Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00970-CR

GEORGE RANDOLPH TRAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 797,885

O P I N I O N

Appellant was charged by indictment with the offense of theft in excess of $200,000. *See* TEX. PEN. CODE ANN. § 31.03(e)(7) (Vernon Supp.1999). A jury found appellant competent to stand trial. Following that finding, appellant pled not guilty to the charged offense, waived his constitutional rights and stipulated to the evidence submitted to the trial court. The trial court found appellant guilty and assessed punishment at five years confinement in the Texas Department of Criminal Justice--Institutional Division. In this appeal, appellant raises six points error all of which contend the trial court erred in admitting certain evidence at the competency hearing. We affirm.

I. Standard of Appellate Review.

We employ the abuse of discretion standard 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 the zone of reasonable disagreement, 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).

II. Competency Determinations and Evidence of the Alleged Offense.

A competency hearing is a separate and independent hearing before a different jury than the jury on the trial on the merits. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, § 4(a); *Barber v. State*, 757 S.W.2d 359, 361 (Tex. Crim. App. 1988). The purpose of a separate hearing is to permit the jury to determine the issue of the defendant's competency to stand trial uncluttered by evidence of the offense itself. *See Basham v. State*, 608 S.W.2d 677, 679 (Tex. Crim. App. 1980). Therefore, the guilt of the defendant is not an issue in a competency hearing and it is improper to introduce evidence of the alleged offense. *See Goodman v. State*, 701 S.W.2d 850, 862 (Tex. Crim. App. 1985); *Callaway v. State*, 594 S.W.2d 440, 443 (Tex. Crim. App. 1980); *McBride v. State*, 655 S.W.2d 280, 284 (Tex. App.—Houston [14th Dist.] 1983, no pet.). However, not every mention of the crime itself will be prejudicial; to necessitate reversal, evidence of the offense brought to the attention of the competency jury must be of such a nature as to deny the accused a fair trial and impartial determination of his competency. *See Brandon v. State*, 599 S.W.2d 567, 580 (Tex. Crim. App. 1979), *vacated on other grounds*, 453 U.S. 902, 101 S.Ct. 3134, 69 L.Ed.2d 988 (1981). Appellant contends the testimony of the six witnesses who are the

subjects of these points of error violated this rule of law because each witness was named as a complainant in the indictment.[1]

III. Factual Summary.

A defendant is presumed competent and, therefore, bears the burden of proving by a preponderance of the evidence incompetency to stand trial. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, § 4(b). To discharge that burden appellant called four witnesses. The first witness, William O'Shea, had known appellant for approximately fifteen years and had engaged in business ventures with appellant. O'Shea described the physical and mental decline of appellant over the years, especially since appellant's confinement in the Harris County Jail following his arrest. Michael Traylor, appellant's son, was called as the second witness. Michael stated appellant suffered from severe hearing loss. He further testified that he had visited his father numerous times in the Harris County jail and had spoken to him over the telephone many more times. Michael testified that during these visits appellant showed confusion and misunderstanding over his family and legal status.[2] The third witness was the Honorable John Ackerman, attorney at law. Ackerman initially represented appellant in the instant case. Ackerman stated he was concerned about appellant's competence from their first meeting, and knew the issue would have to be raised. Ackerman formed the opinion that appellant was not competent to stand trial. As his final witness, appellant called Dr. Floyd Jennings, a clinical psychologist. Dr. Jennings was ordered by the trial court to evaluate appellant. Based upon his interviews with appellant, Dr. Jennings formed the opinion appellant was incompetent to stand trial, and that he suffered from dementia. Additionally, Dr. Jennings found no evidence of malingering.

In it's case-in-chief, the State called several witnesses. One of the State's witnesses was Dr. Steve Rubenzer, a psychologist. Dr. Rubenzer formed the opinion appellant was

[1] The indictment listed more than seventy complainants.

[2] Traylor also testified in rebuttal.

not incompetent but rather malingering. The State then called the six witnesses who are the subjects of this appeal. R. A. McKenzie testified to having known appellant for over twenty-five years as a friend and business associate. McKenzie testified to having a telephone conversation with appellant in November of 1998 at which time McKenzie formed the opinion appellant was competent. James Durham was also a business associate of appellant's. Durham formed the opinion that appellant was competent in November, 1998. Shirley Dragotta had known appellant for approximately twenty-five years as both a friend and a business associate. She spoke with appellant in October, 1998 and from that conversation formed the opinion appellant was competent. Patti Herdell discussed her father's financial affairs with appellant in August and October of 1998. From these conversations, Herdell formed the opinion appellant was oriented to place and time and aware of business affairs. Thomas Pizzo testified that he had known appellant for six years. Pizzo met personally with appellant in early November of 1998. At that meeting appellant was able to answer questions and impart information intelligently. James Upshaw testified that he had a business relationship with appellant since the early seventies. In November, 1998 Upshaw met personally with appellant to discuss investments. At that meeting Upshaw was able to communicate with appellant and had no reason to doubt his competency.

IV. Analysis.

Appellant acknowledges that not every mention of the alleged offense is prejudicial. However, appellant argues that the testimony adduced from McKenzie, Durham, Dragotta, Herdell, Pizzo, and Upshaw, was of such a nature as to deny appellant a fair and impartial determination of his competency to stand trial. *See, Brandon,* 559 S.W.2d at 580.

Prior to the introduction of this testimony, the trial court ordered that the complained of witnesses not mention: (1) that appellant was charged with theft; (2) the details of the alleged theft or how it occurred; (3) the specific statements by appellant regarding the admission of the theft. Consistent with this ruling, none of the

aforementioned witnesses mentioned that appellant had been indicted for theft, nor did they mention they were named complainants in the indictment. They did not testify that they lost any monies at the hands of appellant; they merely testified about their relationship with appellant over the years and gave their opinion of his competency at their last meeting. Appellant's guilt was in no way made an issue at the competency hearing. *See Goodman*, 701 S.W.2d at 862; *Callaway*, 594 S.W.2d 440; *McBride*, 655 S.W.2d 280.[3]

When the complained of testimony is viewed in the abuse of discretion standard, we hold the trial court's decision to admit it was not so clearly wrong as to lie outside the zone of reasonable disagreement, or that the trial court acted arbitrarily and without reference to any guiding rules or principles in admitting the testimony. *See Montgomery*, 810 S.W.2d at 380 and 391. Since the testimony was not of such a nature as to deny the accused a fair trial and impartial determination of his competency, *see Brandon*, 599 S.W.2d at 580, points of error one, two, three, four, five and six are overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird[4]
Justice

Judgment rendered and Opinion filed June 21, 2001.

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[3] We pause here to note that in the charge, the trial court instructed the jury as follows:

> The fact that the defendant is under indictment is no evidence of the defendant's competency to stand trial, and you should not consider such fact as evidence. Neither should you in your deliberations consider nor discuss the guilt or innocence of the defendant with respect to the offense charged against the defendant. You will confine your consideration and deliberations solely to the issues submitted to you.

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

Panel consists of Justice Hudson Senior Chief Justice Murphy and Former Judge Baird.
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