Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00222-CR

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ROGER KEITH PIERCE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 684171

O P I N I O N

The jury found appellant guilty of capital murder and the trial court assessed punishment at imprisonment for life. He challenges the sufficiency of the evidence to support the conviction and challenges the excusal of certain venire persons for cause. We affirm.

TESTIMONY

Appellant and Johnny Talbert lived together and at one time. Bruce Oliver also had

lived with them. During a party, which all three of them attended, Talbert asked Oliver to help him "roll" Richard Monts, the complainant. Talbert said he was "just going to slice [Monts's] throat if he gave him any problems." Oliver testified that he declined to help, and that he later urged appellant not to participate in the contemplated offense before appellant left the party with Talbert. Monts's body was later recovered from a bayou. A knife identified by Oliver as belonging to Talbert was subsequently recovered nearby.

As part of the investigation of the murder, appellant was questioned. The interview was tape-recorded and video-taped. Appellant admitted that he accompanied Talbert to Monts's apartment, and that Talbert lured Monts out of the apartment to "roll" him and take his money. Appellant claimed that he told Talbert he did not want to participate in the robbery, but admitted that he pushed Monts to the ground as they approached the bayou, as directed by Talbert. Appellant further claimed that he "blacked out" when he saw Talbert's knife, and had no other memory of the offense other than a vague recollection of standing in a dark place like a tunnel. He stated that the next thing he remembered was leaving Talbert's apartment the next morning, and seeing Talbert in possession of Monts's wallet and beeper. He also said that he had no idea what Talbert did with Monts's possessions.

After his tape-recorded oral statement, appellant was transported to the offices of the Houston Police Department homicide division where a sergeant transcribed appellant's four-page written statement. The written statement deviated from his previous oral statement. Appellant said that Talbert informed him during their return from the party that they were going to "roll" Monts and take his money. He said they lured Monts out of the apartment by telling him about some motorcycles outside a nearby shop, which could be stolen. Appellant again recounted how he struck Monts from behind and knocked him to the ground, in accordance with Talbert's instructions and upon Talbert's signal; but this time he admitted that he watched as Talbert then stabbed Monts with a hunting knife.

In his written statement, appellant did not claim that he experienced any "black out" or memory lapse with regard to the stabbing. Instead, he said that he stood by as Talbert repeatedly stabbed Monts, and the two men rolled down the bank of the bayou. Appellant admitted that he assisted in concealing Monts's body in a nearby drainage pipe which emptied into the bayou, and that he then accompanied Talbert to an automatic teller machine (ATM), where Talbert attempted to obtain money with Monts's ATM card. Appellant stated that on the following day, he accompanied Talbert during another attempt to obtain money with Monts's ATM card, and then went with Talbert to a garbage dump where they disposed of the clothing they wore during the murder. Contrary to his previous claim that he did not know what became of Monts's property, he admitted being present when Talbert burned Monts's wallet. Appellant's written statement reiterated that appellant did not want to participate in the robbery, and that he did not anticipate that Talbert would stab Monts.

SUFFICIENCY OF EVIDENCE

Legal Sufficiency

In his first point of error, appellant argues that the evidence was legally insufficient to sustain a conviction for capital murder. In analyzing a challenge to the legal sufficiency of evidence, we examine the evidence in the light most favorable to the verdict. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 975 (1993). We consider all of the evidence whether properly or improperly admitted. *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991). We then determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App.), *cert. denied*, 502 U.S. 870 (1991). The trier of fact is the sole judge of the witnesses' credibility and can accept or reject any or all of a witness's testimony. *Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985); *Hemphill v. State*, 505 S.W.2d 560, 562 (Tex. Crim. App. 1974). In determining

legal sufficiency, we do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence to support the verdict. *See Clewis v. State,* 922 S.W.2d 126, 132 n. 10 (Tex. Crim. App. 1996).

Appellant's argument is based largely upon the exculpatory portions of his oral and written statements. The State, however, is not required to disprove exculpatory statements contained in a defendant's confession, which were not redacted prior to admission of the confession. *See* TEX. R. CRIM EVID. 607; *Russeau v. State,* 785 S.W.2d 387, 390 (Tex. Crim. App. 1990). A jury is entitled to believe all or part of the conflicting testimony proffered and introduced by either side and it can selectively believe all or part of the evidence admitted at trial. *Bignall v. State,* 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). A jury is entitled to accept as true the inculpatory portions of a defendant's written statement, but reject the defensive theory by which the defendant seeks to justify his conduct. *See Skidmore v. State,* 530 S.W.2d 316, 320 (Tex. Crim. App. 1975).

The jury was instructed that it should find appellant guilty of capital murder if, with the intent to promote or assist the commission of capital murder, he aided or attempted to aid Talbert in the commission of that offense; or if appellant conspired to rob Monts and the victim's murder was an offense that he should have anticipated as a result of carrying out the conspiracy. *See* TEX. PENAL CODE ANN. § 7.02(a)(2) and (b) (Vernon 1994). The inculpatory portions of appellant's written statement support the jury's determination that appellant was guilty of capital murder, rather than robbery. *Booth v. State,* 679 S.W.2d 498, 501-502 (Tex. Crim. App. 1984).

Guilt as a party under section 7.02(a)(2) can be established by circumstantial evidence. *Beardsley v. State,* 738 S.W.2d 681, 684 (Tex. Crim. App. 1987); *Wilkerson v. State,* 874 S.W.2d 127, 130 (Tex. App.—Houston (14th Dist.) 1994, pet. ref'd). Although mere presence at the scene of an offense alone is not sufficient to support a conviction, it is a circumstance tending to prove guilt, which may be combined with other facts to show

that a defendant was a participant. *Beardsley*, 738 S.W.2d at 685. In determining whether a defendant participated in an offense as a party, the court may examine the events occurring before, during, and after the commission of the offense and may rely on actions of the defendant that show an understanding and common design to commit the offense. *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 940 (1987). The cumulative force of all the incriminating circumstances may be sufficient to warrant a conclusion of guilt. *Thomas v. State*, 915 S.W.2d 597, 599-600 (Tex. App.—Houston [14th Dist.] 1996, pet. ref d).

Appellant admitted knocking Monts to the ground at Talbert's signal. This supports a finding that he actually aided Talbert. Appellant argues that there is no evidence that he harbored a specific intent to promote or assist the commission of a murder. However, there was evidence from which the jury could infer that appellant and Talbert shared a common purpose and design to bring about appellant's death. They traveled together to a location where they mutually expected to "roll" Monts; they acted together in luring him from his apartment to a remote location where his body could be concealed; appellant acted in concert with Talbert by striking the first blow at a prearranged signal, and in the concealment of the body; appellant accompanied Talbert as he attempted to access Monts's bank account and to conceal and destroy the evidence of their crime; appellant exhibited a consciousness of guilt by lying to investigating officers about his purported "black out." This evidence was sufficient to support a finding that appellant acted with the intent to promote or assist Talbert's murder. *See Beardsley*, 738 S.W.2d at 685.

Further, the evidence shows that appellant should have anticipated that a death would occur. Oliver, a former roommate of both Talbert and appellant, testified that Talbert told him on the day of the slaying that he planned to cut Monts's throat if Monts gave him any problems. The jury could rationally assume that Talbert similarly confided in appellant, with whom he still resided. Also, appellant knew that Monts would be able to identify both

Talbert and appellant. When appellant accompanied Talbert and Monts to the bank of the bayou, he should have anticipated that Talbert would not allow Monts to return to his apartment. Appellant physically attacked Monts and indicated his acquiescence in the murder by assisting in the concealment of Monts's body, by accompanying Talbert during his repeated attempts to use the automatic teller card, and during the disposal of their bloody clothing and other evidence linking them to the murder.

A rational trier of fact could find, from the totality of those circumstances, that appellant anticipated Monts's murder, even if he did not intend to assist in its commission. *See Harman v. State*, 788 S.W.2d 193, 194-196 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (circumstances of offense warranted jury's rejection of defendant's claim of mere presence during robbery). Point one is overruled.

Factual Sufficiency

Appellant also argues that the evidence was factually insufficient to support the jury's verdict. In reviewing the factual sufficiency of the evidence, we are not bound to view the evidence in the light most favorable to the prosecution, and may consider the testimony of defense witnesses and the existence of alternative hypotheses. *Clewis* v. *State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). We consider all of the evidence in the record related to an appellant's sufficiency challenge, comparing the weight of the evidence that tends to prove guilt with the evidence that tends to disprove it. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). We are not free to reweigh the evidence and set aside a jury verdict merely because we believe that a different result is more reasonable. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis*, 922 S.W.2d at 135. Only if the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust, will we reverse the verdict and remand for a new trial. *Clewis*, 922 S.W.2d at 135.

Appellant's written statement contained self-serving protestations of innocence, but

the jurors were free to disregard those portions of his statement, and it cannot be said that their decision to do so was so "contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis*, 922 S.W.2d at 129.

Appellant's oral statement conflicted with his written statement. Orally, he claimed that he "blacked out" and had no recollection of events after pushing Monts to the ground. In his written statement, appellant did not claim memory loss but stated that although he was present and cognizant of what was occurring, he had no intent to assist Talbert in the commission of the offense. The jury was free to consider the inconsistencies in assessing appellant's credibility. The jury was authorized to draw appropriate inferences from appellant's conduct, and the inference that he acted with intent to promote or assist the commission of capital murder was reasonable. The verdict is not against the great weight of evidence so as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d at 135. Point two is overruled.

JURY SELECTION

In three points of error, appellant argues that the trial court erred in granting the State's challenges for cause to three veniremembers without first permitting appellant to question them. Appellant argues he had an absolute right to examine each capital veniremember. The Court of Criminal Appeals has held that it is not error to excuse a juror before the defense questions if the juror reveals himself to be "conclusively biased" against some aspect of the law upon which the State is entitled to rely:

> Where it is clear, after inquiry by the trial court, that venirepersons are conclusively biased against a phase of the law upon which the State is entitled to rely, at guilt/innocence or at punishment, and where such views prevent or substantially impair the performance of their duties as jurors, it is not error to deny a defendant an opportunity to question those venirepersons before granting the State's challenge for cause.

Howard v. State, 941 S.W.2d 102, 113 (Tex. Crim. App. 1996). *See also Matthews v. State*, 965 S.W.2d 541, 544, (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other*

grounds, 971 S.W.2d 72 (Tex. Crim. App. 1998).

Article 35.16(b)(3) of the Texas Code of Criminal Procedure provides:

> A challenge for cause may be made by the State for any of the following reasons:
>
> That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

The voir dire examination of each of the three jurors established that they were conclusively prejudice against following the law of parties.

Prospective juror Olsen responded that he could not convict a defendant of capital murder if the defendant did not personally cause the victim's death. He stated that he disagreed with the premise that a party to another's criminal conduct might be "just as guilty as the guy that stabbed the guy," and described it as a "silly law." After a lengthy examination, he then stated that he would not find a defendant guilty of capital murder under the law of the parties.

Veniremember McGhee indicated that he could not convict a getaway driver or look-out of capital murder under the law of the parties, unless that individual encouraged an accomplice to kill. McGhee stated that he could not follow the law and vote for conviction under those circumstances.

Veniremember Stuckey spoke up, stating that she would similarly have a problem and could never convict a defendant of capital murder under the law of the parties.

Based on the answers given to the prosecutor and to the court, it was not error to grant the State's challenge for cause without permitting the defense an opportunity to question her. *Howard,* 941 S.W.2d at 113.

Points three, four, and five are overruled.

Judgment of the trial court is affirmed.

/s/ Cynthia Hollingsworth
Justice

Judgment rendered and Opinion filed September 9, 1999.
Panel consists of Justice Hudson, Lee and Hollingsworth.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1]The Honorable Cynthia Hollingsworth, former Justice, Court of Appeals, Fifth District of Texas at Dallas, and Senior Justice Norman Lee, participating by assignment.