Affirmed and Opinion filed November 30, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00957-CR

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DIAMANTINA KOLOJACO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 786,377

O P I N I O N

To recover life insurance proceeds, appellant plotted with her lover to kill her husband. A jury found her guilty as a party to capital murder. Her punishment was life imprisonment. We determine whether: (1) the evidence was legally sufficient to show she committed the murder "for remuneration," (2) the law of parties was available to the state; (3) the verdict was supported by the law and facts; and (4) the court erred in overruling appellant's motion to suppress her confession. We affirm.

Background

On June 13, 1998, the complainant, the deceased Kolojaco, was found brutally beaten to death in his southeast Houston home. Before his marriage to appellant, complainant had been financially stable. During their marriage, complainant began buying appellant expensive gifts and living a more lavish lifestyle. Eventually, he began experiencing serious financial problems. Appellant and the couple's friends knew that complainant still carried significant life insurance and that appellant was the beneficiary.

During the marriage, appellant took a paramour, Andres Mascorro. According to appellant's written confession, after Mascorro began telling appellant he wanted her to take care of him and buy things for him, appellant said, "as long as Darryl's around, we won't have anything." Appellant then began suggesting more explicitly that Mascorro kill her husband for his life insurance proceeds and other assets. Eventually, they planned the murder. On June 12, 1998, appellant told Mascorro she would be taking her children away from the house so that complainant would be alone, giving Mascorro the opportunity to execute the plan. Mascorro then went to the house and brutally murdered complainant, striking him numerous times in the head and body with a blunt object, probably a metal pipe.

When first questioned by the police about the murder, appellant denied any knowledge of or involvement in it. One of the officers, William Taber, then requested that appellant come to the station a second time, where later that night she signed a confession to her role in the murder. According to appellant at the hearing on the motion to suppress her confession, Taber was aggressive and verbally abusive. He told appellant he was good friends with the district attorney and that if she did not admit to killing complainant, he would personally make sure she got the death penalty. Appellant claims that Taber also showed her a photo of a hypodermic needle used for administering lethal injections saying, "you're going to get this," and that he showed her a gruesome photo of complainant's corpse. Appellant also stated that since she did not have her glasses and was crying, she could not make out the photo of complainant. Taber denied showing a photo of a needle, threatening appellant, or promising her anything. He acknowledged that he showed her photos of the crime scene and that she was visibly shaken. After finding

that Taber made no threats to appellant, and that appellant's statement was made freely and voluntarily, the trial court denied the motion to suppress.

Appellant brings nine issues. First, appellant contends the evidence was insufficient to support her conviction for capital murder where the indictment alleged she committed the offense "for remuneration" but the evidence at trial showed she committed the offense "for the promise of remuneration." These two statutory means, she posits, are mutually exclusive. Appellant's issues two through seven hinge on the argument that the law of parties, by which she was convicted, was not available under section 19.03(a)(3) of the Texas Penal Code because this statute already has the law of parties incorporated into it. In ground eight, appellant claims the jury charge did not authorize her conviction. In her final issue, appellant argues the court erred in denying her motion to suppress her confession to her involvement in the murder.

Remuneration or the Promise of Remuneration

In her first issue, appellant concedes that the evidence showed she committed murder with the expectation she would receive remuneration, i.e., life insurance proceeds. However, she claims that the evidence was legally insufficient to support her conviction for capital murder "where the indictment alleged [she] committed the offense for remuneration, where the evidence at trial showed that she committed the murder for the promise of remuneration, and where the two statutory means of committing the offense [under section 19.03(a)(3)of the penal code] are mutually exclusive" ["for remuneration" as opposed to "for the promise of remuneration"]. Specifically, appellant argues that where the remuneration is realized before or during the murder, it is "for remuneration," and where the remuneration is expected in the future, contingent on the murder taking place, it is committed "for the promise of remuneration." She further postulates that because "for remuneration" and "for the promise of remuneration" require different types of proof, based on when the remuneration is realized, the legislature intended these terms be mutually exclusive. Thus, because appellant did not realize any remuneration, she claims, the state could only prove she murdered for the promise of remuneration.

Section 19.03(a)(3) states a person is culpable of capital murder if the person commits the murder "for remuneration or the promise of remuneration or employs another to commit the murder for

remuneration or the promise of remuneration." TEX. PEN. CODE Ann. § 19.03(a)(3). Appellant's indictment read, in pertinent part: "[Appellant] unlawfully, intentionally, and knowingly, for remuneration, namely life insurance proceeds and inheritance proceeds, caused the death of [complainant] by striking [him] with a pipe and unknown blunt object."

The due process clause of the Fourteenth Amendment requires that every criminal conviction be supported by evidence that a rational factfinder could accept as sufficient to prove guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). Therefore, we must view all the evidence adduced at trial in the light most favorable to the jury's verdict and determine whether rational jurors could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

We disagree with appellant's contentions that the jury could not find beyond a reasonable doubt that appellant committed the murder for remuneration. The penal code does not define "remuneration" or "the promise of remuneration," but the court of criminal appeals has held that those terms encompass "a broad range of situations, including compensation for loss or suffering and the idea of a reward given or received because of some act." *Beets v. State*, 767 S.W.2d 711, 734 (Tex. Crim. App. 1987). "The focus is on the actor's intent or state of mind: Did the actor kill in the expectation of receiving some benefit or compensation, e.g., life insurance proceeds, pension benefits?" *Id*. at 735.

As the state points out, *Beets* is instructive. There, the indictment alleged the murder was committed "for remuneration or the promise of remuneration." While *Beets* did not explicitly turn on either of these grounds, the court nonetheless emphasized in italics the term "for remuneration" in its analysis of whether a person who kills in the expectation of collecting life insurance proceeds has committed a capital offense. *Id*. at 734-35. Further, in its conclusion, the court completely omitted discussion of "for the promise of remuneration." It stated, "[w]e hold, therefore, that a person commits a murder for remuneration . . . where the actor kills a victim in order to receive a benefit or financial settlement paid upon the death of the victim, such as proceeds of insurance and retirement benefits as in the present case." *Id*. at 737.

The state also candidly refers us to *Urbano v. State*, 837 S.W.2d 114 (Tex. Crim. App. 1992). There, the court of criminal appeals noted that where there was no evidence the defendant, a member of a prison gang, had received any benefit from the gang before he committed the murder, there was no evidence he killed "for remuneration." *Id*. at 116. Because the evidence revealed no more than a suspicion that the defendant would be rewarded by the gang for the murder, the court reversed the conviction, holding there was legally insufficient evidence to show the defendant killed with remuneration as a motive at all. *Id*. at 116-17.

While some might argue conflict between these cases, implicit in *Urbano* was the absence of evidence of either remuneration or the promise of remuneration. *Beets* is factually on point with our case, and thus controlling, because it was clearly shown there, as in our case, the defendant killed in order to receive future life insurance proceeds. While it could have been more clearly stated, the *Beets* court's analysis in affirming the conviction for killing with the expectation of receiving life insurance proceeds, turned only on the "for remuneration" aspect of the statute. Conversely, *Urbano* is not factually on point because there was no evidence showing the defendant committed the murder for any type of remuneration. We thus follow *Beets* for the proposition that a person who kills with the expectation of future life insurance proceeds is properly charged under section 19.03(a)(3) as having murdered "for remuneration."

Additionally, a common-sense reading of the statute indicates that appellant killed for remuneration. In this case that there was no "promise" of remuneration in any meaningful sense.[1] Rather, a less strained interpretation of the statute leads us to the conclusion that appellant murdered simply in order to receive remuneration – or, for remuneration – in the form of life insurance proceeds.

[1] We should not be read as holding that a defendant who murders for life insurance cannot be found guilty of committing murder for the promise of remuneration. Appellant's arguments that "for remuneration" and "for the promise of remuneration" are intended to be mutually exclusive, based on when the profit is realized, is not supported by any authority, and because we affirm based on the "for remuneration" prong, we need not address that question here.

We therefore hold that the evidence that appellant murdered her husband in expectation of receiving life insurance proceeds sufficiently showed that appellant murdered for remuneration, as alleged in the indictment. Appellant's first issue is overruled.

Law of Parties

Appellant's second through seventh issues include points on sufficiency of the evidence and the jury charge, all of which turn on whether the law of parties under 7.02(a) of the penal code[2] may be applied under section 19.03(a)(2) of the penal code. Under each issue, appellant's argument hinges on the premise that section 19.03(a)(2), with its employment provisions, already incorporates the law of parties, thus, the law of parties was unavailable to the state.

The problem with appellant's argument is that it ignores the portion of the statute permitting a conviction for a person who commits murder "for remuneration or the promise of remuneration." TEX. PEN. CODE Ann. § 19.03(a)(3). Under this separate basis for culpability, there is patently no concept of parties or employment. Therefore, there was no redundancy in the use of the law of parties or any other impediment to the use of the law of parties in this case. *See* TEX. CODE CRIM. PROC. ANN. art. 7.02. Further, as outlined above, there was ample proof at trial that appellant encouraged and aided Mascorro in the murder, thus participated in the murder as a party, and that she acted in order to receive insurance and inheritance proceeds.[3] We therefore overrule appellant's second through seventh issues.

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[2] The relevant portions of section 7.02 state:

(a) A person is criminally responsible for an offense committed by the conduct of another if:

(1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;

(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

[3] Appellant assumes the state's primary theory at trial was that appellant "employed" Mascorro to kill complainant. While there was evidence that Mascorro would benefit financially from the murder, the thrust of the state's case was that appellant aided and encouraged the murder so that she would receive the life insurance proceeds.

Verdict Not Supported by Theory of Law and Fact Submitted to Jury

In issue eight, appellant argues that the verdict was unsupported by any theory of fact and law submitted to the jury.

Appellant cites *Malik v. State*, which reminds that due process prevents us from affirming a conviction based upon legal and factual grounds not submitted to the jury. 953 S.W.2d 234, 238 n. 3 (Tex. Crim. App.1997). Appellant points to one theory submitted which instructed the jury to find appellant guilty of capital murder if Andres Mascorro committed the murder for remuneration and appellant was a party to this offense. As already noted, Mascorro wanted appellant to take care of him. But according to appellant, as long as the husband was alive, the lovers would have nothing. Circumstantially, only through the life insurance proceeds, could the couple consummate their materialistic desires. Hence, the evidence supported this alternative theory. Furthermore, this was only one of four theories submitted to the jury. Assuming, *arguendo*, this particular theory was somehow not supported by law or fact, appellant's conviction also stands if Mascorro did the murder and appellant was a party and she participated for remuneration.

As discussed above, the state proved at trial that appellant encouraged and aided Mascorro to commit the murder and that she did it in order to receive life insurance proceeds. Therefore, we hold that both theories, along with the party instruction submitted to the jury, were supported by the law and facts at trial. We overrule this issue.

Motion to Suppress Appellant's Statement

Finally, appellant argues the trial court erred in overruling appellant's motion to suppress her confession.

The burden of proof at the hearing on admissibility is on the prosecution, which must prove by a preponderance of the evidence that the defendant's statement was given voluntarily. *See Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). At a suppression hearing, the trial court is the sole judge of the credibility of witnesses and the weight of their testimony. *See Penry v. State*, 903 S.W.2d

715, 744 (Tex. Crim. App.1995). Therefore, we will not disturb the trial court's findings if those findings are supported by the record. *Id*. Instead, we only consider whether the trial court properly applied the law to the facts. *Id*. The statement of an accused may be used in evidence against him if it appears that it was freely and voluntarily made without compulsion or persuasion. *See* TEX. CODE CRIM. PROC. ANN. art. 38.21. A statement is involuntary, for the purposes of federal due process, only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker. *See Alvarado*, 912 S.W.2d at 211. Absent coercive police conduct causally related to the confession, there is no basis for concluding that any state actor has deprived a criminal defendant of due process of law. *Id*. The determination of whether a confession is voluntary is based on an examination of the totality of circumstances surrounding its acquisition. *See Penry*, 903 S.W.2d at 744.

Appellant claims her confession was involuntary because Officer Taber threatened her with a picture of a needle, saying she would be executed with it, used much profanity, and showed her a gruesome photo of her husband's body. Taber denied showing appellant a photo of a needle, threatening her, or saying she would receive the death penalty if she did not cooperate with him. As trier of fact, the court was free to believe Taber and disbelieve appellant. *See Penry*, 903 S.W.2d at 744. Taber did not deny showing appellant the photo of her husband's corpse. However, appellant stated she could not see the photo well because she did not have her glasses (yet her ability to see the needle was quite proficient.) It is undisputed that Taber then told her it was a photo of her husband's bashed-in head and that caused appellant to yell and become upset.

After examining the totality of the circumstances, we find that Taber's statement about the photo of complainant's corpse, even if Taber used profanity[4] and upset appellant, does not rise to the level of coercive conduct that rendered appellant's confession involuntary. *See Brimage v. State*, 918 S.W.2d 466, 504 (Tex. Crim. App. 1996) (defendant's being upset prior to confession did not render confession

[4] If profanity was used, we do not condone this abuse and find it to be both out of protocol and out of character for any member of law enforcement.

involuntary); *see also Muniz v. State*, 851 S.W.2d 238, 255 (Tex. Crim. App. 1993) (officer's showing defendant photos of corpse of complainant not sufficient to raise issue of voluntariness so as to require instruction in jury charge). We therefore hold the trial court did not err in denying appellant's motion to suppress. We overrule appellant's final issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 30, 2000.

Panel consists of Justices Yates, Wittig, and Frost.

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