Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01298-CR

DEREK JERMAINE RHONE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 768,247

O P I N I O N

Over his plea of not guilty, a jury found appellant, Derek Jermaine Rhone, guilty of capital murder in the course of committing a robbery. *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994). The jury assessed punishment at life imprisonment in the Texas Department of Criminal Justice, Institutional Division. Appellant appeals his conviction on seven points of error. We affirm the trial court's judgment for the following reasons: (1) appellant received effective assistance of counsel at trial; (2) legally and factually sufficient evidence supports appellant's conviction; (3) we find no fundamental error in the jury charge; and (4) the record does not support that the trial court improperly communicated with the jury during deliberations.

FACTUAL BACKGROUND

Appellant's friend, Tamika, went to a flea market where she met the complainant and exchanged telephone numbers with him. Later, Tamika overheard appellant and her brothers talking about their need for some "quick money," and she told them about the complainant. Tamika invited the complainant over to her apartment. While they were waiting for him, appellant told his friends that they were going to rob a guy coming over, the complainant. Appellant and most of his friends were juveniles.

When the complainant arrived, appellant pointed a gun at him and demanded that he surrender his possessions. One of appellant's friends hit the complainant in the mouth and took his necklace. While appellant continued to hold the gun, appellant's friends rushed up to the complainant and took his beeper, jewelry, shoes, and wallet. One of appellant's cohorts decided that they had to kill the complainant because he had seen their faces, and they tied him up and dumped him in the trunk of a car. They drove to a dead-end street where appellant's cohorts heard appellant fire several gunshots.

After he returned to the apartment, appellant told Tamika that he shot the complainant. He also gave a voluntary written statement to the police admitting that he shot the complainant. However, at trial, appellant claimed one of his friends, Edward, coerced him into committing the crime, and threatened to kill him if he did not kill the complainant.

DISCUSSION AND HOLDINGS

Ineffective Assistance of Counsel

In his first point of error, appellant argues that he received ineffective assistance of counsel at trial. Appellant asserts that his counsel was ineffective because he failed to object when appellant's voluntary written statement was admitted into evidence. We disagree.

For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and that

but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Hernandez*, 726 S.W.2d at 55.

Appellant carries the burden to prove his trial counsel was ineffective by a preponderance of the evidence. *See Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 688-89. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet ref'd).

Appellant has not met his burden; his complaints about trial counsel do not satisfy the *Strickland* test. Appellant argues his voluntary statement was illegally obtained in violation of section 52.02(a) of the Texas Family Code.[1] He argues that the police officer improperly obtained his written confession at the homicide division rather than a judicial proceeding office, and his trial counsel should have either objected when it was admitted into evidence or filed a motion to suppress. The record is silent as to why trial counsel failed to file a motion to suppress or to object to the statement's admission into evidence at trial. However, the record does reveal that appellant's only defense at trial was duress. The only evidence supporting duress was appellant's confession. In that confession, he admitted shooting the complainant, but claimed he did so only out of duress from Edward. Thus, the record contains a strong indication that appellant's counsel decided not to object to the admission of the confession because it was the only

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[1] Section 52.02 states in relevant part: " . . . [A] person taking a child into custody . . . shall:

(2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;

(3) bring the child to a detention facility designated by the juvenile court . . ." TEX. FAM. CODE ANN. § 52.02(a) (Vernon Supp. 2000) (emphasis added).

evidence raising the defense of duress, and appellant was able to introduce this evidence without being cross examined on it.

In short, because the record is silent as to counsel's trial strategy, but does reveal a reason that trial counsel probably did not object, (1) appellant has not overcome the presumption that trial counsel acted with reasonable professional judgment, and (2) we are unable to conclude that trial counsel's conduct fell below an objective standard of reasonableness. *See Moore v. State*, 983 S.W.2d 15, 21 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (holding that defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy). Appellant's first point of error is overruled.

Legal and Factual Sufficiency of the Evidence

In his next four points of error, appellant complains about the sufficiency of the evidence. We find legally and factually sufficient evidence to support appellant's conviction.

We apply different standards when reviewing the evidence for factual and legal sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the verdict 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*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (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, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Instead, we consider all the evidence equally, including the testimony of defense witnesses and the existence of alternative hypotheses. *See Orona v. State*, 836 S.W.2d 319, 321 (Tex. App.—Austin 1992, no pet.). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129.

Direct and circumstantial evidence are equally probative in proving guilt beyond a reasonable doubt. *See Hankins v. State*, 646 S.W.2d 191, 199 (Tex. Crim. App. 1983). A defendant's guilt for capital murder may be proven by circumstantial evidence alone. *See Narvaiz v. State*, 840 S.W.2d 415, 426 (Tex. Crim. App. 1992). "With circumstantial proof, every fact need not point directly and independently to defendant's guilt; rather, the combined and cumulative force of all incriminating circumstances warrants the jury's conclusion." *Id*.

In his second and third point of error, appellant contends that the evidence is legally and factually insufficient to support his conviction for capital murder because no one saw him shoot the complainant. Although none of the witnesses saw appellant shoot the complainant, the evidence is sufficient to support appellant's conviction. One of appellant's friends, Brown, testified that he drove with appellant to the dead-end street, and saw appellant place the complainant in the grass. Brown saw the appellant approach the complainant, point the gun at him, and he heard two gunshots. Appellant later told Brown that he shot the complainant twice. Another individual, Shaggy, also testified that he was at the scene of the shooting, saw appellant exit the truck with the gun, and heard two gunshots. After returning to the apartment, appellant told Tamika that he shot the complainant. Moreover, appellant gave the police a voluntary written statement admitting that he shot the complainant.

Appellant also argues the evidence is legally and factually insufficient because the witnesses lied while testifying about the facts of the case. Appellant cites to the testimony of several witness, pointing to inconsistent testimony at trial. However, assuming the witnesses testified untruthfully, contradictions or conflicts in a witness' testimony, or in the testimony of several witnesses, do not destroy the sufficiency of the evidence. *See Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). Rather, contradictory statements relate to the weight of the evidence, and the credibility the factfinder gives to the witness. *See id*. We find the evidence legally and factually sufficient to support appellant's conviction and overrule appellant's second and third points of error.

In his fourth point of error, appellant contends that the evidence is factually insufficient to show that he had an intent to rob the complainant because the State proved no nexus between the murder and the robbery. For the State to convict appellant for capital murder under section 19.03(a)(2) of the Texas Penal

Code, it must prove the appellant intentionally and knowingly killed the complainant in the course of committing a robbery. *See Ibanez v. State*, 749 S.W.2d 804, 807 (Tex. Crim. App. 1986). The State must also prove a nexus between the murder and the theft, such as the murder occurring to facilitate the taking of the property. *See Moody v. State*, 827 S.W.2d 875, 892 (Tex. Crim. App. 1992). The ultimate question is whether any rational trier of fact would be justified in finding, from the evidence as a whole, that the defendant intended to take his victim's property before or as the murder occurred. *See Nelson v. State*, 848 S.W.2d 126, 131-32 (Tex. Crim. App.1992).

Here, sufficient evidence shows that appellant formed the intent to steal from the complainant before committing the murder. Tamika testified that she heard appellant talking about a need for some "quick money," and that he intended to rob the complainant. Once the complainant arrived, appellant held a gun over him and demanded his property. Appellant's cohorts announced that they had to kill the complainant because he had seen their faces, and appellant and his friends tied the complainant up and dumped him in the trunk of a car. Throughout this time, appellant continued to hold the gun. This evidence is sufficient to show appellant's acts were intended to facilitate the complainant's murder so that he could complete the robbery. From this evidence, a rational jury could conclude that Appellant formed the intent to obtain control of the complainant's property before or during the commission of the murder. Appellant's fourth point of error is overruled.

In his fifth point of error, appellant contends the evidence is factually insufficient to sustain his conviction because he presented an affirmative defense of duress. Duress is an affirmative defense which the defendant must establish by a preponderance of the evidence. *See* TEX. PEN. CODE ANN. § 2.04(d) (Vernon 1994). In a jury case, where the jurors are the exclusive judges of the facts and the credibility of the witnesses, the jury must decide whether the defense was established by a preponderance of the evidence. *See Penagraph v. State*, 623 S.W.2d 341, 343 (Tex.Crim.App.1981).

The only evidence of duress appellant presented was in his voluntary written statement. In that statement, he alleged that his friend, Edward, coerced him into committing the crime and threatened to shoot him if he did not kill the complainant. However, five witnesses testified at trial that Edward did not

coerce or threaten appellant to commit the crime. The witnesses also testified that appellant voluntarily held the gun over the complainant and refused to put it down.

The jury was not required to accept appellant's version of the facts in his statement, and the jury could reasonably have decided that appellant voluntarily participated in the offense. Because the jury was the exclusive judge of the facts and credibility of the witnesses, it was entitled to find that appellant did not prove duress by a preponderance of the evidence. Appellant's fifth point of error is overruled.

Error in the jury Charge

In his sixth point of error, appellant contends that the trial court erred in the jury charge. Specifically, he claims that the instruction on his affirmative defense of duress was incomplete because it erroneously instructed the jury to find appellant acted under duress only if Edward coerced him to commit the offense. We disagree.

To preserve a jury charge error on appeal, a party must object to any alleged error within the charge at the time of the trial. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon Supp. 1999). A party must make a timely and proper objection at the time of trial to preserve error for appeal. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)(en banc), *aff'd*, 724 S.W.2d 804 (Tex. Crim. App. 1986). A proper objection must distinctly specify the error, so that the trial court may have an opportunity to correct any defect. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1999); *Brown v. State*, 716 S.W.2d 939, 943 (Tex. Crim. App. 1986)(en banc). If a party does not properly object, we will reverse only if the error was fundamental error; it must be so egregious and create such harm that the appellant did not receive a fair and impartial trial. *See Almanza*, 686 S.W.2d at 171.

A trial court must instruct the jury on every defensive theory raised by the evidence. *See Smith v. State*, 676 S.W.2d 584, 586 (Tex. Crim. App. 1984). To raise the defense of duress, some evidence must show the defendant "engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." TEX. PEN. CODE ANN. § 8.05(a) (Vernon 1994). A defendant is compelled to engage in proscribed conduct "only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure." *Id.* § 8.05(c).

The defense of duress is not raised if evidence establishes the defendant "intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subjected to compulsion." *Id.*§ 8.05(d).

Here, appellant did not object to the jury charge at trial, and therefore, we reverse only if the error was fundamental. Appellant argues that the three other participants in the offense also coerced him to commit the offense. However, no evidence presented during trial raises this issue. In his written statement, appellant asserted that only Edward threatened and coerced him into committing the crime. All the witnesses to the offense testified that appellant was not coerced into shooting the complainant, but voluntarily held the gun, took complainant's possessions, and shot him.

Because the evidence did not raise the issue of duress from any of the other participants in the crime, we hold that the trial court was not required to submit an instruction to the jury on duress from anyone other than Edward. Further, because the charge included an instruction on duress by Edward, a matter that was raised by the evidence, we hold that appellant received a fair and impartial trial. Finding no fundamental error, we overrule appellant's sixth point of error.

Improper Communication During Jury Deliberations

In his seventh point of error, appellant argues the trial judge improperly communicated with the jury during its deliberations. He argues that we should infer the jury viewed a handwritten note appearing in the appellate record.[2] Because we find no support in the record that the contents of the note were communicated to the jury, we will not make such an inference.

After the jury has retired to deliberate, the trial court can give additional jury instructions only if they comply with article 36.27 of the Texas Code of Criminal Procedure.[3] These provisions are mandatory and

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[2] This note reads: "Review of statements delay trials makes (sic) juries think we are incompetent & cost tax payers money. Require disclosure before trial."

[3] Article 36.27 provides:

> [T]he court shall answer any such communication [from the jury] in writing, and before giving such answer to the jury shall use reasonable diligence to secure the presence of the defendant and his counsel, and shall first submit the question and also submit his answer to

(continued...)

noncompliance is reversible error. *See Revell v. State*, 885 S.W.2d 206, 211 (Tex. App.—Dallas, pet. ref'd). If the trial court communicates with the jury in contravention of article 36.27, appellant must object to preserve the error for review. *See Archie v. State*, 615 S.W.2d 762, 765 (Tex. Crim. App. [Panel Op.] 1981). Unless the record shows otherwise, we presume that the trial court complied with article 36.27. *See Smith v. State*, 513 S.W.2d 823, 829 (Tex. Crim. App. 1974); *Revell*, 885 S.W.2d at, 211.

Here, nothing in the record demonstrates that the note was submitted to the jury, and appellant has provided no evidence that the jury viewed its contents. Because the record does not show otherwise, we must presume that the trial court complied with the statute and did not improperly communicate with the jury during its deliberations.

Moreover, we will not presume detriment to appellant without demonstrable harm. *See McGowan*, 664 S.W.2d at 359 (quoting *Haliburton v. State*, 578 S.W.2d 726, 728 (Tex. Crim. App.1979)). Thus, even if the note was communicated to the jury, appellant has not demonstrated that he was harmed by the court's actions.

Having found no support in the record that the note was communicated to the jury or that the appellant was harmed, we overrule appellant's seventh point of error. The judgment of the trial court is affirmed.

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[3] (...continued)
the same to the defendant or his counsel or objections and exceptions, in the same manner as any other written instructions are submitted to such counsel, before the court gives such answer to the jury, but if he is unable to secure the presence of the defendant and his counsel, then he shall proceed to answer same as he deems proper. The written instruction or answer to the communication shall be read in open court unless expressly waived by the defendant. TEX. CODE CRIM. PROC. ANN. Art. 36.27 (Vernon 1981).

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Yates, Fowler, and Edelman.

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