Affirmed as Modified and Opinion filed October 21, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01078-CR

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KHONEKHAM JON MANOKHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 736,748

O P I N I O N

Appellant was charged by indictment with the offense of capital murder. Following his plea of not guilty, the jury convicted appellant of the charged offense. The State did not seek the death penalty, therefore, the trial court assessed the mandatory punishment of imprisonment for life in the Texas Department of Criminal Justice--Institutional Division. *See* TEX. PEN. CODE ANN. 12.31(a) (Vernon 1994). Appellant raises four points of error. We affirm.

I. Factual Summary

The facts of the instant case may be briefly stated as follows. Martin E. Rivera and Thomas Fulcomer drove from Killeen to Houston to purchase marijuana. In Houston, Rivera and Fulcomer met with Joshua Thorne and Huy Tu, also known as Lee. At the meeting, contact was made with appellant and Long Nguyen, and arrangements were made to meet to complete the drug transaction.

Rivera, Fulcomer, and Lee, drove in a rental van to the designated location. Subsequently, appellant arrived in a car with Nguyen in the passenger seat. After directing the van to follow them to a dark road, the car then parked behind the stopped van. While appellant was allegedly getting the marijuana from the trunk of the car, Rivera questioned appellant about why it was taking so long. Rivera then heard gunshots from the car. The three men in the van tried to duck down and escape from the van. Rivera tried to start the van, but was unsuccessful. Rivera then tried to open the van's sliding door, but was hit in the hand by a bullet or spraying glass. Lee was hit in the head by gunfire and killed. Rivera, exited the van and began running through the thorny underbrush; he then heard Fulcomer yelling that he had been hit. Rivera hid in the woods, hearing more gunshots and appellant's car circling around. Fearing he would be found, Rivera held his breath and eventually passed out. Fulcomer was found dead from multiple gunshot wounds outside the van. Rivera regained consciousness when he heard the police at the scene and was taken to a hospital. Rivera was able to identify appellant and Nguyen and received use immunity for his testimony at trial.[1]

II. Conspirator's Statements

[1] It is the author's policy to not refer to victims by name. Because of the factual circumstances of this case, however, that policy cannot be followed. *See First v. State*, 846 S.W.2d 836, 837 n.2 (Tex. Crim. App. 1992).

A. Thorne's Statement

In his first point of error, appellant contends the trial court erred in admitting hearsay testimony over his timely objection. Thorne, a roommate of the deceased Lee, testified for the State about a telephone conversation between Lee and appellant regarding the sale of marijuana to Rivera and Fulcomer. Thorne testified that Lee told him (Thorne) that appellant wanted to "jack them." Appellant's hearsay objection to this testimony was overruled by the trial court. After a discussion at the bench regarding these comments, however, the trial court instructed the jury to disregard the comments they had just heard regarding any possible "ripoff." Appellant's request for a mistrial was denied.

B. Applicable Law

Statements made by a co-conspirator are not hearsay if made in the course of and in furtherance of the conspiracy. *See* Tex. R. Evid. 801(e)(2)(E). To avail itself of this exception, the State must prove by a preponderance of the evidence that a conspiracy existed, the statements were made during the course of and in furtherance of the conspiracy, and both the declarant and appellant were members of the conspiracy. *See Meador v. State*, 812 S.W.2d 330, 333 (Tex. Crim. App. 1991); *Crum v. State*, 946 S.W.2d 349, 363 (Tex. App.--Houston [14th Dist.] 1997, pet. ref'd). The State is required to prove the coconspirator made the statement both "during the conspiracy" and "in furtherance of the conspiracy." *Meador*, 812 S.W.2d at 333; *Speer v. State*, 890 S.W.2d 87, 94 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd).

C. Analysis

We have no problem finding that appellant's statements "were made during the conspiracy." Therefore, we turn our focus on whether the statements were made "in furtherance of the conspiracy." The "in furtherance" requirement must be separately met in addition to the requirement that the statement be made during the conspiracy. *Meador*, 812 S.W.2d at 333. To determine whether a statement was made "in furtherance" of the conspiracy,

the record is examined to see if the statement "advanced the cause of the conspiracy" or in any way aided the conspiracy. *See Speer*, 890 S.W.2d at 95. Statements that do not advance the objective of the conspiracy are not made "in furtherance" of the conspiracy. *See Fairow v. State*, 920 S.W.2d 357, 362 (Tex. App.--Houston [1st Dist.] 1996), *aff'd*, 943 S.W.2d 895 (Tex. Crim. App. 1997).

The statements Lee made that appellant wanted to "jack them" did not advance the objective of the conspiracy, which was a drug deal. Clearly, Lee would not further a conspiracy where he, himself, would be the victim of a crime. Consequently, we hold the statement was hearsay and the trial court erred in admitting it before the jury.

D. Instruction to Disregard

After appellant objected several times, and a discussion occurred at the bench, the trial court instructed the jury to disregard the comments they had just heard regarding any possible ripoff. An instruction to disregard will cure the error in admitting improper testimony unless it appears the evidence was clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of removing the harmful impression from their minds. *See Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992). The reasoning for this rule was explained in *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987), where the court stated:

> In the vast majority of cases in which argument is made or testimony comes in, deliberately or inadvertently, which has no relevance to any material issue in the case and carries with it some definite potential for prejudice to the accused, this Court has relied upon what amounts to an appellate presumption that an instruction to disregard the evidence will be obeyed by the jury. *See* 1 R. Ray, Texas Practice, Law of Evidence, S 29 (3rd ed. 1980). *Thompson v. State*, 612 S.W.2d 925 (Tex. Crim. App.1981). In essence this court puts its faith in the jury's ability, upon instruction, consciously to disregard the potential for prejudice, and then consciously to discount the prejudice, if any, in its deliberations.

Although the instruction was not promptly given, there is nothing in the record to rebut the presumption of the efficacy of the trial court's instruction to disregard the question. *See Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988). Accordingly, we overruled appellant's first point of error.

III. Present Sense Impression

A. Rivera's Statement

In his second point of error, appellant contends that the trial court erred in admitting hearsay testimony over appellant's timely objection. Rivera, the sole survivor of the van occupants, testified that while following appellant's car, Lee told Rivera that in the car up ahead was "[appellant] and a guy named Low, Long, something like that." Appellant contends this statement was inadmissible under rule 801(e)(2)(E) of the Texas Rules of Evidence, the co-conspirator's exception to the hearsay rule. The State contends the statement is admissible under rule 803(1) as a present sense impression. *See* TEX. R. EVID. 803(1). We agree.

B. Applicable Law

A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *See* TEX. R. EVID. 803(1). It is a comment made at the very time the declarant is receiving the impression, or immediately thereafter, so that the rationale for this exception stems from the statement's contemporaneity. *See Rabbani v. State*, 847 S.W.2d 555, 560 (Tex. Crim. App. 1992); *Beauchamp v. State*, 870 S.W.2d 649, 652 (Tex. App.--El Paso 1994, pet. ref'd). The nature of the statement and the context in which it was made determines whether a statement qualifies as a present sense impression. *See Beauchamp*, 870 S.W.2d at 652. The rationale for this exception is "that the contemporaneity of the statement with the event that it describes eliminates all danger of faulty memory and virtually all danger of insincerity." TEXAS RULES OF EVIDENCE HANDBOOK, 772 (3d ed. 1998). The statement

must be descriptive or explain something observed and not merely be an opinion about a condition or event. *See Beauchamp*, 870 S.W.2d at 652.

C. Analysis

In *Rabbani*, the State's witness testified that the complainant looked out the window and said the defendant was outside. 847 S.W.2d at 560. That is similar to the instant case, where Lee told Rivera that appellant was in the car following them. The statement was an observation made as the events were unfolding. Consequently, we hold the statement was a present sense impression and an exception to the rule forbidding hearsay. Appellant's second point of error is overruled.

IV. Lesser Included Offense

In his third point of error, appellant contends the trial court erred by failing to charge the jury on the lesser included offense of felony murder.[2]

A. Applicable Law

Before a lesser included offense instruction is required, "the lesser included offense must be included within the proof necessary to establish the offense charged, and second some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense." *See Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). The trial court does not determine the credibility or weight to be given the evidence raising the issue of a lesser included offense. *See Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992); *Gibson v. State*, 726

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[2] The State argues this point of error is not preserved for our review because appellant did not make a specific reference to section 19.02 of the Texas Penal Code when he requested a lesser included offense charge. The record reflects, however, that at the charge conference, appellant made the following request: "Since there hasn't been any evidence to support an intentional and knowing killing, the jury might think the act of shooting in the car was an act clearly dangerous to human life as dictated by 19.02, that would call for a charge of murder." Consequently, we will address the merits of this point of error.

S.W.2d 129, 132-33 (Tex. Crim. App. 1987); *Smith v. State*, 881 S.W.2d 727, 733 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd). Whether the evidence raising the issue may conflict with or contradict other evidence in the case is not relevant to whether a charge on the issue must be given. *See Gibson*, 726 S.W.2d at 133; *Smith*, 881 S.W.2d at 733. In determining whether a refusal to charge the jury on a lesser included offense is error, all evidence presented at trial is considered. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994); *Jones v. State*, 921 S.W.2d 361, 364 (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd).

It is well established that felony murder is a lesser included offense of capital murder. *See Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999); *Adanandus v. State*, 866 S.W.2d 210, 231 (Tex. Crim. App. 1993). The offense of capital murder requires the specific intent to kill, while in felony murder the actor must only have the intent to commit the underlying offense, here the "jacking" of the complainants. *See Lamb v. State*, 680 S.W.2d 11, 15 (Tex. Crim. App. 1984); *Garrett v. State*, 573 S.W.2d 543, 545 (Tex. Crim. App. 1978); *Rodriguez v. State*, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977).

B. Analysis

The issue in this case is whether Thorne's statement regarding the "jacking" amounts to evidence that would permit a jury rationally to find that if appellant was guilty, he was guilty only of the lesser offense.

The record evidence clearly establishes there was no attempt to merely rob the complainants. Appellant and Nguyen went to the back of their car, waited a few moments, and began shooting. The police found a total of 38 fired shells, 27 from an AK-47 assault rifle and 11 from a 9-millimeter semi-automatic handgun. Although the two remaining men in the van were killed, the drug purchase money was left in the van by appellant. There is no evidence that this was not an intentional crime. Therefore, we hold the trial court did not err in refusing to

instruct the jury on the lesser offense of felony murder. Appellant's third point of error is overruled.

V. Deadly Weapon Finding

In his fourth fourth point of error, appellant claims the trial court erred in making an affirmative finding of a deadly weapon and not submitting the issue to the jury. Article 42.12 section 3g(a)(2) authorizes the entry of an affirmative finding of a deadly weapon in the judgment when it is shown that a deadly weapon was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(2) (Vernon Supp. 1999). Article 42.12 clearly distinguishes between the affirmative findings required for a principal and a party: the proper affirmative finding in a case where the law of parties is involved must state either that appellant used or exhibited a deadly weapon, or that appellant knew that the deadly weapon would be used or exhibited. *See id.*; *Mulanax v. State*, 882 S.W.2d 68, 70 (Tex. App.--Houston [14th Dist.] 1994, no pet.). The law is clear, and the State concedes, that when the jury is charged under the law of parties and it is not clear if the defendant was found guilty as a party or a principal, the affirmative finding of a deadly weapon must be made by the jury that the accused knew a deadly weapon would be used or exhibited. *See Pritchett v. State*, 874 S.W.2d 168, 172 (Tex. App.--Houston [14th Dist.] 1994, 1 pet. dism'd, 2 pets. ref'd).

A. Applicable Law and Analysis

When the jury is charged under the law of parties, an affirmative finding of a deadly weapon may only be entered when the *jury* finds that the appellant knew a deadly weapon would

be used or exhibited. *See id.* (emphasis added). In this case, the trial court did not submit the issue to the jury; rather, it made the affirmative finding once the jury had returned its verdict. Though the trial court's action was erroneous, it does not require a reversal. This court has the authority to reform the judgment by redacting an erroneous deadly weapon finding, and we have done so in prior cases. *See Tate v. State*, 939 S.W.2d 738, 754 (Tex. App.--Houston [14th Dist.] 1997, no pet.); *Mulanax v. State*, 882 S.W.2d 68, 70-71 (Tex. App.--Houston [14th Dist.] 1994, no pet.); *Pritchett*, 874 S.W.2d at 172. *See also* TEX. R. APP. P. 43.2 (stating that court of appeals may modify trial court's judgment and affirm it as modified). Accordingly, we sustain appellant's fourth point of error and reform the judgment by deleting the deadly weapon finding.

The judgment of the trial court is affirmed as modified.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed October 21, 1999.
Panel consists of Justices Hudson, Fowler, and Baird.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Judge Charles F. Baird sitting by assignment.