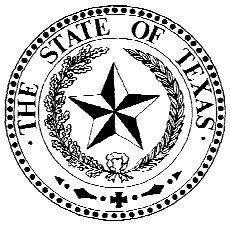
Affirmed and Opinion filed November 8, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00880-CR

JOHN CARROLL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 248th District Court
Harris County, Texas
Trial Court Cause No. 803,430

O P I N I O N

Appellant John Carroll appeals his conviction for capital murder in two points of error, alleging that there is legally insufficient evidence of (1) his role as a principal, party, or conspirator and (2) the aggravated element of robbery. We affirm.

BACKGROUND

The victim, Thomas Wilson, offered work, laundry, food, alcohol, and an overnight bed to two homeless men whom he saw under a Houston freeway with a sign which read, "Please help feed me today." In the course of the evening, the homeless men, either appellant or his friend John Pheasant, strangled and beat Wilson to death. They tried

unsuccessfully to steal his van, and after locating keys, rode away in Wilson's car. The next day, many miles away on the interstate highway, Pheasant and appellant set fire to the car. Police found them within walking distance of the car, intoxicated and asleep under a blanket.

The police established the men's connection to the burned car and the car's connection to Wilson in Houston. Meanwhile, police had discovered the bloody murder scene and Wilson's bound and bruised body in Houston. A forensic pathologist determined that Wilson died from strangulation and multiple blunt force injuries.

Appellant gave three statements to the police, first fabricating explanations for his possession of Wilson's car, but later admitting his presence at Wilson's house, but blaming the night's violence on Pheasant. At trial, the jury found him guilty of capital murder, and the trial court assessed his punishment at life imprisonment.

STANDARD OF REVIEW

Appellant challenges legal sufficiency of the evidence in both his issues. When reviewing legal sufficiency of the evidence, we review evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mason v. State*, 905 S.W.2d 540, 574 (Tex. Crim. App. 1995). The trier of fact is the exclusive judge of the witnesses' credibility and the weight to be given their testimony. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *Id.*

ISSUE ONE

In his first issue, appellant argues there is legally insufficient evidence to convict him of capital murder as a principal, party, or conspirator. The State responds with an assertion that there is legally sufficient evidence to convict appellant as a party.

Under Texas law, a defendant may be criminally responsible as a party to another's offense. TEX. PEN. CODE ANN. § 7.02 (Vernon 1994). The law of parties applies to capital murder cases. *Johnson v. State*, 853 S.W.2d 527, 534 (Tex. Crim. App. 1992). The State

argues the following two subparts of section 7.02 are applicable to the issue of whether appellant is guilty as a party for Wilson's death:

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
>
> . . . .
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.
>
> . . . .
>
> (b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

TEX. PEN. CODE ANN. § 7.02(a)(2) & (b).

In one of his statements to the police, appellant admitted helping Pheasant tie Wilson's feet: "I tried to tie the guy's feet once with duct tape but that was it." He did so even though Wilson begged him to stop the beating. Further, the forensic pathologist testified that Wilson's feet were bound with duct tape only *after* he had been "hogtied" from wrists to feet with a telephone cord. Thus, appellant's assistance in taping Wilson's feet further incapacitated an already bound man. Additionally, police found what appeared to be blood smears on the driver's side of the van that appellant admittedly tried to hotwire. Appellant excuses his assistance in the killing by claiming that he was under duress. However, duress is an affirmative defense. TEX. PEN. CODE ANN. § 8.05 (Vernon 1994). It was appellant's burden to prove duress during trial, TEX. PEN. CODE ANN. § 2.04(d) (Vernon 1994), and to seek a jury instruction on the issue. *See* TEX. CODE CRIM. PROC. ANN. Art. 36.15 (Vernon Supp. 2001). Appellant did neither. Further, the State is not required to negate duress in order to meet its burden of proof. *See* TEX. PEN. CODE ANN. § 2.04(b). Viewed in the light most favorable to the verdict, appellant's statement about binding

Wilson's feet is legally sufficient evidence to support his guilt as a party under section 7.02(a)(2).

Additionally, the evidence supports appellant's guilt as a party under section 7.02(b). For a conspiracy to exist, there must be "some type of encouragement by words, actions, or agreement, which show an understanding and common design to do a certain act." *Gutierrez v. State*, 681 S.W.2d 698, 704 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd). Appellant's second statement reveals that just after Pheasant began beating Wilson, but while he was still conscious, Pheasant and appellant decided to steal Wilson's van: "John [Pheasant] said, 'Let's get out of here. Get the keys to the van. They're under the bed.' I went in the master bedroom but I couldn't find the keys. I then went to the garage. . . . I tried to open the steering column." While appellant searched for keys and unsuccessfully tried to hotwire the van, Pheasant continued beating, strangling, and stabbing Wilson. Ultimately, appellant and Pheasant stole Wilson's prized, classic Oldsmobile car, and appellant stole a knife. This is legally sufficient evidence to support the conclusion that in their conspiracy to rob Wilson, Pheasant killed him. Accordingly, there is legally sufficient evidence to hold appellant responsible as a party under section 7.02(b).

We overrule issue one.

ISSUE TWO

In his second issue, appellant argues there is legally insufficient evidence to prove the aggravated element of robbery. The crux of his argument is that there is no evidence that an intent to steal was formed before or as Wilson was murdered.

To qualify as capital murder, the intent to rob must be formed before or concurrent with the murder. *Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993). As the Texas Court of Criminal Appeals explained, the timing of the intent to steal is critical:

> [I]t is possible to have murder followed by theft without having murder in the course of robbery. What elevates the occurrence of theft to robbery is the presence, at the time of, or prior to, the murder, of the intent to obtain or maintain control of the victim's property. Thus, if the State proves that the

> requisite intent was present, it has proven that a murder occurred in the course of robbery, although the element of appropriation occurred after the murder.

Nelson v. State, 848 S.W.2d 126, 132 (Tex. Crim. App. 1992).

Appellant's statement to the police again provides legally sufficient evidence that his and Pheasant's intent to rob was formed before or concurrent with Wilson's murder. In his statement, appellant explains that he and Pheasant decided to steal the van just after Pheasant began beating Wilson. From appellant's explanations, it can be inferred that Pheasant did not bind, strangle, stab, or spray fire extinguisher propellant on Wilson until after appellant began trying to steal the van. We therefore overrule issue two.

Having overruled both issues, we affirm appellant's conviction.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed November 8, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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