Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00398-CR

JOHN CHARLES PHEASANT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 803428

O P I N I O N

After appellant, John Charles Pheasant, was convicted by a jury of capital murder, he was sentenced by the court to life imprisonment. In four points of error, he complains (1) the evidence is legally insufficient to support his conviction, (2) the trial court erred by overruling his objection to the prosecutor's explanation of the term "beyond a reasonable doubt" and, (3) he was denied reasonably effective assistance of counsel. We affirm.

I. Background Facts

On January 21, 1999, Tom Wilson came upon John Carroll, who was panhandling

under a Houston freeway overpass. Appellant and Carroll were hitchhiking from Florida to Arizona, although appellant denies he met Wilson at this time.[1] In any event, Carroll had a sign which read, "Will work for food." Wilson asked whether Carroll would be interested in mowing Wilson's yard. Carroll agreed and returned with Wilson to Wilson's house to mow his lawn. Thereafter, Wilson drove Carroll back to the same freeway intersection, where appellant had remained. According to appellant's statement, Wilson offered to take both men back to his house so they could spend the night out of the elements. Also according to appellant's statement, at some point during the evening, Carroll became upset with Wilson when he refused Carroll's demand for money. Carroll became so upset that he began beating Wilson. Appellant admitted to assisting Carroll in tying up Wilson by providing Carroll with duct tape. Appellant also admitted that, after Wilson was bound, and as Carroll continued to beat him, appellant pulled the phone out of the wall so Wilson could not call for help. Appellant said that during the attack, he looked for things to steal, partially in an effort to calm Carroll down. After Wilson lay dead, appellant and Carroll went to the garage and apparently tried to steal Wilson's van. Evidently unable to start the van, they decided to steal Wilson's 1976 Oldsmobile 98. Later that evening, Wilson's neighbor noticed that the garage door was open and that Wilson's Oldsmobile was missing.

Appellant and Carroll drove Wilson's Oldsmobile west towards San Antonio. The next day, in the early morning hours, a man in Roosevelt, Texas noticed the two men syphoning gas. The man called the police, but due to an unusually heavy fog that morning, authorities never made it to the gas station where appellant and Carroll had been. The man described the car he saw appellant and Carroll driving as an old Cadillac. Not long after this call, another call was received by the Kimble County Sheriff's Department. This time, the caller told police that a car was on fire on a neighbor's property. When sheriff deputies arrived, they saw Wilson's Oldsmobile on fire, a trail of unopened beer cans leading from

[1] Some of the background facts are taken from appellant's own statement.

the car, and at least one container of antifreeze. Footprints leading away from the car eventually faded. However, after a brief search, the police found appellant and Carroll passed out and lying under a quilt.

After they were arrested for criminal mischief, trespassing, and public intoxication, appellant was taken to a magistrate to receive statutory warnings. He subsequently gave two statements. In one statement, appellant told authorities that the burning car belonged to a friend and that the car caught fire after it left the road and gasoline inside the passenger compartment spilled and ignited. The statement indicated that the gasoline was being transported in antifreeze containers, that it spilled when the car went off the road due to the fog, and that it ignited because they were smoking and dropped their cigarettes in the accident. Deputy Brown was suspicious of appellant's story, as the antifreeze containers were found outside the car and the fire had multiple points of origin, indicating the fire was started intentionally. No statement by appellant indicated appellant knew of Wilson's death or that Carroll killed anyone or that appellant was afraid of Carroll.

Meanwhile, authorities in Houston went to Wilson's house after they received the call from Wilson's neighbor. Once inside, they found the house ransacked, blood splatters throughout the home and Wilson's body lying on the floor. An autopsy report concluded Wilson's cause of death was "strangulation with multiple blunt force injuries of the head, neck, thorax, and arms." After authorities in Kimble were able to tie the Oldsmobile to Wilson's murder, Houston police were called to return appellant to Harris County on charges of capital murder.

II. State's Illustrations to Explain Reasonable Doubt

In his first point of error, appellant claims that the trial court erred in overruling his objection to the State's use of two illustrations to explain the meaning of the term "proof beyond a reasonable doubt" during its voir dire of the jury. He further claims that the instructions the jury ultimately received did not cure the error.

In the first illustration, the prosecutor explained that beyond a reasonable doubt was

akin to that degree of certainty one forms in his or her mind when deciding to purchase or rent a home. The second explained that beyond a reasonable doubt was like "getting medical treatment for a child, expert medical treatment. If it works, the child is going to live; if it doesn't work, the child is going to die. The degree of certainty that you reach when you reach and make that decision as a parent . . . ." At this point, appellant interposed an objection which the trial court overruled.

In order to preserve error for appeal, a party must make a timely objection. TEX. R. APP. P. 33.1(a); *Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993). Appellant waived any objection to the State's use of the first illustration. After the prosecutor gave the home-buying illustration, she then asked whether the prospective jurors would hold the State to that burden of proof, and not to a higher one. She explained, by referencing *Perry Mason*, that the standard of proof is not "beyond a shadow of a doubt," and that the State was not required, simply because this was a capital murder charge, to prove its case to a point of absolute certainty. After these general remarks, the prosecutor proceeded to ask the jurors, row by row, which of them would hold the State to a burden higher than beyond a reasonable doubt. She additionally elicited responses from several members of the venire about these concepts. Finally, defense counsel interposed an objection. The court, however, never ruled on this objection, as the State then offered the medical care example. Accordingly, appellant waived any error by failing to object at the first possible opportunity and by failing to obtain an adverse ruling. TEX. R. APP. P. 33.1(a); *Martinez*, 867 S.W.2d at 35.

Appellant timely objected, however, to the prosecutor's second illustration. We review the trial court's allowance of a hypothetical during voir dire through the prism of the abuse of discretion standard. *Pineda v. State*, 2 S.W.3d 1, 10 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). "Because the law allows the use of a hypothetical to ascertain the views of the prospective jurors on issues pertinent to a fair determination of the case, it must be determined whether the hypothetical was used to explain the law or was used to commit the jurors to particular circumstances." *Atkins v. State*, 951 S.W.2d 787, 789 (Tex.

Crim. App. 1997). Questioning jurors about their understanding of the term "reasonable doubt" is a relevant issue. *Dinkins v. State*, 894 S.W.2d 330, 344 (Tex. Crim. App. 1995). Texas permits both the State and the defendant to question potential jurors on the State's burden of proof. *Woolridge v. State*, 827 S.W.2d 900, 906 (Tex. Crim. App. 1992). The State's hypothetical was not so far afield as to be *per se* impermissible. An attorney is permitted to argue the law, even if his argument is outside the confines of the charge, as long as he does not make a statement contrary to the law provided in the charge. *State v. Renteria*, 977 S.W.2d 606, 608 (Tex. Crim. App. 1998). Thus, it was permissible for the prosecutor to attempt to explain a legal concept, as long as her explanation did not conflict with the charge. *See id.* Here, the prosecutor's second illustration was intended to impart unto the jury the solemnity of the issue they were being asked to decide. When viewed in the context of her entire explanation, the prosecutor did not misstate the law regarding the definition of hesitation or reasonable doubt. *See Lyon v. State*, 885 S.W.2d 506, 522–23 (Tex. App.—El Paso 1994, pet. ref'd). Accordingly, we cannot say that the trial court abused its discretion in permitting the State's use of the medical care hypothetical to illustrate the legal concept of beyond a reasonable doubt.

III. Ineffective Assistance of Counsel

In his next point of error, appellant claims he was denied reasonably effective assistance of counsel. He bases this claim on his lawyer's failure to object during voir dire to an erroneous definition of beyond a reasonable doubt given by the trial judge, to the State shifting the burden of proof to appellant by stating that "the killer controls" what evidence is left behind, and to the State's claim that requiring scientific evidence is the equivalent of requiring more than proof beyond a reasonable doubt. Appellant also complains his lawyer was ineffective during closing arguments for failing to object when the State mischaracterized the law of parties, misinformed the jury as to the burden of proof for convicting a person as a party by arguing that "all the law requires is evidence of an agreement," and commented on appellant's failure to testify and post-arrest silence.

The law on ineffective assistance of counsel is well-established. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas). Before a defendant can succeed on a claim of ineffective assistance of counsel, he must present a record sufficient to overcome the presumption that his lawyer's actions were the result of a "strategic plan." *Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000). Here, appellant has not come forward with anything supporting his claim. Accordingly, appellant cannot overcome the presumption that this was part of his lawyer's trial strategy. *See id.* at 714 (stating "the record in the instant case is silent as to why appellant's counsel failed to object and is therefore insufficient to overcome the presumption that counsel's actions were part of a strategic plan.").

In any event, appellant's claims do not show that an objection would have been proper. For instance, appellant complains that the judge erred by inviting the jurors to resort to a "subjective interpretation" of what beyond a reasonable doubt means and, consequently, his lawyer was ineffective for failing to object. The judge's remarks, however, correctly state Texas law on beyond a reasonable doubt.[2] *See Paulson v. State*, 28 S.W.2d 570, (Tex. Crim. App. 2000) (overruling *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991) and stating Texas's tradition that, "since [beyond a reasonable doubt] ha[s] a commonly accepted meaning, '[i]t is not proper for the court to discuss what reasonable doubt is. The jury is as competent to determine that as the court.'"); *cf. Victor v. Nebraska*, 511 U.S. 1, 14–15 (1994) (finding "moral certainty" requires jurors to find *subjective* state of near certitude).

Next, appellant argues the State shifted the burden of proof by stating that the killer controls what evidence is left behind. Not only is this a truism, but it did not impart onto appellant the burden of doing anything. If no evidence were available because the

[2] We also note that counsel's failure to object to the judge's remark may have been trial strategy. For instance, counsel could have believed that a juror would subjectively equate beyond a reasonable doubt to absolute certitude that requires scientific evidence or an eyewitness of impeccable character.

murderer was particularly meticulous, either the jury would have been required to acquit appellant or this Court would be obligated to reverse and order a judgment of acquittal. In no event, however, would appellant be required to come forward with evidence or argument in support of his innocence. Likewise, our law does not require the State to come forward with scientific evidence in order to convict. *See King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000) (stating "fact that appellant was convicted upon circumstantial evidence does not, in itself, require reversal of the conviction under either our legal or factual sufficiency analyses."); *see also Garza v. State*, 18 S.W.3d 813, 820 (Tex. App.—Fort Worth 2000, pet. ref'd) (holding law allows State to ask jurors whether they will require State to produce medical evidence where such evidence is not necessary to convict).

We also disagree that the prosecutor's illustration to explain what the law required in order to show an agreement was objectionable. *See, e.g.*, *Renteria*, 977 S.W.2d at 608 (stating so long as argument correctly states the law, there is no error in providing jurors with everyday examples). The prosecutor's illustration provided that an agreement to watch a movie could be inferred from the fact that A asks B to watch a movie, and B, without saying a word, sits down next to A. Because an agreement need not be expressly made, the prosecutor's illustration of an agreement was not improper. *Cf. Cordova v. State*, 698 S.W.2d 107 (Tex. Crim. App. 1985) (finding jury could reasonably infer a prior agreement to commit capital murder in course of robbery by conduct of defendant). Hence, appellant's lawyer was not ineffective for failing to object to it.

Nor was appellant denied reasonably effective assistance of counsel because of his lawyer's failure to object to the prosecution's "unlawful comment" on his post-arrest silence. No such improper comment was made.[3] Appellant was not silent following his

[3] In closing argument, the prosecutor told the jury that, if appellant "had really been trying to stop Mr. Carroll, don't you know that the first time he had a chance to be away from him, he would have spilled his guts and said, 'Man, you don't know what awful things this man did. I was terrified and did you see how big he was? I was afraid. . . .'"

arrest. Instead, in the proper context in which the complained of remarks were made, it is clear that the prosecutor was pointing out to the jury the inconsistency between his statement to the police and his claims at trial. Our constitutional rights have not been extended so far as to include a right to lie. *See, e.g., United States v. Wong*, 431 U.S. 174, 178 (1977) (stating the Fifth Amendment "does not endow the person who testifies with a license to commit perjury.").

IV. Sufficiency of the Evidence

In his final point of error, appellant claims that the evidence is legally insufficient support the jury's verdict because Carroll's conduct was clearly sufficient by itself to cause the victim's death, while appellant's own actions were clearly insufficient to cause death.[4] Law of the parties and conspiracy were defined for the jury. They were charged that they could find appellant guilty of capital murder only if they believed beyond a reasonable doubt that (1) appellant intended to cause the death of Wilson while in the course of robbery, (2) Carroll intended to cause the death of Wilson while in the course of robbery to which appellant was a party or, (3) Wilson was murdered as part of a conspiracy between appellant and Carroll. The record does not reflect where appellant requested an instruction under 6.04.[5]

The law on legal sufficiency is well-established. *See, e.g., Wesbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000). The evidence at trial amply supports the jury's verdict. Appellant conceded he was at the murder scene. He conceded that he handled the fire extinguisher, and the evidence, viewed in the light most favorable to the verdict, supports the conclusion that the jury believed the fire extinguisher was the murder

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[4] The Penal Code provides that "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." TEX. PEN. CODE ANN. § 6.04(a) (Vernon 1994).

[5] In any event, this argument misses the mark. *See, e.g., Cain v. State*, 976 S.W.2d 228, 234 (Tex. App.—San Antonio 1998, no pet.) (stating that law of parties can sustain murder conviction even though there is *no evidence* defendant fired fatal shot).

weapon. Accordingly, the evidence was legally sufficient to establish appellant's culpability, even assuming section 6.04 of the Texas Penal Code applies.[6]

Likewise, the evidence was legally sufficient under the law of parties. Appellant admitted that he supplied Carroll with duct tape used to bind the decedent's feet before the fatal blows were inflicted, and he admitted that he pulled the telephone cord from the wall when Carroll began beating the decedent so that they could escape before Wilson could call for help. Appellant further admitted that he took several items from the house, although he stated he did so only in part to placate Carroll, who appellant claimed began the attack when Wilson refused to give Carroll money. Accordingly, the evidence is also legally sufficient to support the jury's verdict on the State's theory that appellant "solicited, encouraged, directed, or *aided"* Carroll in murdering the decedent while in the course of a robbery. *See* TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994) (emphasis added). Finally, the jury heard that appellant told authorities ever-changing versions of what happened and lied about how he and Carroll came to be driving the decedent's Oldsmobile. On these facts, we find that a rational jury could have found the essential elements of capital murder beyond a reasonable doubt. *See McDuff v. State*, 939 S.W.2bd 607, 614 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Appellant's final point of error is overruled.

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[6] The coroner testified that, in layman's terms, Wilson was strangled *and* beaten to death. In a legal sufficiency challenge, we consider only the evidence which supports the jury's verdict. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). Thus, we do not consider whether appellant's comparatively slight build "mean[t] he could not have rained blows with . . . a fire extinguisher on Wilson's head and thorax until after Carroll had beaten Wilson to the floor." Indeed, the jury could have just as easily believed Carroll bound the decedent, and that appellant, with or without Carroll's assistance, thereafter used the fire extinguisher and metal rod to beat the decedent to death.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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