Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

————————

NO. 14-98-00126-CR

————————

CEDRIC SANTOSCOY, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 755,418

O P I N I O N

A jury convicted appellant, Cedric Santoscoy, of capital murder for his part in the shooting death of Damon Smith.[1] *See* TEX. PEN. CODE ANN. § 19.03 (Vernon 1994). The trial court assessed his punishment at life in prison. In thirteen points of error appellant contests the sufficiency of the evidence to sustain his conviction, the charge, the admission of certain testimony, and the trial court's action in replacing an unqualified juror. We affirm.

FACTS

---

[1] Appellant was tried with a codefendant, Kenny Gonzalez. In an unusual procedural move, two juries were empaneled to hear the evidence simultaneously.

Because appellant contests the sufficiency of the evidence, we will set forth the relevant testimony in detail.

Reyna Bahena testified that on April 4, 1997, she lived next door to the house where the shooting took place. She saw a "wine-colored" car with a spoiler on the back pull up in front of the house and then pull away. Later she heard shots and looked out her window to see the car backing out of the driveway at the house next door. She saw her neighbor run out after the car and then go back inside.

Houston Police Officer Lynn Mack said she was one of the first officers to arrive on the scene. She found the victim, Damon Smith, on the floor of the kitchen. She said Smith was clutching his chest where he had been shot, told her he was going to die and said that three Hispanic males who he did not know had broken into the house and shot him with "a revolver, possibly a .357." He said they were driving a red car, possibly a Toyota Supra, and that he could identify his assailant. Smith also told her the three attackers had tried to steal something from him but did not say what.

Darryl Smith testified he lived at the residence in question with his brother, Damon Smith, and his parents. He said on April 3, 1997, he had a quarter-pound of marihuana and a quarter-pound of cocaine in his room, which he was holding for someone else. The cocaine was kept inside a small purple bag, which was kept inside a slightly larger black bag. The night before the shooting the owner of the cocaine, Manuel Diaz, came over with several people. He said he retrieved the cocaine and gave it to Diaz, who parceled some out to Kenny Gonzalez. Smith said he put the cocaine back in his bedroom. The next day, after his brother had been murdered, Smith found that the cocaine was missing.

Houston Police Officer J.S. Hammale said he was called to the address in question five days later, when the residents found a bullet imbedded in the wall. He managed to retrieve a fragment, but Hammale said there was not enough bullet to estimate what kind of weapon fired it.

David Neidlinger said he was a member of a gang, the Latin Coalition, and appellant was a member of a rival gang, the Sunset Players. Neidlinger said that on the morning of April 4, appellant came to his house out of breath and told him that he and some others had "jacked" somebody and that he had shot someone. Appellant said they had gone to a house to get cocaine, that he had pulled a gun and said, "This is a jack move, fool," and that he shot the man at the house three times. After the shooting, appellant had

panicked because a police car appeared to be following them, so he got out of the car and fled on foot. Neidlinger said appellant offered to sell his father a chrome .357 revolver which appellant said had been used in the robbery. His father declined and Neidlinger never saw the weapon again.

Manuel Mongoy testified that on the night of April 3, he was at a party with Kenny Gonzalez when they went to the Smith house to get cocaine. He said he and Gonzalez were joined by Edwin Navarrette and appellant at Gonzalez's apartment during the night. At about 7 a.m. he and Gonzalez decided to go get more cocaine; he said the other two were not participating and didn't care. So Mongoy borrowed his mother-in-law's car, a maroon Toyota with a spoiler on the back, and took the three others back over to the Smith house. He said appellant was playing with a chrome .357 Magnum revolver on the way over to the house.

Mongoy said appellant and Gonzalez got out of the car and went into the house to buy the cocaine. After a few minutes he heard a sound like "balloons popping" and saw a man covered in blood come running out of the house, followed by appellant and Gonzalez. Mongoy said appellant was carrying a small purple bag. He said they drove away from the house back to Gonzalez's apartment, where appellant doled out about an ounce of cocaine to Gonzalez and less than a gram to him. Mongoy said that he told Neidlinger about the robbery later that day, but that Neidlinger already knew.

Houston Police Officer Fred Hale was the crime scene investigator. He said there was blood from the street and sidewalk outside the house to the kitchen, where the telephone receiver was off the hook. He also said there were no signs of a struggle inside the house. Hale said there was a black bag in the living room which a drug dog "alerted" on as containing drugs at one time.

Hale said he later talked with appellant and took a statement which he read into the record. In the statement appellant said he spent the night of April 3 at Gonzalez's apartment; on April 4 he woke up and saw Gonzalez and Navarette arming themselves to commit a robbery. Appellant said he went with Gonzalez, Navarette and Mongoy to the house, that the first time they knocked there was no answer, and that they came back a short time later and got Smith to answer the door. Appellant said he followed the armed pair into the back bedroom, where Smith was getting cocaine for them, and Gonzalez and Navarette pulled their weapons. The statement said Navarette pumped his shotgun, sending a shell onto the floor,

and that Gonzalez shot Smith once. Appellant denied shooting anyone. Hale also testified that appellant's version of events was inconsistent with the evidence he had acquired in his investigation.

Tommy J. Brown, deputy chief medical examiner for Harris County, said Smith suffered three gunshot wounds: one to the upper chest, one in the lower abdominal area and one in the forearm. Brown said Smith's second and third wounds were at extremely close range, less than six inches. He said the fatal wound was the first, to the upper chest area.

The defense rested without calling any witnesses.

SUFFICIENCY

In four of his points of error appellant attacks the sufficiency of the evidence to support his conviction. His first two points argue that the evidence was insufficient to show that Smith was appellant's victim; his twelfth and thirteenth points argue that federal due process concerns require an overruling of *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997), which defines the role of the jury charge in a sufficiency analysis.

Under *Malik*, sufficiency of the evidence is measured against the offense defined by a hypothetically correct jury charge. *Id.* at 240. Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restricts the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." *Id.* In so holding, the court of criminal appeals overruled a line of cases holding that if the charge increases the burden on the state, and the state does not object, the state is bound to carry the higher burden imposed by the charge or risk acquittal of defendant. *Boozer v. State*, 717 S.W.2d 608 (Tex. Crim. App. 1986); *Benson v. State*, 661 S.W.2d 708 (Tex. Crim. App. 1982).

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See Jackson v. Virginia*, 443 U.S. 307, 315-16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The standard for reviewing a legal sufficiency challenge is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 320, 99 S.Ct. at 2789; *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997).

In conducting factual sufficiency review, the evidence is no longer viewed in the light most favorable to the verdict. *Clewis v. State,* 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). The verdict will be set aside, and the cause remanded for a new trial, if it is contrary to the overwhelming weight of the evidence and therefore clearly wrong and unjust. *Id*. at 129. A reviewing court must be deferential to the fact finder, i.e., careful not to invade the province of the jury to assess the credibility and weight of the evidence. *Id*. at 133, 135; *De Los Santos v. State*, 918 S.W.2d 565, 569 (Tex. App.—San Antonio 1996, no pet.).

In his first and second points of error appellant argues that the accomplice witness, Mongoy, was not specific enough in identifying the victim to permit his conviction to stand. This point of error need not detain us long. The fact that the accomplice witness did not know the victim does not render the evidence insufficient; there was ample evidence from other sources for the jury to infer that the victim was Smith. We overrule his first two points of error.

In his twelfth point of error appellant argues that the evidence is inconsistent with his guilt under the law of parties; in his thirteenth he argues the evidence is inconsistent with the charge as submitted to the jury, and so to hold him responsible would be a due process violation.

Appellant contends that *Malik* must be overruled because it permits conviction under a theory not set out in the charge. The gist of this contention is that the charge given the jury does not authorize convicting appellant as a party where appellant actually pulled the trigger. Because he could have been guilty as a party who actually pulled the trigger, appellant argues, there is a fatal variance between the charge and the evidence. Appellant is wrong. The charge authorized appellant's conviction as a principal if the jury concluded that appellant pulled the trigger. No charge on the law of parties where appellant acted as a principal was necessary. We therefore overrule appellant's twelfth and thirteenth points of error.

In his fourth point of error[2] appellant contends the trial judge committed "fundamental error" in replacing a juror after the jury had been sworn. After the names of the venire who would serve as jurors were called and sworn as a jury, a juror reported to the court that a fellow juror did not understand the English language. The juror was questioned by the judge and the attorneys and when it became obvious that she did not understand English, the trial judge determined that she could not serve as a juror. The judge then obtained the express approval of the prosecutor, the defense counsel (who is also counsel for appellant on this appeal), and the defendant personally, to seat the next juror who had not been struck.

Despite the express consent of appellant and his attorney, appellant now contends the trial judge committed error. For authority, appellant disingenuously quotes a passage from *Sanne v. State*, 609 S.W.2d 762 (Tex. Crim. App. 1980) reciting the prior rule that once a juror has been empaneled in a felony case, the court is without power to discharge him. What counsel fails to point out, however, is the fact that the *Sanne* court quoted the previous rule in order to expressly overrule it. Appellant's fourth point is overruled.

In appellant's fifth, sixth and seventh points of error appellant contends the trial court erred in admitting testimony that appellant was a member of a gang. State's witness Neidlinger, to whom appellant admitted committing the offense, stated that both he and appellant were gang members. On cross-examination appellant's counsel questioned Neidlinger at great length about the gang affiliation of both the witness and appellant and suggested that this rival gang membership was incentive for Neidlinger to lie. We hold that appellant has waived any complaint he may have had based upon the rule that an objection to the admissibility of evidence is waived if the same evidence is subsequently introduced without objection. *Massey v. State*, 933 S.W.2d 141, 149 (Tex. Crim. App. 1996). Appellant's points five through seven are overruled.

In his eighth and ninth points of error appellant contends the trial court erred in failing to declare a mistrial. Since the points are so closely related, and governed by the same rule, they are grouped together for disposition.

---

[2] Appellant does not advance a third point of error.

Both points deals with testimony by Mongoy. When asked whether he had received any threats from the defendant, he said, "I guess my friends have told me . . ." Appellant objected, interrupting his statement. The trial judge sustained the objection and instructed the jury to disregard the statement and to "not consider it for any purpose whatsoever" but denied a motion for mistrial.

Later Mongoy was questioned about an order that he was to have no contact with the defendants. When asked if he had "come into contact in the jail, in the chain coming to court or leaving court" with either defendant, appellant objected before the witness could answer. The jury was again admonished to disregard the question and not consider it "for any reason whatsoever," but the trial court denied a motion for mistrial.

Recently, in *Bauder v. State*, 921 S.W.2d 696 (Tex. Crim. App. 1996), the court revisited in depth the issue of mistrials. Among the observations made by the court were that a mistrial is an extreme remedy for prejudicial events occurring in the trial process; the declaration of a mistrial should be an exceedingly uncommon remedy for the residual prejudice remaining after objections are sustained and curative instructions given; a reviewing court should engage in the presumption that the jury follows instructions to disregard, and only when it is apparent that an objectionable event is so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant, may a motion for mistrial be granted. *Id.* at 698.

In this case the jury never heard any testimony as to whether appellant was incarcerated or whether Mongoy had been threatened because appellant's timely objections were sustained before he could answer. As the court said in *Bauder*, "Because tactical decisions to offer prejudicial evidence are a normal and, in most respects, acceptable part of the adversary process, it would be counterproductive to terminate the trial every time an objection is sustained." *Id.*

The instructions were sufficient to cure any potential harm. We overrule appellant's eighth and ninth points of error.

In his tenth point of error appellant contends the trial court erred in permitting Officer Mack to testify concerning statements made to her by the deceased. Mack was one of the first officers to arrive at the scene in response to a "burglary in progress" call. Upon determining which house the burglary call

concerned, she entered and found Smith lying on the kitchen floor. When she asked him what happened, he clutched his chest and said he was going to die and was in severe pain. She asked him who did it and he stated he didn't know them but they were three Hispanic males. He said he was shot with a revolver, "possibly a .357," and that he could identify the "shooter." He also said they were trying to steal something from him, and that they were driving a red car, possibly a Toyota.

A statement made by a declarant while believing his death to be imminent, concerning the cause or circumstances of his impending death, is an exception to the hearsay rule. TEX. R. EVID. 804(b)(2). We review the actions of the trial court under the abuse of discretion standard. *Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994). The statement made by the deceased conformed to the requirements of *Herrera v. State*, 682 S.W.2d 313 (Tex. Crim. App. 1984), in that they were shown to have been made voluntarily and not in answer to interrogation calculated to lead the witness to make any particular statement. Here we find no abuse of discretion and overrule the tenth point of error.

In his eleventh point of error appellant contends the trial court erred in denying his requested charge on "independent impulse" as a defense to vicarious liabilty under the law of conspiracy. At the charge conference appellant merely stated that "we are also requesting a charge on independent impulse." In neither the charge conference nor in his brief on appeal does appellant elaborate on what type of instruction he desired or what evidence raised the issue.

An independent impulse instruction is warranted when "an accused, though he was admittedly intent on some wrongful conduct, nevertheless did not contemplate the extent of criminal conduct actually engaged in by his fellows, and thus cannot be held vicariously responsible for his conduct." *Mayfield v. State*, 716 S.W.2d 509, 513 (Tex. Crim. App. 1986). If the evidence raises a question as to whether the offense actually committed was committed in furtherance of the conspiracy, or was one which could have been anticipated, then the jury should be charged on independent impulse. *Id.* at 515.

In setting out the law for the jury, the court's charge instructed:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in

> furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

The application paragraph authorized the jury to convict appellant on a conspiracy theory only if they found beyond a reasonable doubt that "the murder of Damon Smith was an offense that the defendant should have anticipated as a result of carrying out the conspiracy." Appellant has not pointed out any evidence that raised the issue of independent impulse and our search of the record reveals none. We hold that the charge, as given, adequately protected appellant's rights. We therefore overrule his eleventh point.

We affirm the judgment.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Robertson, Cannon, and Lee.*

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

* Senior Justices Sam Robertson, Bill Cannon and Norman Lee, sitting by assignment.