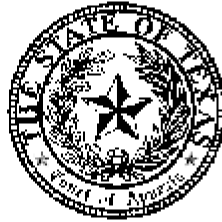
Affirmed and Opinion filed May 10, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-99-00677-CR

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EDWARD PAUL ST. JULES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 767,900

O P I N I O N

Appellant was charged by indictment with the offense of capital murder. The jury convicted appellant of the charged offense. The trial court assessed punishment at confinement for life in the Texas Department of Criminal Justice--Institutional Division. Appellant raises two points of error. We affirm.

I. Co-Conspirator Statements.

The first point of error contends the trial court erred in admitting a hearsay statement of Derek Rhone. The State offered the statement under Rule 801(e)(2)(E) of the Texas Rules of Evidence, which provides a statement by a co-conspirator during the course and in

furtherance of the conspiracy is not hearsay.

The State's witness, Larry Brown, was permitted to testify about a conversation with Rhone. This conversation took place before the commission of the instant offense and, as a result of the conversation, Brown agreed to participate in the robbery of the complainant. Prior to the admission of this testimony, the State made the following proffer outside the presence of the jury:

> Q. We're talking about the conversation you had with [Rhone] when you arrived on May 18th. What does [Rhone] tell you?
>
> A. They were going to rob somebody.
>
> Q. ... When [Rhone] said "they," who was [Rhone] referring to?
>
> A. [Rhone], [appellant] and [co-defendant].
>
> Q. And why was [Rhone] telling you that?
>
> A. Because I was talking to them, I asked what they was up to, what they was about to do. And [Rhone] told me they was going to rob somebody.
>
> Q. Now, did [Rhone] ask you about joining him in this?
>
> A. No, sir.
>
> Q. During this conversation, did you agree to join [Rhone]?
>
> A. Yes, sir.
>
> Q. Did [Rhone] explain to you who they were going to rob?
>
> A. [Rhone] didn't know.

Q. Did [Rhone] explain to you where it was going to take place?

A. Yes, sir.

Q. What did [Rhone] tell you?

A. [Rhone] said they was going to rob him in the house.

Q. In the house?

A. Yes, sir.

Q. Did he mean right there where you were at that time?

A. Yes, sir.

Q. Was there anybody there then?

A. At the house?

Q. The person that was going to be robbed, was he there at that time?

A. No, sir.

At the conclusion of this proffer, the trial court overruled appellant's objection that the statement was not made in the "furtherance" of the conspiracy. Brown then testified, before the jury, that following this statement by Rhone, the complainant entered the apartment. Approximately three minutes later Brown entered the same apartment. At this point Rhone held the complainant at gunpoint while Brown, appellant and the co-defendant removed property from the complainant.

We employ the abuse of discretion standard of review when reviewing a trial court's decision to admit or exclude evidence. *See Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000) (citing *Prystash v. State*, 3 S.W.3d 522, 527 (Tex. Crim. App. 1999)). An abuse of discretion occurs when a trial court's decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree, or when the trial court's acts are arbitrary and unreasonable without reference to any guiding rules or principles. *See Montgomery v. State*, 810 S.W.2d 372, 380 and 391 (Tex. Crim. App. 1990). Under this standard, the appellate court will uphold the trial court's evidentiary rulings unless there is no reasonable support for the evidentiary decision. *See Moreno v. State*, 22 S.W.3d 482, 487 (Tex. Crim. App. 1999).

For a statement to be admissible under Rule 801(e)(2)(E), the State must demonstrate that (1) a conspiracy existed; (2) the statement was made during the course of and in furtherance of the conspiracy; and (3) both the declarant and appellant were members of the conspiracy. *See Deeb v. State*, 815 S.W.2d 692, 697 (Tex. Crim. App. 1991); *Crum v. State,* 946 S.W.2d 349, 363 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). A conspiracy exists where two or more persons, as shown by words or deed, agree to do an unlawful act. *See Butler v. State*, 758 S.W.2d 856, 860 (Tex. App.—Houston [14th Dist.] 1988, no pet.). In the instant case, we find a conspiracy existed, and Brown and Rhone were members of that conspiracy. The issue, therefore, is whether the complained of statement was made in furtherance of the conspiracy.

Statements that are made in furtherance of a conspiracy include those made (1) with intent to induce another to deal with co-conspirators or in any other way to cooperate with or assist co-conspirators; (2) with intent to induce another to join the conspiracy; (3) in formulating future strategies of concealment to benefit the conspiracy; (4) with intent to induce continued involvement in the conspiracy; or (5) for the purpose of identifying the role of one conspirator to another. *See Williams v. State*, 815 S.W.2d 743, 746 (Tex. App.—Waco 1991), *rev'd on other grounds,* 829 S.W.2d 216 (Tex. Crim. App. 1992). Conversely, statements that are not in furtherance of a conspiracy, and thus remain hearsay, include those

that are (1) casual admissions of culpability to someone the declarant had individually decided to trust; (2) mere narrative descriptions; (3) mere conversations between conspirators; or (4) "puffing" or "boasts" by co-conspirators. *See id.*

Although the statement by Rhone did not include an express invitation to join the conspiracy, the statement was apparently made with intent to induce Brown to join Rhone, appellant, and the co-defendant in the robbery of the complainant. The statement was neither a casual admission of culpability, a narrative description, a mere conversation, nor boasting because at the time of the statement an offense had not been committed. Therefore, under these circumstances, we cannot find the decision of the trial court to admit the complained of statement was outside the zone of reasonable disagreement or without regard to the guiding principles and rules discussed above. Accordingly, the first point of error is overruled.

II. Comment on Weight of Evidence.

The second point of error contends the trial court erred in commenting on the weight of the evidence during the voir dire phase of appellant's trial. Such comments are prohibited by article 38.05 of the Code of Criminal Procedure. However, there was no objection to the alleged comment. Therefore, the issue has not been preserved for our review. *See Moore v. State*, 907 S.W.2d 918, 923 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).

Nevertheless, we have reviewed the complained of remarks by the trial court and do not find them to be comments on the weight of the evidence, but rather an effort to explain to the venire when jurors may be asked to consider lesser included offenses. To constitute reversible error, the comment must be either reasonably calculated to benefit the State or to prejudice the defendant's right to a fair and impartial trial. *See Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App. 1983). The complained of remarks are neither. The second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed May 10, 2001.

Panel consists of Justices Fowler, Edelman and Baird.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

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