Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00958-CR

ANDREW BENJAMIN TALERICO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District court
Harris County, Texas
Trial Court Cause No. 689,282

O P I N I O N

Andrew Benjamin Talerico appeals his conviction by a jury for capital murder. The trial court sentenced him to life imprisonment. In his first point of error, appellant contends the trial court erred in failing to grant a mistrial after instructing the jury to disregard an inflammatory remark by a witness. In points two, three, four, five, and six, appellant contends the trial court erred in admitting evidence of appellant's solicitation of Dalton Collins to commit two unrelated capital murders. In points seven, eight, nine, and ten, he asserts the evidence was legally insufficient to support appellant's conviction either as a principal or a party. We affirm.

Dalton David Collins (Dalton) met appellant through appellant's stepson, and they became friends. Dalton was only 19 or 20 years old when he met appellant, and appellant was 40 years old. Appellant was from the East, and bragged about doing "some jobs" for a crime syndicate. Appellant asked Dalton if he would do a contract murder in Chicago for money, and Dalton agreed. However, the contract in Chicago never materialized. Appellant later approached Dalton about killing a man who had sexually assaulted appellant's young son. Dalton and his brother, Robert, went by the man's house in Jersey Village late at night and checked for a car alarm. After determining the man's car did not have an alarm, Dalton told appellant he thought he could put a bomb in the car. Appellant told Dalton to hold off "because something else" was going on.

In February 1992, appellant told Dalton about Charles Farguson. Appellant told Dalton that Farguson was an alcoholic who abused his wife and teenage daughter. Appellant told Dalton that Farguson's wife, Annie, would pay them for a "hit," and indicated that appellant and Dalton would split $10,000.00 for killing Farguson. Thereafter, Dalton started investigating likely places to kill Farguson, and discussed his plans with appellant. Appellant and Dalton finally decided to kill Farguson in his house, and that Annie Farguson would let Dalton in. Annie and her daughter would then leave the house and Dalton would kill Farguson. Dalton did not get the actual final plan until the date of the killing.

On March 9, 1992, appellant went to Dalton's house and told him he was to kill Farguson that date. He told Dalton to be at the Farguson house at a certain time, and Annie Farguson would be in the yard "doing something." Dalton would be let in the house by Annie, and Annie and her daughter, Brandi, would leave. Annie would show Dalton where Farguson kept his guns. When he came home from work, Dalton would kill Farguson with one of Farguson's guns, then ransack the house and steal some guns to make it look like Farguson was killed while interrupting a burglary.

Dalton's brother, Robert, drove Dalton to the location, and let Dalton out at the corner of Farguson's block. Dalton walked across the neighbors' lawns and met Annie in front of Farguson's house. Dalton told Annie, "you know why I'm here," and she let him in the house. Annie and Dalton talked for a short time, and Annie told Dalton that his payment was "contingent on getting the insurance." Annie showed Dalton the bedroom where Farguson's guns were kept, and Dalton selected a .22 caliber rifle to

use. Annie and Brandi left, and Dalton waited for Farguson in the bedroom. Farguson came home after work, walked into the bedroom, and Dalton shot him three times in the chest. Farguson spun around, fell face down into the adjoining hallway, and died. Dalton dragged Farguson's body back into the bedroom, then ransacked the house to make it appear that Farguson was killed by a burglar. Dalton took several rifles and shotguns, wrapped them in a bedspread, then called appellant from the living room telephone to come pick him up. Appellant drove to Farguson's house in his truck, and Dalton threw the guns in the back of the truck. Appellant drove Dalton to Dalton's house, and left the guns with Dalton. A few days later, appellant went to Dalton's house and picked up the guns. Dalton was never paid anything for killing Farguson.

In March 1995, Robert Collins reported the murder to the police. After he was arrested, Dalton gave a statement to the police. Appellant fled to Alabama after he found out he was charged with capital murder. The Alabama police arrested appellant in April 1995, and returned him to Houston to stand trial.

In point one, appellant contends the trial court erred in denying his request for a mistrial after instructing the jury to disregard Dalton's nonresponsive answer to a prosecutor's question. The prosecutor asked Dalton what similar interests he and appellant had that made appellant a mentor to Dalton. Dalton replied they both liked weapons, that appellant had been in the armed services and Dalton came from a service oriented family, and they "smoked a little pot, drank some booze." Appellant objected, and the trial court sustained the objection, and instructed the jury to disregard Dalton's testimony that he and appellant smoked pot. The trial court denied appellant's request for a mistrial. Appellant argues the statement was highly prejudicial and could not be cured by the trial court's instruction.

It is well-settled that testimony referring to or implying extraneous offenses can be rendered harmless by an instruction to disregard by the trial judge, unless it appears the evidence was so clearly calculated to inflame the minds of the jury or is of such damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind. *Kemp v. State*, 846 S.W.2d 289, 308 (Tex.Crim.App. 1992), *cert. denied,* 113 S.Ct. 2361 (1993); *Gardner v. State*, 730 S.W.2d 675, 696-97 (Tex.Crim.App.1987). We find the uninvited and unembellished reference to appellant's "smoking a little pot" with Dalton--although inadmissible--was not so inflammatory as to undermine the efficacy of

the trial court's instruction to disregard. *Kemp,* 846 S.W.2d at 308. We overrule appellant's point of error one.

Under point two, appellant contends the State did not give appellant notice of its intent to use Dalton's testimony about appellant soliciting Dalton to commit capital murder in Chicago and Jersey Village under rule 404(b), Texas Rules of Evidence. Appellant filed a motion requesting the State give him notice of any extraneous offenses it intended to use in the trial of his case pursuant to rule 404(b). The State contends it was not required to give notice because appellant did not get a ruling on his motion.

When a defendant relies on a motion to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule. *Espinosa v. State*, 853 S.W.2d 36, 39 (Tex.Crim.App. 1993). Because appellant did not secure a ruling on his motion, the State was not required to give notice. *Id.* We overrule appellant's point of error two.

In points three, four, five, and six, appellant contends the trial court erred in admitting Dalton's testimony concerning the "hits" in Chicago and in Jersey Village. He argues that he was on trial for being a "hit man," and Dalton's testimony about two extraneous "hits" clearly harmed appellant and deprived him of a fair and impartial trial.

Appellant asserts that Dalton's testimony on the two "hits" was not relevant. TEX. R. EVID. 401, 402. He contends that if this evidence is relevant, it should have been excluded under rule 403, Texas Rules of Evidence, because the "probative value of this testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403.

Out of the presence of the jury, the trial court conducted a hearing to determine whether Dalton should be allowed to testify before the jury about appellant's solicitation of Dalton for contract killings in Chicago and Jersey Village. Dalton stated appellant approached him in 1991 and asked Dalton if he would like to make some money by working on a contract killing in Chicago. The Chicago "hit" never materialized, and the subject was never brought up again by appellant. Thereafter, Dalton stated that appellant approached him about killing a man in Jersey Village who had sexually assaulted appellant's son. Appellant suggested that Dalton use a car bomb, and told Dalton where the man lived. Dalton

reconnoitered the man's home, tested a couple of devices that could be used for a car bomb, and then went back to appellant for further instructions. Appellant told Dalton to hold off on this job for the present because he had something else working. After hearing the testimony, the trial court overruled appellant's relevancy objection and his rule 403 objection.

Appellant first asserts the "hits" were not relevant to any issue in the case. The State contends the evidence was relevant to show the relationship between the parties and the role appellant played in the murder. At the hearing on the "hits," the prosecutor argued that the evidence was admissible because they were part of appellant's planning and "initiation" leading up to Farguson's murder. Appellant's defensive theory was that he was innocent, and Dalton Collins was lying.

If the opponent of extraneous offense evidence objects on the grounds that the evidence is not relevant, violates Rule 404(b), or constitutes an extraneous offense, the proponent must satisfy the trial court that the extraneous offense evidence has relevance apart from its character conformity value. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App.1990) (opinion on reh'g). If the trial court determines the evidence has no relevance apart from supporting the conclusion that the defendant acted in conformity with his character, it is absolutely inadmissible. *Id.* On the other hand, extraneous offense evidence is admissible if the proponent persuades the trial court that [the extraneous offense evidence] tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, *e.g.* absence of mistake or accident . . . [or] that it is relevant upon a logical inference not anticipated by the rule makers. *Montgomery*, 810 S.W.2d at 387-388; *see also Taylor v. State*, 920 S.W.2d 319, 321 (Tex.Crim.App.1996), *cert. denied,* 117 S.Ct. 364 (1997). As long as the trial court's ruling was within the zone of reasonable disagreement, there is no abuse of discretion and the trial court's ruling will be upheld. *Montgomery*, 810 S.W.2d at 391. *See also Santellan v. State*, 939 S.W.2d 155, 168-169 (Tex.Crim.App. 1997).

Appellant testified that Dalton Collins worked at his insurance agency for a time, then was terminated for trying to sell drugs to a customer. Appellant stated that he was unaware that Annie Farguson was having any domestic problems, and he did not know Charles Farguson. He stated he never talked to

Dalton about killing Charles Farguson, he knew nothing about the murder, and took no part in the murder. After Farguson was killed, appellant stated he moved to Alabama to live with his wife's relatives. He stated he knew that he had been charged with an offense, but he moved to Alabama on the advice of an attorney.

Because appellant denied any complicity in Farguson's murder, appellant's identity and intent were elemental facts of consequence and the extraneous "hits" were admissible as relevant to show appellant's identity and intent to murder Charles Farguson for remuneration from Annie Farguson. *See Taylor,* 920 S.W.2d 319, 321 (appellant denied committing the murder; court of criminal appeals found that evidence of an extraneous offense of a similar earlier murder was relevant to show appellant's identity, intent, motive, and to rebut appellant's defensive theory). We find the trial court correctly found the "hits" were relevant.

Appellant further objected that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under rule 403, Texas Rules of Evidence. Once it is found that an extraneous offense is relevant, a trial court must determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Taylor,* 920 S.W.2d at 321; *Montgomery*, 810 S.W.2d at 389. In making this determination the trial court should consider: 1) whether the ultimate issue was seriously contested by the opponent of the evidence; 2) whether the State had other convincing evidence to establish the ultimate issue to which the disputed evidence was relevant; 3) the compelling nature, or lack thereof, of the evidence; and 4) the likelihood that the evidence was of such a nature as to impair the efficacy of a limiting instruction. *Taylor*, 920 S.W.2d at 321; *Montgomery*, 820 S.W.2d at 392-393.

Appellant's identity as Dalton's employer in this contract killing and his intent were hotly contested issues at trial. Appellant denied any and all complicity in the Farguson murder, and stated that Dalton was seeking revenge for being fired by appellant. Dalton's credibility was also in issue because he was an admitted drug and alcohol abuser. Other than Dalton's testimony, the State had no other evidence of appellant's participation in the Farguson murder.

Other than generally alleging that this evidence is prejudicial, and the State did not need it, appellant does not explain why the trial court erred in failing to exclude this evidence pursuant to Rule 403. Appellant's defensive theories effectively controverted the State's case against him. The State attempted

to refute those theories by proving that appellant had twice before attempted to interest Dalton in contract killings. Without this evidence regarding appellant's prior conduct toward Dalton, the State would have difficulty in effectively rebutting appellant's claim of innocence. Without such evidence of similar prior attempts to involve Dalton in contract killings, the jury might have accepted appellant's version of Dalton's involvement as being an act of revenge inspired by Dalton's drug and alcohol problems. *Williams v. State*, 927 S.W.2d 752, 759 (Tex.App.-El Paso 1996, pet. ref'd). Thus, the evidence of appellant's first "testing" Dalton on other possible contract killings is highly probative.

Although any extraneous offense results in some prejudicial effect, the evidence in this case did not result in unfair prejudice to appellant. Further, we note that the trial court included a limiting instruction in the jury charge. Given the substantial probative value of this evidence, the trial court did not abuse its discretion in refusing to exclude the extraneous acts evidence under Rule 403. *See Taylor,* 920 S.W.2d at 323. *See also Williams v. State*, 927 S.W.2d 752, 759 (Tex.App.-El Paso 1996, pet. ref'd). Appellant's points of error three, four, five, and six are overruled.

In point seven, appellant contends the evidence was legally insufficient to support his conviction because the State failed to corroborate the testimony of Dalton and Robert Collins as accomplice witnesses.

The test for weighing the sufficiency of corroborative evidence is to eliminate from consideration the testimony of the accomplice witness and then examine the testimony of other witnesses to ascertain if there is evidence which tends to connect the accused with the commission of the offense. *Hernandez v. State*, 939 S.W.2d 173, 176 (Tex.Crim.App. 1997); *Reed v. State*, 744 S.W.2d 112, 125 (Tex.Crim.App.1988). The non-accomplice evidence need not be sufficient in itself to establish the accused's guilt beyond a reasonable doubt. *Reed*, 744 S.W.2d at 126. Nor is it necessary for the non-accomplice evidence to directly link the accused to the commission of the offense. *Reynolds v. State*, 489 S.W.2d 866, 872 (Tex.Crim.App.1972). The accomplice witness rule is satisfied if there is some non-accomplice evidence which tends to connect the accused to the commission of the offense alleged in the indictment. *Gill v. State*, 873 S.W.2d 45, 48 (Tex.Crim.App.1994) (citing *Gosch v.*

State, 829 S.W.2d 775, 777 (Tex.Crim.App.1991), *cert. denied*, 509 U.S. 922, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993); *Cox v. State*, 830 S.W.2d 609, 611 (Tex.Crim.App.1992).

Appellant admitted he went to Alabama after learning he had been charged with capital murder. Appellant claimed he went on the advice of an attorney. Evidence of flight and guilty demeanor, coupled with other corroborating circumstances, may tend to connect a defendant with the crime. *Burks v. State*, 876 S.W.2d 877, 888 (Tex.Crim.App.1994), *cert. denied*, 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *see also Passmore v. State*, 617 S.W.2d 682, 685 (Tex.Crim.App.1981) (evidence presented at trial which shows flight serves to corroborate accomplice testimony). We find appellant's flight tended to connect him to the commission of the offense.

Greg Stephenson, appellant's employer in Alabama, testified that he gave appellant a ride home. When they came near appellant's home, appellant told Stephenson to drive on after appellant saw cars parked in front of his house. Stephenson wanted to know what was going on, and appellant finally told him he had hired a hit man in Houston to kill a lady's husband, and the hit man got caught. On the advice of an attorney, appellant told Stephenson that he came to Alabama to "lay low" until the matter "blew over."

An admission of guilt alone can provide sufficient evidence to convict a defendant, since admissions of guilt by the defendant need only be corroborated as to the *corpus delecti* of the crime. *See Farris v. State*, 819 S.W.2d 490, 495 (Tex.Crim.App. 1990), *cert. denied*, 112 S.Ct 1278 (1991). App.1985.) Here, the circumstances of Farguson's demise left virtually no doubt that he met his end by a criminal agency. *See Id.* Because appellant admitted his guilt to Stephenson, and there was no doubt Farguson was murdered, his admission of guilt alone is sufficient to sustain his conviction, and certainly sufficient to corroborate Dalton's testimony.

Robert Vlach testified that he stored a boat that previously belonged to Farguson. Appellant told Vlach that he obtained the boat as payment for a favor he had done for a woman. The record contains the certificate of title showing the boat had been registered to Farguson. The record also contains an affidavit of heirship to the boat which states that Farguson died intestate, without administration upon his estate, and that appellant should be issued a title. The affidavit is signed by appellant and Annie Farguson. Appellant

testified that he bought the boat from Annie Farguson. This evidence tends to connect appellant to the remuneration element because appellant told Vlach the boat was *payment* for a favor he had done for a woman.

Appellant's flight to Alabama, admission of guilt, plus evidence of payment "for a favor" strongly tend to connect appellant to the commission of the offense. We find that rational jurors could conclude that this evidence sufficiently tended to connect appellant to the offense. We overrule appellant's point of error seven.

In points eight, nine, and ten, appellant contends the evidence was legally insufficient to support his conviction. In point eight, he argues the evidence fails to show that he shot Farguson, and is legally insufficient to support his conviction under the first paragraph of the indictment alleging appellant shot and killed Farguson during a robbery. In point nine, appellant asserts the evidence fails under the second paragraph of the indictment alleging he shot and killed Farguson for remuneration because he did not actually shoot Farguson. In point ten, he asserts the evidence fails to show Dalton was committing theft at the time of the offense, and therefore, the evidence was legally insufficient under the first paragraph of the indictment alleging murder while committing a robbery.

In points eight and nine, appellant asserts the evidence is legally insufficient because it failed to show appellant was the actual shooter. The trial court instructed the jury on the law of parties, authorizing the jury to convict if they found he acted with the intent to promote or assist the commission of the murder, and he solicited, encouraged, directed, aided or attempted to aid another person to commit the offense. TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994 & Supp. 2000).

The indictment sufficiently and accurately charged appellant with the instant offense. The State did not need to indict appellant as a party to the commission of capital murder for robbery and/or remuneration in order for the jury to convict him for being a party to that offense. *Jackson v. State*, 898 S.W.2d 896, 898 (Tex.Crim.App. 1995). The "law of parties may be applied to a case even though no such allegation is contained in the indictment." *Id.* This rule applies to the law of parties as it is set out in both § 7.02(a)(2) and in § 7.02(b), Texas Penal Code. *Id.* We find the evidence was legally sufficient to sustain appellant's conviction, and we overrule appellant's points of error eight and nine.

In point ten, appellant asserts that Annie Farguson gave effective consent to Dalton to take her husband's guns, and therefore, appellant contends there was no theft. With no theft, there can be no capital murder by robbery. Therefore, appellant contends the evidence is legally insufficient to prove capital murder by robbery as alleged in the indictment.

Appellant cites no authority to support this novel claim other than *Collins v. State*, 548 S.W.2d 368 (Tex.Crim.App.1976). In *Collins*, the appellant contended that his wife's consent to search did not mean he also freely and voluntarily gave consent. *Id.* at 372. The court of criminal appeals held that her consent was valid as to appellant. *Collins* does not apply to this situation, and without authority to support his assertion that Annie Farguson gave *effective* consent to Dalton to take her husband's guns, and use one of them to kill her husband, appellant has presented nothing for us to review. Appellant has waived these contentions by failure to adequately brief these points. *McFarland v. State*, 928 S.W.2d 482, 521 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 966 (1997).

In any case, the indictment in this case alleged alternative theories of capital murder: capital murder during a robbery or capital murder by remuneration. The jury returned a general verdict finding appellant guilty as "charged in the indictment." If a general verdict is returned under an indictment alleging alternate means of committing an offense, and there is sufficient evidence to convict under any of the theories submitted, the evidence is legally sufficient to support the conviction. *Kitchens v. State*, 823 S.W.2d 256, 259 (Tex.Crim.App. 1991) The State need prove only one of the underlying offenses charged in the indictment in order to support the conviction for capital murder. *Id.* We find the evidence was legally sufficient to support appellant's conviction under the remuneration allegation in the indictment. We overrule appellant's point of error ten.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed April 27, 2000.

Panel consists of Justices Sears, Cannon, and Draughn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.