**Affirmed and Opinion filed April 19, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-01193-CR**

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**MAKNOJIYA JAINUL, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 208th District Court**
**Harris County, Texas**
**Trial Court Cause No. 745,560**

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## O P I N I O N

Maknojiya Jainul ("appellant") was charged by indictment with the felony offense of capital murder. Over his plea of not guilty, a jury convicted him and assessed his punishment at life in the Texas Department of Criminal Justice, Institutional Division. He appeals his conviction on three points of error. We affirm the conviction because we find that 1) accomplice witness testimony offered against him was sufficiently corroborated; 2) the trial court did not err in overruling his objections to the prosecutor's jury argument, and he waived error as to unobjected to jury arguments; and 3) the trial court did not err in overruling his

motions for mistrial.

## FACTUAL BACKGROUND

Raphique Ali ("Ali") and appellant shared an apartment. During the evening of February 17, 1997, Tajdin Modi ("Modi") went to this apartment and waited for appellant and Ali to come home from work so that the three of them could go out. The three of them did go out, and, at approximately 2:30 a.m. on February 18, 1997, they went to the Fu Kim Truck Stop for beer. On the way to the store, Ali and appellant revealed to Modi that they were going to "pick some money." Modi understood this to mean that they intended to rob the store, and agreed to go along. Once they arrived at the store, Ali parked at the back of the building. Modi and appellant entered the store while Ali stayed in the car. When the two entered the store, the clerk, Karim Sunesasa ("the deceased"), was talking on the telephone with a friend, Mahmood Sunesera ("Sunesera"). The deceased recognized Modi and told him they were acquainted through a family member. They talked for a few minutes while appellant walked around in the store.

The deceased and Modi came to an understanding as to why Modi and appellant were there. The deceased told Modi to go ahead and get the beer. After a moment of reflection, however, it seems that the deceased decided that since it was after midnight, and he could not sell beer after midnight, that he should retrieve the beer from the back cooler, rather than Modi and appellant getting it from the display.

Appellant followed the deceased into the cooler while Modi returned a page he had received. Moments later, while he was on the telephone, Modi heard what sounded like breaking glass. He walked over to the cooler and saw that, as the deceased walked out of the cooler, appellant pulled him back in by his shirt. Appellant began cursing the deceased and stabbed him repeatedly while the deceased pleaded with him to stop. Appellant continued stabbing the deceased until the deceased grew faint and fell backwards over boxes of beverages. Still stabbing him, appellant stood over the deceased and stabbed until his knife blade broke off

in the deceased's body. Appellant dropped the handle, ran throughout the store, and returned to the deceased with a hacksaw, which he used to cut the deceased's throat.

Appellant then ran from the cooler. He told Modi to leave. Modi left through the front of the store and got into Ali's car which Ali had driven around to the front. Appellant remained inside for a little while longer. When he emerged from the store, he carried a white bag. The bag held the videotape from the store, money from the cash register and the handle of appellant's knife. Ali asked for the bag, looked in it, and placed it under the front seat.

Appellant cut his hand while he was in the midst of the killing. His blood was found throughout the store, notably on the VCR and on the floor between the cooler and the place in the store where the hacksaws were located. The cut on his hand, as depicted in photographs in evidence, is consistent with his having pulled the blade out of the deceased's body.

After the robbery and murder, the three went to Ali and appellant's apartment. The next day, Ali and Modi drove to Galveston to deal with a traffic ticket Modi had received on a prior, unrelated, occasion. While in Galveston, they disposed of a bag containing the videotape that Ali and appellant had destroyed, the clothes appellant had worn, and the knife blade. Next, the three of them bought merchandise at Best Buy with the money from the robbery, drove to Mississippi to see an attorney, did not see the attorney, but returned to Houston when Ali found out that his sister was being held for something he had done. When the three returned to Houston, homicide detectives contacted them and asked them to come to Fu Kim. When they arrived there, the detectives interrogated them separately.

## DISCUSSION AND HOLDINGS

### A. Accomplice Witness Testimony

Modi testified at trial as an accomplice witness. In his first point of error, appellant complains that the evidence is insufficient to support his conviction because the State failed to corroborate Modi's testimony. When the State relies upon an accomplice witness's

testimony, the testimony must be corroborated by independent evidence as to a material matter which tends to connect the accused to the offense. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979); *Holladay v. State*, 709 S.W.2d 194, 200 (Tex. Crim. App. 1986). In reviewing the sufficiency of accomplice witness corroboration, the proper focus is not whether the evidence, standing alone, sufficiently establishes the guilt of the accused. *Cox v. State*, 830 S.W.2d 609, 611 (Tex. Crim. App. 1992). Rather, the test is to eliminate from consideration the evidence of the accomplice witness, and then examine the testimony of the other witnesses to ascertain if there is inculpatory evidence which tends to link the accused to the commission of the offense. *Hernandez v. State*, 939 S.W.2d 173, 176 (Tex. Crim. App. 1997); *Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993). The corroborating evidence need not directly link the defendant to the crime, or even be sufficient, standing alone, to establish guilt. *Hernandez*, 939 S.W.2d at176; *Cook*, 858 S.W.2d at 470. Apparently insignificant incriminating circumstances may sometimes afford satisfactory evidence of corroboration. *Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993).

First, it should be noted that the court properly instructed the jury on the law regarding accomplice witness testimony. Both the State and the defense went into an explanation of that law during their closing arguments. Furthermore, Modi's testimony that appellant stabbed the deceased, that he went throughout the store for a hacksaw, and that he sustained a large cut on his hand during the murder, all found corroboration in the physical evidence. The pictures admitted into evidence show appellant's cut on his hand, and show a mug shot of appellant with a large bandage wrapped around his hand. Consistent with this, Officer Chisholm testified that it is common for an assailant during a stabbing to be cut. In addition, appellant's blood was found throughout the store, notably on the floor between the cooler and the hacksaw, and on the VCR where he retrieved the tape that recorded this incident.

In short, this evidence clearly tends to connect appellant to the offense. Thus, the requirements of the accomplice witness rule are satisfied. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979); *McDuff v. State*, 939 S.W.2d 607, 612-13 (Tex. Crim. App. 1997);

*Hernandez*, 939 S.W.2d at 178-79; *Richardson v. State*, 879 S.W.2d 874, 880 (Tex. Crim. App. 1993). Therefore, appellant's first point of error is overruled.

**B. Jury Argument**

In his second point of error, appellant argues that the trial court erred, at the guilt-innocence phase of the trial, in allowing repeated instances of improper jury argument during the state's closing argument. Two of the arguments complained of were objected to, but two were not objected to.

Proper jury argument must fall within one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's arguments; or (4) a plea for law enforcement. *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985). Improper closing arguments include references to facts not in evidence or incorrect statements of law. *Burke v. State*, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983). An argument must be considered in light of the record as a whole, and, to constitute reversible error, the argument must be extreme or manifestly improper, violate a mandatory statute, or inject new facts, harmful to the accused, into the trial proceedings. *Brandley*, 691 S.W.2d at 712-13.

Appellant complains of two jury arguments that the trial court permitted, but that appellant did not object to at trial. The first unobjected to argument occurred when the State argued that the defense concocted a phony theory to make it appear that Modi wore gloves and committed the crime. Appellant complains that this argument struck at appellant over the shoulders of his defense counsel and is an argument of facts outside the evidence. The second unobjected to argument occurred when the State argued that the jury should believe Modi because a condition of Modi's plea agreement was to tell the truth. Appellant argues that this second argument was contrary to the evidence at trial.

Errors in jury argument can be waived. A defendant's failure to object to a jury argument, or a defendant's failure to pursue an adverse ruling on his objection to a jury

argument, forfeits his right to complain about the argument on appeal. *Valencia v. State*, 946 S.W.2d 81, 82 (Tex. Crim. App. 1997); *McFarland v. State*, 928 S.W.2d 482, 510 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Mijores v. State*, 11 S.W.3d 253, 256 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Appellant failed to object to these two jury arguments, consequently waiving any complaint to the same on appeal. Therefore, we overrule this point of error as to those two jury arguments.

We will review the remaining two jury arguments that appellant complained of at trial.

The first jury argument we review occurred as follows:

**The State:** [Defense counsel] asked you to believe the Tajdin Modi is the killer and that the defendant had nothing to do with it. Had nothing to do with the killing. Wasn't in the cooler. Nothing to do with it. Well, where's any evidence of that? Where's the evidence–

**Defense:** Judge, I object to that. She's shifting the burden to me.

**The Court:** Overruled.

**Defense:** Note my exception.

**The Court:** Yes, sir.

The second jury argument occurred as follows:

**The State:** Now the defense has made a big deal about the fact that this knife handle and hacksaw blade don't have any finger prints on it and it wasn't tested for blood. What do you know from the pictures and what the police knew on February 18th, 1997? That the knife handle and hacksaw blade are recovered right there in the area where Karim bled. They would assume at that point that any blood on it is going to be . . .

**Defense:** Judge I'm going to object to that. It's outside the record in this case.

**The Court:** They can make logical deductions. Go ahead please.

**The State:** That the blood is going to be Karim's blood on it, and so what do they decide to do with it at that point? They decide to send it to the latent print lab and see if it has any finger prints on it. They don't collect any

> blood from inside the cooler because they assume its Karim's blood in there. They don't know until the next day until they catch the killer that he's cut himself during the course of it, so they don't collect any blood in there.

In the first argument, the State is responding to the defense counsel's argument that Modi, rather than appellant, actually committed the crime. Therefore, it is a proper jury argument and the trial court did not err in overruling objection to it. *Brandley*, 691 S.W.2d at 712.

As to the second argument, it is a reasonable deduction from the evidence. *Id*. A prosecutor is given wide latitude in drawing inferences from the evidence so long as they are reasonable, fair, legitimate, and offered in good faith. *Denison v. State*, 651 S.W.2d 754, 761-62 (Tex. Crim. App. 1983). Appellant's second point of error is overruled.

**C. Defendant's Motions for Mistrial**

In his third point of error, appellant complains that a mistrial should have been granted based on two instances of hearsay that occurred during trial. As to both instances, the trial court sustained objections and gave a prompt instruction to disregard. Appellant pursued these objections to an adverse ruling by requesting a mistrial. This request was overruled.

A mistrial is an extreme remedy for prejudicial events which occur during the course of a trial. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). The trial court's ruling on a motion for mistrial is reviewed under the abuse of discretion standard. *Id*. at 698. Further, an instruction to disregard was given to the jury in both instances. Such an instruction generally serves to cure any error committed by the hearsay. *Audujo v. State*, 755 S.W.2d 138, 144 (Tex. Crim. App. 1988). Except in extreme cases where it appears that the evidence is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of cure absent a mistrial, an instruction renders the error harmless. *Coe v. State*, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984).

In reviewing the record, nothing in the testimony indicates that the State intended to taint the proceedings through this testimony. In fact, it appears that the State attempted to clarify the testimony of the witness. Furthermore, the jury is presumed to have obeyed the instruction, and a review of the record reveals no indication that the jury failed to follow the instruction. *See Bauder*, 921 S.W.2d at 698. Therefore, the extreme remedy of a mistrial was not required. As a result, we overrule appellant's third point of error.

Having overruled appellant's three points of error, we affirm the decision of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 19, 2001.

Panel consists of Justices Yates, Fowler, and Lee[1]

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[1] Senior Justice Norman R. Lee sitting by assignment.