Affirmed and Opinion filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00705-CR

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JOHN DANIEL EVANS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 726,486

O P I N I O N

John Daniel Evans appeals his conviction by jury for the felony offense of capital murder. *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994). A deadly weapon finding was entered, and the trial court sentenced appellant to life imprisonment in the Texas Department of Criminal Justice, Institutional Division. In two points of error, appellant contends that the trial court erred by (1) defining the offense in the application paragraph such as to make the evidence insufficient, and (2) making a preliminary competency determination in a way which caused the appellant's counsel to testify against the appellant. For the reasons set forth below, we affirm the judgment of the trial court.

BACKGROUND

Samson Rassu and Mengsteab Adhamon worked in a convenience store in southwest Houston. On April 2, 1996, a man with a bandana partly obscuring his face ran into the store. The man pointed a gun at Rassu and said, "Give me your money." Rassu asked Orlando Moore, a customer in the store, to help him. Moore then grabbed the gunmen from behind and, with the help of Rassu and Adhamon, beat the masked man into submission. Adhamon took the gun away from the man and gave it to Rassu. Rassu then went to call the police while Moore held the man down.

A second man, identified in court as the appellant, then entered the store and pointed a gun at Adhamon and Rassu. Appellant told them to give him the money, his friend's gun, and to let his friend go. Rassu triggered an alarm which also automatically locked the front door. Moore continued to hold down the first robber while Rassu approached appellant. A struggle then ensued between Rassu and appellant.

While Adhamon tried to hide behind a shelf, he heard a gunshot. When he stood up to see what had happened, appellant fired several shots at him. These shots missed, and Adhamon again took cover. Adhamon heard several more shots. Appellant then shot the glass out of the locked front door, and both robbers fled the store. Rassu died at the scene as a result of six gunshot wounds to the head, chest, right groin, and back.

Several weeks later, Adhamon saw appellant getting off a bus, but he was not able to summon the police in time. Adhamon ran into appellant on four more occasions before the police finally apprehended him. Adhamon positively identified appellant as being the robber who shot at him and who killed Rassu. Moore also identified appellant as the man who had shot Rassu. The other suspect was never apprehended.

While in jail awaiting trial, appellant shared a cell with Tyrone Lampkin. Appellant informed Lampkin that he was guilty of the charged crime. Appellant stated that he was supposed to wait outside the store and be the look-out. Wondering why his friend was taking

so long to rob the store, appellant looked inside. He saw that some people were fighting with his friend. Appellant admitted to Lampkin that he had to shoot Rassu in order to free his friend. Appellant then said that he shot through the front door and escaped. Lampkin testified in court as to this conversation in exchange for a reduced sentence in his own case.

POINT OF ERROR ONE

By point of error one, appellant argues that the court's charge erred by applying the law of parties to the case. Appellant asserts that the jury charge error requires reversal of the conviction and a new trial. We disagree.

The relevant part of the indictment reads as follows:

> The duly organized Grand Jury of Harris County, Texas presents in the District Court of Harris County, Texas, JOHN DANIEL EVANS, hereafter styled the Defendant, on or about APRIL 2, 1996, did then and there unlawfully, while in the course of committing and attempting to commit the ROBBERY of SAMSON RASSU, intentionally cause the death of SAMSON RASSU by SHOOTING SAMSON RASSU WITH A DEADLY WEAPON, NAMELY FIREARM.

In order to convict the accused of capital murder, the State must prove and the jury must find beyond reasonable doubt that the accused intentionally committed murder while in the course of committing or attempting to commit the robbery. *See* TEX. PEN. CODE ANN. § 19.02(a)(2) (Vernon 1994). The application paragraph in the jury charge authorized the jury to convict appellant as follows:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 2nd day of April, 1996, in Harris County, Texas, the defendant, John Daniel Evans, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Samson Rassu, intentionally caused the death of Samson Rassu by shooting Rassu with a deadly weapon, namely, a firearm; *or if you find from the evidence beyond a reasonable doubt that on or about the 2nd day of April, 1996, in Harris County, Texas, another person did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Samson Rassu, intentionally cause the death of Samson Rassu by shooting Samson Rassu with a deadly weapon,*

> *namely, a firearm, and that the defendant, John Daniel Evans, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person to commit the offense, if he did, then you will find the defendant guilty of capital murder, as charged in the indictment.*
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> (Emphasis added).

Appellant does not challenge the legal sufficiency of the evidence, but rather argues that the trial court committed fundamental charge error, resulting in egregious harm, by charging the jury under the law of parties when the evidence supported only a charge of liability as the primary actor.

We shall assume, without deciding, that error occurred and turn to the question of harm. Appellant did not object at trial that a parties charge should not have been submitted at all; therefore, to prevail on his fifth point of error, he must show egregious harm. *See Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). The State elicited testimony from Adhamon and Moore that appellant acted as a principal. Appellant admitted to killing Rassu to another inmate in jail. Such testimony conforms with the State's theory of the case – that appellant was primarily responsible for Rassu's death. Even where proper objection is made at trial, the Court of Criminal Appeals has held that where, as in the instant case, the evidence clearly supports a defendant's guilt as the primary actor, error in charging on the law of parties is harmless. *See Cathey v. State*, 992 S.W.2d 460, 466 (Tex. Crim. App. 1999); *Black v. State*, 723 S.W.2d 674, 675 & 676 n. 2 (Tex. Crim. App. 1986); *Govan v. State*, 682 S.W.2d 567, 570-571 (Tex. Crim. App. 1985). The State did not attempt to introduce evidence linking appellant's accomplice in the robbery to the shooting of Rassu. If, as appellant acknowledges, there was no evidence to support a finding that appellant's accomplice shot Rassu, then it is highly unlikely that a rational jury would base its verdict on a parties theory. Rather, the jury would have had to base the verdict on the evidence tending to show appellant's guilt as a principal actor. Having failed to show harm, appellant also has failed to show egregious harm. Point of error one is overruled.

POINT OF ERROR TWO

By his second point of error, appellant contends that the trial court erred by conducting a preliminary competency hearing, pursuant to TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2 (Vernon 1979), in such a way as to pit appellant's trial counsel against appellant. We disagree.

In the middle of trial, appellant cried out: "He told me I would go home if I could cop a plea." The trial judge immediately excused the jury and held a hearing outside the jury's presence. The judge noted that it had been brought to her attention that appellant had a plan to sabotage his trial. The judge informed appellant that he would get a fair trial, but she would not allow him to sabotage the proceedings. Trial counsel then asked the court to instruct the jury to disregard appellant's outburst, and the court agreed. Then, trial counsel moved for a mistrial based on appellant's outburst in front of the jury and requested a recess in order for appellant to be examined for competence. At that point, the trial court questioned appellant regarding his understanding of the proceedings and his ability to assist his lawyer. Appellant indicated he understood what he was charged with and the nature of the proceedings, and he was capable of conversing with his attorney if he chose to do so.

Trial counsel then informed the court that for the two years appellant's case had been pending, appellant had been very cooperative and assisted in furthering his defense. However, counsel stated that appellant had become disturbed with the advent of this trial. Counsel indicated his concern that appellant was so agitated that he would be disruptive during the trial and would be incapable of assisting in his defense. The court entered a finding that appellant was competent to stand trial. Counsel then explained to the court that appellant's comment was in reference to an earlier plea bargain proposal which appellant vehemently refused. When the jury returned, the trial court instructed the jurors to totally disregard appellant's comment and not to consider it for any purposes. Appellant now claims that this dialogue rendered trial counsel ineffective because, "the spirit of cooperation between the appellant and his attorney was destroyed." While appellant concedes that his argument is not based on ineffectiveness

of counsel, he does claim that his counsel's remarks created a conflict of interest. We find three reasons why this claim is without merit.

First, appellant cites no convincing authority to support his assertion, nor is his contention supported by the record. An "actual conflict of interest" exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests to the detriment of his client's interest. *See Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997). Unlike the authority cited by appellant, this case does not present a situation where an attorney divides his loyalty between two present clients or where the attorney has a continuing duty to his former client or where the attorney is financially pressured to work less than vigorously for the accused. Rather, counsel vigorously protected appellant's interest by requesting a jury instruction and by moving for a mistrial.

Second, appellant's argument is not compelling under a reading of Article 46.02 of the Texas Code of Criminal Procedure. Section 2 of Article 46.02 states:

> (a) The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.
>
> (b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.

TEX. CODE CRIM. PROC. ANN. Art. 46.02, § 2 (Vernon 1979). It would frustrate the purpose of Article 46.02 for this court to accept appellant's view on the consequences of an attorney explaining why he requested a competency evaluation. Section 2(a) allows a defendant's counsel to file a written motion asserting that defendant is incompetent to stand trial. If appellant's argument is followed to its logical conclusion, the filing of such a motion would

also amount to a conflict of interest. The legislature could not have intended such an absurd consequence.

Third, counsel's remarks were made outside the presence of the jury. The jury was only aware of appellant's initial comment and the trial court's instruction to disregard this outburst. Under these circumstances, appellant has failed to show that the court's inquiry into his competency adversely affected the attorney's legal representation of appellant. Appellant's argument is without merit.

We overrule appellant's second point of error and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed June 29, 2000.

Panel consists of Justices Amidei, Anderson, and Frost.

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