Affirmed and Majority and Dissenting Opinions filed February 17, 2000.

In The

Fourteenth Court of Appeals

NO. 14-97-01350-CR

LARRY FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 756,276

M A J O R I T Y O P I N I O N

Larry Flores appeals a conviction for capital murder on the grounds that: (1) the evidence is legally and factually insufficient to sustain the conviction; and (2) the trial court erred in: (a) limiting appellant's scope of cross-examination of an accomplice witness; and (b) denying appellant's request for a continuance to obtain the testimony of a defense witness. We affirm.

Background

Appellant and two other individuals, Billy Bearden and Manuel Martinez, were involved in a robbery in which a man and a woman were killed. Appellant was charged by

indictment with capital murder in connection with those deaths.[1] A jury convicted appellant, and the trial court assessed a mandatory life sentence.

Sufficiency of the Evidence

Appellant's first two issues contend that the evidence is legally and factually insufficient to sustain a conviction for capital murder[2] because: (1) the testimony of Manuel Martinez, an accomplice witness,[3] was not sufficiently corroborated; and (2) with or without the accomplice witness testimony, the evidence shows appellant's intent only to commit a robbery and not to commit capital murder.

Accomplice Witness Testimony

A conviction cannot stand on accomplice testimony unless it is corroborated by other evidence tending to connect the defendant with the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). The corroborating evidence is insufficient if it merely proves the commission of the offense. *See id.*; *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). However, it is not necessary that the corroborating evidence directly connect the defendant to the crime or be sufficient by itself to establish his guilt. *See id.* There need only be *some* non-accomplice evidence which *tends* to connect appellant to the commission of the offense. *See McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App. 1997). The test for sufficient corroboration is to eliminate from consideration the accomplice testimony and then examine the other inculpatory evidence to ascertain whether it tends to connect the defendant with the offense. *See id.* at 612. If the combined weight of the non-accomplice

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1 Appellant was a juvenile at the time of the offense, but jurisdiction was waived by the juvenile district court after he was certified to stand trial as an adult

2 The jury charge authorized the jury to convict the appellant if he acted as a principal or as a party to the offense.

3 It is undisputed that Martinez participated with appellant before, during, and after the commission of the offense. As such he was an accomplice witness whose testimony required corroboration and the jury was charged accordingly.

evidence tends to connect the defendant to the offense, the corroboration requirement has been fulfilled. *See Cathey*, 992 S.W.2d at 462.

As corroborating evidence in this case, the State introduced: (1) phone records which showed that appellant had talked to the female decedent on the night of the murders; (2) testimony that two of appellant's fingerprints were found in the motel room where the murders occurred; (3) testimony of the boyfriend of the female decedent that she was to meet with someone named "Moe" on the night of the incident, and that Moe is appellant's nickname; and (4) testimony of Ray "Darkman" Benavides, that prior to the incident appellant told him about the proposed robbery and asked him what would happen if someone got killed during the robbery. Benavides also testified that he was present when the parties got together to discuss their alibi.

This evidence shows that appellant and the female decedent had communicated with one another on the night of the murders, the female decedent had intended to meet with appellant, appellant had been in the room where the murders occurred, and appellant had intended to rob and kill the victims. This evidence sufficiently connects appellant to the offense to corroborate the accomplice witness testimony. We next examine the sufficiency of the evidence.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). In reviewing factual sufficiency, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Kutzner*, 994 S.W.2d at 184. A factual sufficiency review takes into consideration all of the evidence and weighs the evidence

tending to prove the existence of the fact in dispute against the contradictory evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999).

Intent to Commit Murder

In this case, appellant asserts that the evidence establishes that it was Bearden who had the intent to kill and actually committed the murders because Bearden admitted to shooting the female decedent and Martinez testified that Bearden ran out of the motel room holding the shotgun used to kill the male decedent. Appellant also argues that the evidence does not support the State's theory that appellant was the mastermind behind the planning of the crime. He argues that the evidence instead shows that either one or both of the accomplices were the ones who planned the crime and then blamed it on appellant because they knew he could not be sentenced to death. Further, appellant argues that the testimony of Benavides, relied on by the State to establish that appellant intended to commit murder, was contradictory and insufficient to meet the State's burden to prove appellant's intent to commit the murders.

The record in this case contains evidence of the following: (1) appellant knew both of the victims; (2) appellant arranged a fake drug deal, intending to rob the victims; (3) appellant's conversation with Benavides indicated that he intended to also kill the victims; (4) the phone records evidenced that appellant had contacted the female decedent on the night of the offense; (5) the female decedent's boyfriend stated that she was to meet someone that night named Moe; (6) appellant's nickname is Moe; (7) the female decedent had paged appellant the night of the offense; (8) appellant was orchestrating the involvement of the accomplices; (9) appellant entered the motel room first, armed with the 9 millimeter pistol used to kill the female decedent; (10) during the commission of the offense, appellant was in possession of both a 9 millimeter weapon and a shotgun; (11) appellant ordered Martinez to bring the car around to the room; (12) appellant and Bearden were the only two individuals, besides the victims, in the motel room; (13) appellant's fingerprints were found in the motel room, including at the location where the accomplice witness testified appellant

had been standing; and (14) appellant received a larger "stack"of the money taken from the victims. Viewing this evidence in the light most favorable to the verdict, a rational trier of fact could find beyond a reasonable doubt that the appellant intended to commit the offense of capital murder.

The evidence on which appellant relies to challenge factual sufficiency is that he was a 16 year old minor at the time of the offense, while the two accomplices were 19 to 20 years old, a majority of the instrumentalities used in the commission of the crime were provided by the accomplices, and after the crime was committed the parties went to stay with a friend of Martinez in an attempt to establish an alibi. Although appellant presents an alternative explanation of the evidence, it does not render the jury's verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Therefore, we overrule appellant's first two issues.

Scope of Cross-Examination

Appellant's third issue argues that the trial court erred in limiting appellant's cross-examination of Martinez about the parole eligibility enhancement Martinez received in exchange for pleading guilty to the lesser charge of aggravated robbery. The court did not allow appellant to question Martinez about the exact number of years in which he would be eligible for parole.[4] However, during cross-examination, Martinez did testify that he had

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[4] Specifically, the exchange between the court and defense counsel regarding the questioning of Martinez on this subject was as follows:

> DEFENSE COUNSEL: My legal argument is that this young man would have gotten 40 years minimum mandatory calendar time without any possibility of parole. . . . Instead, what he's decided to do is to point the finger at [appellant] and by doing that, he will be eligible for parole in . . . 22-and-a-half years. The difference between 22-and-a-half and 40 is 17-and-a-half calendar years that he wins by testifying against [appellant]. . . .
> * * * *
> COURT: Being eligible for parole doesn't mean he will be paroled. Now, what he has gained, obviously – and certainly you can question him and argue – is if he had gone to trial on the capital murder charge, he would have been looking at, if found guilty, an automatic life sentence. That is fair game and that is a significant difference and certainly you can explore his bias. But I am not going to permit you

been under indictment for capital murder, that he was aware that he could have been executed for capital murder or sentenced to mandatory life imprisonment had he been tried and found guilty of capital murder, and that his sentence was reduced to forty-five years by testifying against appellant. Martinez also acknowledged that he would be spending significantly less time in jail because of his plea agreement with the State. On further cross-examination, Martinez admitted that although the State was going to recommend forty-five years as his sentence, the court was not bound to it and he could conceivably get as little as five years.

Appellant made a bill of exceptions regarding the disallowed testimony which showed that Martinez would be eligible for parole in twenty-two and one-half years if he gets a sentence of forty-five years, but would have to serve a minimum of forty years had he been sentenced to mandatory life in prison. Martinez stated that he was aware of the reduction in parole eligibility by testifying against appellant. Appellant argues that this reduction was the

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> to inject some precise formula as to when – you know a precise number, 17-and-a-half years, that he gains, that that may or may not be the case. You know, in general terms that he would be eligible for parole in a significantly less time, maybe something that general, but we can't put a formula to this.
> * * * *
> COURT: I'm not going to let you apply a formula on parole to a particular defendant any more than the law permits juries to apply the law to a particular defendant. Yes, you may explore the fact that he has obviously saved himself by the reduced sentence the risk of a life sentence. . . . But as far as specifically getting into a formula and a precise number of years based on comparing parole eligibility, no. In general, that he would be able to be paroled significantly sooner on this – on a 45-year sentence as opposed to a life sentence for capital murder, yes, but not a specific number of years.
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> DEFENSE COUNSEL: There is a lot of case law that says it's not the specific formula or the actuality of obtaining parole, but, in fact, what counts is this young man's perception of when he will be paroled, and if he is sitting –
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> COURT: Then you talk to him about his perception and what he has gained for himself. . . .

true benefit of the plea agreement and therefore, he should have been allowed to cross-examine Martinez on it to expose a motive for him to testify falsely.[5]

The right to confrontation includes the right to cross-examine witnesses about potential bias or motivation. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986). A trial court violates this right if it completely denies any cross-examination of a witness's possible motivation to testify stemming from a deal with the State on a criminal charge against the witness. *See id.* at 679. However, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. *See id.* While exposing a witness's motivation to testify against a defendant is a proper and important function of the constitutionally protected right to cross-examination, this right does not prevent a trial court from imposing some limits on the cross-examination into the bias of a witness. *See McDuff v. State*, 939 S.W.2d 607, 617 (Tex. Crim. App. 1997). A trial court's limitation of an accomplice witness's testimony on parole eligibility is reviewed for abuse of discretion. *See Perkins v. State*, 887 S.W.2d 222, 225 (Tex. App.-- Texarkana 1994, pet. ref'd).

In Texas, parole is not a matter for a jury's consideration. *See Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995); *Perkins*, 887 S.W.2d at 226. Had Martinez testified in this case about the specific number of years in which he would be eligible for parole if charged with capital murder, it would also have disclosed to the jury appellant's parole eligibility were he to receive a life sentence.

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[5] The appellant relies on *Virts* in support of his argument; however, in *Virts* the trial judge had refused to allow the defendant to cross-examine an accomplice witness regarding actual provisions in the plea agreement. *See Virts v. State*, 739 S.W.2d 25, 31 (Tex. Crim. App. 1987). Also, the witness was the "star" witness for the prosecution and the court stated that the excluded information was relevant because it could affect when the witness became eligible for parole. *See id.* In this case, however, all parts of the agreement were before the jury. Moreover, the appellant was allowed to question Martinez regarding the benefits received by entering into the plea agreement and appellant acknowledged that he would be out of prison earlier by entering into the plea agreement.

Even without that testimony, the full extent of Martinez's agreement was before the jury. The jury was thus able to learn that Martinez saved himself years in prison and received a significant benefit in exchange for his testimony. Under these circumstances, the trial court's limitation as to the precise number of years was within the its discretion. *See Perkins*, 887 S.W.2d at 226. Therefore, we overrule appellant's third issue.

Motion for Continuance

Appellant's fourth issue argues that the trial court erred in denying his request for a brief continuance so that a witness could appear and testify. During presentation of appellant's case in chief, at 5:15 in the afternoon on the last day of testimony, appellant orally requested a one hour continuance so that an un-subpoenaed witness who was enroute could appear and testify.[6] After some questioning by the court, defense counsel stated that he had only decided to use this witness's testimony the day before and had advised the witness to be in court at 3:00 that afternoon. The court allowed a "short" recess. However, when counsel still could not produce the witness, he requested permission to "swear out a motion for a very brief continuance" which was denied; the defense then rested.

A court can grant a continuance or postponement after trial has begun based on a motion by either the State or the defendant, when it appears to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had. *See* TEX. CODE CRIM. PROC. ANN. art. 29.13 (Vernon 1989). A trial court's ruling on a motion for continuance is reviewed for abuse of discretion. *See Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996). A motion for continuance not in writing and not sworn will not preserve error for review. *See* TEX. CODE CRIM. PROC. ANN. art. 29.03; *Dewberry*

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[6] Defense counsel did not advise the court as to the substance of the witness's testimony other than to describe him as a "fact" witness. Nor was a bill of exception or offer of proof made of the witness's testimony. Therefore, the record does not reflect what the substance of the witness's testimony would have been.

v. State, 4 S.W.3d 735,755 (Tex. Crim. App. 1999); *Matamoros v. State*, 901 S.W.2d 470, 478 (Tex. Crim. App. 1995).

In this case, appellant's motion was not in writing, not sworn, and was for an un-subpoenaed witness. Further, the record does not reflect what the content of the witness's testimony would have been. Therefore, we conclude that appellant has failed to preserve the issue for our review,[7] and his fourth issue is overruled. Accordingly, the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 17, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

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[7] Appellant argues that his oral motion preserved the issue, relying on the idea of an "equitable" continuance rather than a "statutory"continuance. However, even if the complaint had been preserved, appellant has failed to establish how the denial of the motion prejudiced him. *See Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996). There is no evidence in the record as to the substance of the of witness's testimony or any indication of its relevance to the defendant's case. Similarly, under article 29.13, appellant has failed to establish that the witness's testimony was made necessary by an unexpected occurrence which no reasonable diligence could have anticipated, and that he was so taken by surprise that a fair trial could not be had. *See Martinez v. State*, 867 S.W.2d 30, 41 (Tex. Crim. App. 1993); *cf. Matamoros*, 901 S.W.2d at 478-79.

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D I S S E N T I N G O P I N I O N

I dissent to point out the failure of the majority to apply the correct standard of review concerning the issue of factual sufficiency. I also find fault in both the trial judge and our court's refusal to allow material cross examination by appellant of the only eye witness placing appellant at the crime scene in derogation of precedent and constitutional standards.

While the trial judge attempted to place reasonable limitations on the right to cross examine, she failed to follow her own true instincts thus refusing to allow the defense the opportunity to show bias, motive and interest. The state's only eye witness, Martinez, was facing capital murder charges but pled out to 45 years. This deal was in marked contrast to

a possible death sentence or life sentence which would have mandated a minimum of 17.5 years longer than he in fact received. In other words, by pleading this bloody murder case to 45 years, he would be eligible for parole 17.5 years earlier than the prospective life sentence which mandated a minimum 40 years calender time. The trial court properly placed some restriction on going into the formula details of parole eligibility. However, the court ruled the defense could go into the witness's perception of when he could be paroled. Then by proper bill of exception, Martinez agreed he could get paroled 17.5 years earlier and yet the trial court excluded the very testimony she had correctly observed would be admissible. Like *Virts*, Martinez is the critical witness for the offense of capital murder. Therefore, properly applying precedent, I would hold "that this information was clearly relevant because such could affect when Cindy (Martinez) becomes eligible for parole." *Id*.

The substantial harm is apparent. Appellant admitted complicity to robbery but denied involvement in murder. Thus this juvenile is made the scapegoat for murder by the older adult Martinez. Martinez is allowed to escape cross examination of his direct interest in lying, the possibility of parole in half the time of capital murder. The path of justice is deviated when we disallow full and comprehensive cross examination of bias, motive and interest.

A factual sufficiency requires us to review the evidence without "the prism of light most favorable to the prosecution." *See Clewis*. The majority mysteriously ignores this standard of review and performs only a legal sufficiency review. Accordingly, I disagree with my distinguished colleagues.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed February 17, 2000.
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