Affirmed and Opinion filed January 3, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01200-CR

RICHARD MARVIN MACKENZIE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 850,877

O P I N I O N

Richard Mackenzie appeals his capital murder conviction in the strangling death of Sidney Irby. Appellant claims his conviction should be reversed because of the trial court's failure to grant appellant's motion for an instructed verdict, refusal to admit character evidence relating to one of the State's witnesses, and failure to charge the jury regarding lesser-included offenses. We affirm.

Background

Appellant is the nephew of Allen Bowen. Mr. Bowen and appellant are both natives of Trinidad. Mr. Bowen began work for Mr. Irby in 1998. In 1999, appellant arrived in the United States. Mr. Bowen introduced appellant to Mr. Irby, who offered appellant a job. Appellant accepted. At some point, appellant became indebted to Mr. Irby.

On September 30, 1999, Mr. Irby was murdered in his home. Appellant was seen at the home around the time of death by a woman hired to clean Mr. Irby's home. Mr. Irby's body was discovered in a closet at the home on October 2nd. Appellant's fingerprints were found on Mr. Irby's checkbook and on a check torn from the checkbook. The trial evidence also indicated that appellant had failed to timely return a television, VCR, and microwave that Mr. Irby had loaned to appellant.

When initially confronted by police, appellant gave a written statement that he was at Mr. Irby's home the day of the murder. Appellant denied any wrongdoing and said that Mr. Irby had been alive and had loaned him seventy dollars. A few hours later, under questioning, appellant gave a different story, claiming that when he arrived at Mr. Irby's home, two men were holding Mr. Irby at gunpoint and forcing him to write a check for $10,000. Then, according to appellant, one of the men strangled Mr. Irby with a crowbar and gave the crowbar to appellant, who threw it under a table. The men forced appellant to drag Mr. Irby into the closet. After additional questioning, appellant proposed, in a second written statement, that he had gone to the house intending to borrow money, but when he approached Mr. Irby and unwittingly startled him in his kitchen, Mr. Irby suddenly fell to the floor and died. Not knowing what to do, appellant stated that he dragged Mr. Irby to the closet. In a third written statement, one hour later, appellant offered that, without knowing whether Mr. Irby was alive or dead after the surprising collapse, he gagged Mr. Irby with the belt from Mr. Irby's terry-cloth robe. The three written statements were admitted at trial. Appellant also testified in his own defense.

Issues

Appellant identifies three legally distinct issues on appeal. First, appellant claims the evidence supporting his capital murder conviction is legally insufficient. Second, appellant argues the trial court erroneously denied appellant's request for a jury charge on the lesser-included offense of murder. Last, appellant argues the trial court erred in disallowing appellant's impeachment of appellant's uncle, Allan Bowen.

I. Legal Sufficiency

Appellant submits the State failed to offer evidence that Mr. Irby's murder occurred "in the course of committing" robbery, as required by Section 19.03 of the Texas Penal Code. Thus, appellant argues the evidence supporting his capital murder conviction is legally insufficient. We disagree.

When reviewing the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 433 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, we do not reevaluate the weight and credibility of the evidence. Rather, we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

Here the evidence established that appellant was indebted to Mr. Irby at the time of the murder. Appellant admitted requesting money from Mr. Irby on the day of the murder. Appellant's fingerprint was found on a check that would, according to the check numbers and transaction history, probably have been written on the day of Mr. Irby's death. This check was found lying on the floor in Mr. Irby's home. Another check, unsigned, without a payee, dated September 30, and in the amount of $10,000 was found still attached to the

same checkbook in the home. A third check in the series was never located. It's carbon copy showed an amount entered of $10,000. Collectively, this evidence is sufficient to enable a jury to rationally conclude, beyond a reasonable doubt, that the murder occurred during the course of a robbery, as required.

We overrule appellant's first issue.

II. Request for Jury Charge

Appellant argues the trial court erred in refusing to submit a simple murder charge as a lesser-included offense to capital murder. A defendant is entitled to an instruction on a lesser-included offense where the proof for the offense charged includes the proof necessary to establish the lesser-included offense and where there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Forest v. State,* 989 S.W.2d 365, 366 (Tex. Crim. App. 1999). Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). In other words, the evidence must establish the lesser-included offense as "a valid, rational alternative to the charged offense." *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997).

Appellant contends his trial testimony that he did not commit the robbery constitutes "some evidence" that he was guilty only of the lesser-included offense. Well-settled law provides for the opposite conclusion: Where the defendant denies the commission of the greater offense, the issue of a lesser-included offense is not raised. *See Eldred v. State*, 578 S.W.2d 721 (Tex. Crim. App. 1979); *see also Francis v. State,* 801 S.W.2d 548 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (defendant who denied killing victim not entitled to instruction on voluntary manslaughter).

At trial, appellant denied committing the murder as well as the robbery. His testimony that he did not commit the robbery is, therefore, not evidence sufficient to mandate submission of the lesser-included charge of non-capital murder.

Appellant's second issue is overruled.

III. Refusal to Permit Testimony

Appellant testified at trial that his uncle, Allan Bowen, had committed the murder. Appellant stated he had lied in his first statement to police in an effort to conceal Mr. Bowen's role in the killing. Mr. Bowen admitted he owed Mr. Irby $600 at the time of the murder. In an effort to buttress his contention that Mr. Bowen had murdered Mr. Irby, appellant attempted to elicit testimony from Mr. Bowen that Mr. Bowen had "jacked-up" Mr. Irby at some point before the murder. The trial court refused to allow this questioning. In refusing to admit the evidence, the trial court sustained the following the objections from the State: (1) the evidence was "an extraneous;" (2) the evidence was "absolutely inadmissable;" (3) the evidence was hearsay; and (4) the evidence was irrelevant. Appellant made no offer of proof of Mr. Bowen's testimony

Later, during appellant's case in chief, appellant unsuccessfully attempted to have Arlene Porche, the mother of Mr. Bowen's ex-wife, testify that Mr. Bowen had told her a few weeks before the murder that he had "jacked-up" Mr. Irby. At the close of the defense's case-in-chief, appellant made an offer of proof of Ms. Porche's testimony. Appellant argued the testimony was admissible under Texas Rule of Evidence 404(b) to show Mr. Bowen's motive, intent, and involvement in the murder. Though not completely clear from the record, it appears the trial court held, pursuant to Rule 404(b), that Ms. Porche's testimony had no relevance apart from character conformity.

On appeal, appellant argues that Ms. Porche's testimony should have been allowed under Texas Rule of Evidence 613(b) to show Mr. Bowen's bias and motive to murder Mr. Irby. The State counters that an offering under Rule 613(b), even if possible, cannot constitute error because that ground for objection was not raised at trial. *See Ibarra v. State*, 11 S.W.3d 189 (Tex. Crim. App. 1999). Next, the State argues that appellant failed to comply with the requirement under Rule 613(b) that the witness first be permitted to explain

or deny the impeachment material. Third, because appellant failed to have Mr. Bowen's deny making the contested statement to Ms. Porche in his offer of proof, the State submits that no error was preserved for review under 613(b). We do not address these grounds because we hold that the trial court properly refused to admit Ms. Porche's testimony under Rule 404(b).

B. Review of the Rule 404(b) decisions

An objection that evidence is not relevant or constitutes an extraneous offense is sufficient to lodge a Rule 404(b) objection. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990). Therefore, the trial court heard and ruled upon a Rule 404(b) objection with regard to both the cross-examination of Mr. Bowen and the direct testimony sought from Ms. Porche.

If the opponent of evidence objects on the ground that the evidence violates Rule 404(b), the proponent must then satisfy the trial court that the extraneous offense evidence has relevance apart from its character conformity value. *See Tate v. State*, 981 S.W.2d 189, 193 (Tex. Crim. App. 1998); *Santellan v. State*, 939 S.W.2d 155, 168 (Tex. Crim. App. 1997). A trial court's Rule 404(b) ruling is to be given due deference because some leeway in deciding whether evidence does in fact serve a legitimate purpose other than action in conformity is necessary. *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1990). A trial court's ruling shall not be disturbed so long as reasonable men may disagree whether, in common experience, a particular inference is available. *Id.* at 391.

We hold that reasonable men may disagree whether, in the light of common experience and the context of this case, the fact that Mr. Bowen told Ms. Porche that he "jacked-up" Mr. Irby had relevance apart from character conformity. Mr. Bowen was indebted to Mr. Irby. The evidence also demonstrated that Mr. Bowen and Mr. Irby disagreed with each other in the past. To the extent the "jacking-up" testimony was offered to show that Bowen acted in conformity, the evidence was inadmissible under Rule 404(b).

Conversely, to the extent it was offered to prove motive, the trial court acted within its discretion in ruling that the testimony from Mr. Bowen and Ms. Porche did not tend to show a sufficient motive for Mr. Bowen to have killed Mr. Irby.

Because we affirm the trial court's decision to exclude the contested testimony under Rule 404(b), we do not address the arguments presented by the parties under Rule 613(b). Appellant's third issue is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed January 3, 2002.
Panel consists of Justices Yates, Edelman, and Wittig.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.