe. On October 20, 1999, three days before the complainant's murder, McCabe and a co-worker left work shortly after 2:00 a.m. On their way to the co-worker's home, near Tanglewilde, McCabe became lost and ended up on a dead-end street. While on the dead-end street, she noticed she had a flat tire. The co-worker became extremely nervous because the women were stranded in a high crime area. While McCabe called for help, her co-worker walked home.

While waiting in her vehicle, McCabe saw a man in a gray hooded sweatshirt, whom she later identified as the appellant, approach her car. Appellant pointed a gun at McCabe's head and demanded her purse. McCabe gave appellant her purse through the window of her car. Appellant then threatened to kill her if she did not open the door to the car. After several threats to her life, McCabe opened her car door. Appellant placed the gun against McCabe's head and demanded she pull down her underwear. When she refused to do so, he pulled down her underwear, slapped her legs apart, and sexually assaulted her with his hand. When appellant took one hand off McCabe to unzip his pants, McCabe drove away as fast as she could. Before admitting this evidence to the jury, the trial court issued an instruction to the jury limiting their consideration of the extraneous offense. The trial court gave a similar instruction in the jury charge.

In his third point of error, appellant contends the trial court erred in overruling his objection to evidence of the extraneous offense pursuant to rule 404(b) of the Texas Rules of Evidence. The trial court did not err, however, because the extraneous offense was admissible to show identity. Because this was a circumstantial evidence case, identity was the primary disputed issue at trial. To be admissible to show identity, an extraneous offense must be so similar to the charged offense as to mark the offenses as the defendant's handiwork. *Lane v. State,* 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). For such evidence to be admissible, identity must be an issue in the case. *Id.* In determining similarity of the offenses for the purpose of establishing identity, appellate courts should take into account both the specific characteristics of the various offenses and the time interval between them. *Id.* The exactness that might be required of an offense committed at a more remote period of time might not necessarily be required for an offense committed within a very short period of time. *See Ransom v. State,* 503 S.W.2d 810, 813 (Tex. Crim. App. 1974) ("[T]he common distinguishing characteristic may be the proximity in time and place or the common mode of the commission of the offenses."). In *Ransom,* the court of criminal appeals held the offenses to be sufficiently similar when (1) both offenses were robberies, (2) both offenses were committed at gunpoint, (3) the defendant was aided by a confederate, and (4) the offenses occurred three days apart.

Here, the offenses were similar in that (1) both offenses involved robberies that occurred at night; (2) the offenses occurred within the same area of the city; (3) both women were small and were approached in public areas; (4) both victims' underwear was removed; (5) both victims' purses were taken; (6) the offenses occurred three days apart; and (7) both offenses involved a perpetrator who approached on foot, wore a gray hooded sweatshirt, and pointed or fired a handgun in the direction of the victim's head. The proximity in time and place, the common mode of committing the offenses, and the circumstances surrounding the offenses, are sufficiently similar for the extraneous offense to be relevant to the issue of identity. The trial court did not err in overruling appellant's objection based on rule 404(b)

of the Texas Rules of Evidence. Appellant's third point of error is overruled.

In his fourth point of error, appellant claims the trial court erred in overruling his objection to the extraneous offense pursuant to rule 403 of the Texas Rules of Evidence. Appellant contends the prejudicial effect of the admission of the extraneous offense was outweighed by its probative value. The trial court should consider several factors in determining whether the prejudicial effect of evidence substantially outweighs its probative value under rule 403. Those factors include:

1. how compellingly evidence of the extraneous offense serves to make a fact of consequence more or less probable;
2. the extraneous offense's potential to impress the jury in some irrational but indelible way;
3. the trial time that the proponent will require to develop evidence of the extraneous misconduct; and
4. the proponent's need for the extraneous transaction evidence.

Lane, 933 S.W.2d at 520.

Here, identity was a contested issue and the extraneous offense evidence made that fact of consequence more probable. Further, the evidence served to rebut the defense's theory that appellant did not attack and shoot the complainant, but came upon her body after the attack and stole her purse. The State introduced the evidence with one witness in a relatively short period of time considering the length of the trial. Further, the State needed the evidence to show identity because there was no direct physical evidence to link appellant to the murder of the complainant. Finally, while evidence of an extraneous sexual offense will always carry emotional weight and the danger of impressing the jury in an irrational way, the rules of evidence require the exclusion of relevant evidence only if the danger of unfair prejudice, delay, or needless repetition substantially outweighs the probative value. The trial court's admission of the extraneous offense fell within the zone of reasonable disagreement and was not an abuse of discretion. Appellant's fourth point of error is overruled.

In his fifth point of error, appellant claims the admission of the extraneous offense violated his substantial rights and requires reversal under rule 44.2(b) of the Texas Rules of Appellate Procedure. Appellant references the rule of harmless error to be applied by this court when we find error in the trial court. Because we have found no error, we need not address the issue of harm. Appellant's fifth point of error is overruled.

Sufficiency of the Evidence

In his sixth and seventh points of error, appellant contends the evidence is factually and legally insufficient to support his conviction. When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89 (1979); *Cardenas v. State,* 30 S.W.3d 384, 389 (Tex. Crim. App. 2000). In reviewing factual sufficiency, we do not view the evidence "in the light most favorable to the prosecution." *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). Rather, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates the proof of guilt is either so obviously weak as to undermine confidence in the jury's determination, or, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Wesbrook v. State,* 29 S.W.3d 103, 112 (Tex. Crim. App. 2000), *cert. denied,* 532 U.S. 944, 121 S.Ct. 1407 (2001).

A person commits the offense of capital murder if he intentionally or knowingly causes the death of an individual in the course of committing or attempting to commit kidnaping, burglary, robbery, aggravated sexual assault, arson, obstruction, or retaliation. TEX. PEN. CODE ANN. § 19.03(a)(2). Appellant contends the evidence is insufficient to identify him as the assailant and to prove the complainant's death occurred during a robbery or attempted robbery.

With regard to identity, appellant claims he could not have been at the crime scene and no physical evidence links him to the scene. First, appellant claims that because Officer Butler said he saw appellant leave "the apartment complex" at 10:20 p.m., he could not have fired the gunshot heard at 10:45 p.m. The "apartment complex" from which Officer Butler saw appellant leave was not the complex where the complainant was shot, but the complex appellant fled to after burglarizing Sergeant Preston's vehicle at the movie theater. Therefore, Officer Butler's testimony does not support appellant's contention that he could not have been at the crime scene.

Appellant further contends that Stacey Moss's testimony shows that appellant could not have been at the crime scene. Moss testified that appellant picked her up between 10:30 and 11:00 p.m. and that appellant did not rob and kill the complainant while with her. Although the jury was free to disbelieve Moss's testimony, they could also have believed that appellant picked her up at 11:00 p.m. after killing the complainant. Further, appellant attempted to use the complainant's credit card within hours of her death, and a fired Nyclad bullet, which was the type of bullet that was loaded in Sergeant Preston's gun, was found at the scene. Preston and Kim Downs, a firearm examiner, testified that Nyclad bullets were not commonly used.

Although appellant presented evidence in an attempt to discredit the evidence against him, the jury chose to believe the State's evidence and disbelieve the inferences raised by appellant. A rational jury could have found the elements necessary to prove beyond a reasonable doubt that appellant murdered the complainant. Further, after examining the evidence of identity in a neutral light, we find the verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Appellant further contends the evidence is legally and factually insufficient to show he murdered the complainant in the course of a robbery or attempted robbery. The evidence showed that appellant attempted to use the complainant's credit card shortly after she was murdered. The complainant's employer testified that she left work on the night of the

offense carrying a black purse. When her body was found, no purse was found. Further, appellant assaulted McCabe three days earlier in a similar fashion and took her purse. We find the evidence legally and factually sufficient to support the jury's finding that appellant killed the complainant in the course of committing a robbery. Appellant's sixth and seventh points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed March 7, 2002.
Panel consists of Justices Yates, Seymore, and Guzman.
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