Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00187-CR

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BILLY WAYNE BEARDEN, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 768,297

O P I N I O N

Billy Wayne Bearden, Jr., appellant, was found guilty of capital murder by the jury and sentenced to life imprisonment. He presents eight issues on appeal, alleging error by the trial court in admitting into evidence the audiotape of his second police statement, and in certain trial procedures regarding the indictment and court's jury charge. We find no error and affirm the judgment below.

In January of 1997, a man and a woman were found dead in a hotel room, victims of gunshot wounds to the head. The ensuing investigation eventually lead police to appellant, who gave a tape-recorded confession. He and two other individuals were charged with capital murder, and appellant was appointed counsel to represent him. While in jail awaiting trial on the charges, appellant sent word through

family members to the investigating officer that he wanted to give the officer a second statement regarding the murders. The officer complied, and appellant gave a second tape-recorded statement which waived his right to counsel, confirmed his involvement in the murders and implicated one of his co-defendants to a greater degree. This second statement was admitted into evidence at trial.

By his first four issues, appellant complains that the trial court erred in overruling his motion to suppress the second statement, as the statement was taken in violation of his right to counsel. Appellant concedes that he was represented by counsel at the time of the statement, and further concedes that he himself had initiated and requested the second statement, that he waived his right to have counsel present and did not contact his attorney. He argues, however, that the State should have contacted his attorney and informed him of appellant's plans to make a second recorded statement, as the law requires counsel to acquiesce to his client's waiver of counsel.

While appellant acknowledges that Texas case law validates an interrogation initiated by a defendant where the defendant knowingly, voluntarily and intelligently waives his right to counsel, he argues these cases were implicitly overruled by *Holloway v. State*, 780 S.W.2d 787 (Tex. Crim. App. 1989). We disagree. In *Holloway*, the defendant was represented by counsel, but waived his right to counsel for purposes of a police-initiated interrogation. The Texas Court of Criminal Appeals held that the defendant's unilateral waiver of his Sixth Amendment rights was invalid despite having received the required *Miranda* warnings, as the interrogation had been initiated by the police, who were aware he was represented by counsel. As recognized by the Court of Criminal Appeals in *State v. Frye*, 897 S.W.2d 324, 327 (Tex. Crim. App. 1995), a fundamental safeguard provided by the Sixth Amendment is the general prohibition of state-initiated interrogation of an accused who is represented by counsel, except where counsel is present or is informed of the interrogation.

Where a *defendant* initiates the contact, however, the unilateral waiver of his right to counsel has been upheld. For such waiver to be effective, the law requires that the accused must initiate the contact with the police that leads to the waiver, and the contact initiated by the accused must be of a type that evidences a willingness and desire for a generalized discussion about the ongoing investigation. *Baldtree v. State*, 784 S.W.2d 676, 685-86 (Tex. Crim. App. 1989). This has not been changed by *Holloway*, and

remains the law in Texas. *See Castro v. State*, 914 S.W.2d 159 (Tex. App.–San Antonio 1995, pet. ref'd.). We find that appellant initiated the second contact with investigators, waived his right to counsel, and evidenced a willingness and desire for a generalized discussion about the murders. The resulting recorded statement was properly obtained and properly admitted at trial. *Baldtree*, 784 S.W.2d at 686. Appellants' first four issues are overruled.

By issues five through eight, appellant challenges the State's decision to seek conviction under three "theories" of capital murder. Specifically, he argues error by the trial court in not requiring the State to elect a single theory upon which to seek conviction, and, in absence of such election, should have instructed the jury that a unanimous verdict as to any *one* of the theories was required. Due to these errors, appellant alleges, his right against double jeopardy has been violated.

Appellant was charged with the capital murder of two individuals in a three paragraph indictment. The first two paragraphs alleged murder in the course of committing or attempting to commit robbery, one as to each of the two murder victims. The third paragraph alleged murder of both named individuals during the same transaction. During trial, appellant twice requested that the State be forced to elect which paragraph it intended to pursue; this request was denied. Appellant further requested the trial court to instruct the jury that a unanimous verdict was required as to *any one paragraph*, which request was also denied. The jury returned a general verdict, finding appellant guilty of capital murder "as charged in the indictment."

We find no error. Paragraphs one, two and three of the indictment alleged three different ways of committing the offense of capital murder. TEX. PEN. CODE ANN. § 19.03(a)(6)(A) provides that a person commits capital murder if he commits murder as defined under TEX. PEN. CODE ANN. § 19.02(a)(1), and murders more than one person during the same criminal transaction. TEX. PEN. CODE ANN. § 19.03(a)(2) provides that a person commits capital murder if he commits murder in the course of committing or attempting to commit robbery or other enumerated offenses. In such cases, there need be but a general verdict form. *Aguirre v. State*, 732 S.W.2d 320, 325 (Tex. Crim. App. 1987) (opinion on reh'g). It was therefore not required for the State to elect any one particular paragraph for trial

purposes, nor was the jury required to designate under which theory it found appellant guilty. *Kitchens v. State*, 823 S.W.2d 256 (Tex. Crim. App. 1991).

Lastly, appellant contends that the jury's general verdict violates his rights against double jeopardy, as conceivably, the State could someday attempt to try him for either of the individual murders. This argument is conjecture and does not raise or allege a present violation of appellant's constitutional rights. Under these circumstances, the argument is not ripe and is not properly before us in this instant appeal. *Burks v. State*, 876 S.W.2d 877, 889 (Tex. Crim. App. 1994). Appellant's fifth through eighth points of error are overruled.

The judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Justices Robertson, Cannon and Lee.*

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* Senior Justices Sam Robertson, Bill Cannon and Norman Lee sitting by assignment.