AFFIRM in part, REVERSE and REMAND in part; Opinion issued August 24, 2012

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In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-11-00676-CR

TERRANCE HENRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F09-59736-W

MEMORANDUM OPINION

Before Justices Bridges, Francis, and Lang
Opinion By Justice Francis

A jury convicted Terrance Henry of capital murder, and the trial court assessed a mandatory life sentence without parole. On appeal, appellant brings eight issues, complaining about the composition of the jury, the sufficiency of the evidence, his arraignment in the presence of the jury, an evidentiary ruling, charge error, improper argument, and the constitutionality of his sentence. Having reviewed his issues, we conclude only one has merit: the punishment issue. In light of the United States Supreme Court's recent opinion in *Miller v. Alabama*, 132 S. Ct. 2455 (June 25, 2012), we reverse the trial court's judgment as to punishment and remand for a new punishment hearing only.

In his third issue, appellant claims the evidence is legally insufficient to support his conviction for capital murder. The State charged appellant with intentionally and knowingly causing the deaths of Byron Carter and Brandon Gilstrap during the same criminal transaction or under the same scheme or course of conduct.

When assessing whether evidence is legally sufficient to support a conviction, we review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury, as sole judge of the witnesses' credibility and the weight to be given their testimony, is free to accept or reject any and all evidence presented by either side. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Initially, we note appellant argues the State "must exclude every reasonable hypothesis raised by the evidence that tends to exculpate the accused." This legal construct, however, was overruled by the court of criminal appeals in *Geesa v. State*, 820 S.W.2d 154, 155 (Tex. Crim. App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000).

Viewing the evidence in the light most favorable to the jury's verdict, we conclude the evidence was legally sufficient to support his conviction for capital murder. The evidence showed that on the night of September 26, 2009, Carter, Gilstrap, Elvin Thornton, and Steve Morrison were at a car wash in southeast Dallas socializing and having their cars cleaned. Gilstrap, who was wearing two medallions around his neck, walked next door to the Texaco station to get change for a $20 bill. Appellant, who was with Derrick Jackson and two other teen-agers, was standing nearby and saw Gilstrap. Jackson, who was also charged with capital murder and had no agreement with the State, testified at trial about the events of that night. According to Jackson, appellant was armed with a .32-caliber weapon. After seeing Gilstrap, he said, "I'm about to get this n-----." As Gilstrap

left the store, appellant grabbed him from behind, pointed the gun at him, and told him to "drop out." Gilstrap put up his hands, and appellant removed the medallions. Appellant then told Jackson to go through Gilstrap's pockets. Jackson did and removed Gilstrap's wallet. Appellant put Gilstrap in a neck hold and dragged him to the car wash area where Gilstrap's friends were talking. Jackson then heard gunshots and ran.

Morrison and Thornton testified they looked up and an armed man, holding Gilstrap around the neck, told them to "drop out." When they failed to move quickly enough, the man said, "You think I'm playing," and began shooting. Morrison immediately began running and was not hit. Carter and Thornton were each hit multiple times before the man turned the gun on Gilstrap and shot him once. Carter and Gilstrap fell to the ground. Thornton ran toward the Texaco, but realizing he was shot and believing he might not "make it," he drove home to see his wife and children.

Neither Morrison nor Thornton could identify the shooter, but witnesses other than Jackson testified appellant was the shooter. Two brothers, Benny and Roderick Williams, were at the car wash that night cleaning vehicles for extra money. Both testified they went to the car wash every day and said appellant was "one of the kids" who would hang out there. Both knew appellant as "TJ" or "JJ." Both testified appellant walked up holding Gilstrap around the neck and told Carter, Morrison, and Thornton to "drop out." Both said appellant then began shooting. Benny said he ducked down at the side of a car, while Roderick said he was so shocked he "couldn't move." After appellant shot Carter and Thornton, he shot Gilstrap once and then ran off. Both brothers left the scene before the police arrived. The police picked them up a less than a week later, and both identified appellant as the shooter.

A third witness, Charles Taylor, testified that shortly before the shootings, he was standing at a bus stop in the area when an acquaintance walked up with three other guys. One of the guys, who

Taylor identified at trial as appellant, raised his shirt and showed a firearm. Taylor said appellant was the only person he saw with a gun. After talking briefly, Taylor said he walked to a nearby restaurant, and the group walked to the car wash. About ten minutes later, Taylor walked out of the restaurant and saw that a crowd had gathered at the car wash and two men were lying on the ground. Taylor acknowledged that when the police showed him a photo lineup shortly after the shootings, he could not positively identify appellant. He explained, however, that appellant looked "much younger" in the photo and was wearing braids in his hair.

The autopsies showed that Gilstrap died from a single gunshot that entered from above the rear of his left shoulder and Carter died from four gunshots wounds to his torso and right arm. A firearms expert analyzed the bullet fragments removed from the bodies and concluded they were fired from the same .32-caliber weapon.

Appellant did not testify at trial but presented an alibi defense. His mother, sister, and a third witness testified appellant was staying with his sister on the night of the offense to help her because she was ill. The sister testified appellant left the house once early in the day to get something to eat, returned, and did not leave again.

On appeal, appellant argues the evidence fails to prove he was the person who shot and killed Carter and Gilstrap. He argues no physical evidence ties him to the scene and it was "so dark," no one could "positively identify him as the perpetrator." We cannot agree. Three witnesses who knew appellant before this offense testified he was the shooter. A fourth person identified him in the courtroom as the man he saw in the area with a gun only minutes before the shooting. While appellant claims these witnesses were not credible for various reasons, that was an issue for the jury to decide. Based on the above evidence, we conclude a rational jury could have found, beyond a reasonable doubt, that appellant was the person who intentionally caused the deaths of Carter and

Gilstrap in a single transaction as alleged in the indictment. We overrule the third issue.

In his first and second issues, appellant contends the trial court erred in denying his *Batson* challenge to the State's peremptory strikes of prospective jurors No. 5 and 7, Dawrence White and Leonel Mendoza, respectively. He asserts the prospective jurors were excluded solely because of their race.

The Equal Protection Clause forbids a prosecutor from exercising peremptory strikes based solely on the race of the potential juror. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). The party exercising a peremptory strike typically does not have to explain its rationale for the strike, unless the strike is challenged under *Batson*. *Nieto v. State*, 365 S.W.3d 673, 675 (2012).

When a party makes a *Batson* challenge, the trial court engages in a three-step inquiry. *Id.* First, the defendant must make a prima facie showing of racial discrimination. *Id.* at 676. Second, if the defendant makes the requisite showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for the strike. *Id.* Finally, if a race-neutral explanation is proffered, the trial court must determine if the defendant proved purposeful discrimination. *Id.* We skip the first step of the analysis if the trial court proceeded immediately to the second step by inquiring as to the striking party's race-neutral reasons. *Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008).

We may overturn the trial court's ruling on a *Batson* challenge only if that ruling was clearly erroneous. *Nieto*, 365 S.W.2d at 676. The clearly erroneous standard is highly deferential because the trial court is in the best position to determine if the prosecutor's explanation is genuinely race neutral. *Id.* The trial court must focus on the genuineness of the asserted non-racial motive, rather than the reasonableness. *Id.* We defer to the trial court's ruling in the absence of exceptional circumstances. *Id.*

Here, the trial court immediately inquired into the reasons for the strikes, so we presume

appellant made a prima facie showing of racial discrimination and skip to the second step. We begin with Dawrence White, an African-American male. The prosecutor explained he struck White because he had a "bad juror rating" and because he had an assault family violence case that had been dismissed. Both reasons are facially race-neutral. *See Ivatury v. State*, 792 S.W.2d 845, 848 (Tex. App.—Dallas 1990, pet. ref'd) (bad record during prior jury service); *Dennis v. State*, 151 S.W.3d 745, 750 (Tex. App.—Amarillo 2004, pet. ref'd) (prior arrest or criminal history). In response, defense counsel asked the prosecutor if there were any persons "of the white race or . . . might be considered majority" with "similar types of reasons" that he did not strike, and the prosecutor said no. The prosecutor also noted that an African-American female was seated on the jury. After the prosecutor's response, defense counsel did not object or otherwise respond to the prosecutor's proffered reason.

With respect to Leonel Mendoza, a Hispanic male, the prosecutor said he struck him because he was "kind of young," he wavered on whether he could convict if the State proved its case beyond a reasonable doubt with one witness, and because he had a DWI conviction. Again, each of these reasons is facially race-neutral. *See Chambers v. State*, 866 S.W.2d 9, 24–25 (Tex. Crim. App. 1993) (age); *Gibson v. State*, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004) (reservations about convicting on basis of testimony of one witness); *Dennis*, 151 S.W.3d at 750 (prior arrest or criminal history). The prosecutor also noted that a Hispanic male and a Hispanic female were seated on the jury. After the prosecutor gave its reasons, defense counsel said, "I have no questions of the prosecutor at this point." Defense counsel did not object or otherwise respond.

On appeal, appellant argues White and Mendoza gave similar answers as non-minority jurors to various voir dire questions. He does not, however, argue or direct us to any evidence that the State engaged in disparate treatment by failing to strike similarly situated white venirepersons who (1) had

a bad juror rating and had a family violence assault case dismissed or (2) were young, wavered on the one-witness rule, and had been convicted of DWI. Because appellant did not offer any evidence in the trial court in response to the State's race-neutral reasons for striking prospective jurors No. 5 and 7, we cannot conclude the trial court's ruling was clearly erroneous. *See, e.g.*, *Satterwhite v. State*, 858 S.W.2d 412, 424 (Tex. Crim. App. 1993) (holding appellant failed to carry his burden of showing racial discrimination because appellant did not cross-examine the prosecutor or offer any evidence to rebut prosecutor's race-neutral explanations); *see also Crew v. State*, No. 05-08-00959-CR, 2009 WL 2712386, at *4 (Tex. App.—Dallas Aug. 31, 2009, pet. ref'd) (mem. op., not designated for publication) ("Once the State provided its race-neutral explanation for the strike, appellant made no further argument against the explanation such as questioning the prosecutor or offering his own evidence of impermissible motive. Thus, on the record before us we cannot say the trial court's decision to overrule appellant's *Batson* challenge was clearly erroneous.") (internal citations omitted); *Daniels v. State*, 05-06-01363-CR, 2008 WL 444467, at *5 (Tex. App.—Dallas Feb. 20, 2008, pet. ref'd) (mem. op., not designated for publication) (concluding trial court's ruling denying *Batson* challenge was not clearly erroneous because "[b]y failing to challenge any of the State's race-neutral reasons for striking the jurors, appellant did not meet his burden of showing the State's explanations were pretextual."). We overrule the first and second issues.

In his fourth issue, appellant contends the trial court erred in arraigning him in the presence of the jury. Appellant confuses the arraignment process with the first step in a criminal trial.

After the jury is impaneled, the charging instrument is read to the jury by the prosecuting attorney and, if the defendant's plea is not guilty, it "shall also be entered." *See* TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1), (2) (West 2007); *Posey v. State*, 840 S.W.2d 34, 36–37 (Tex. App.—Dallas 1992, pet. ref'd). An arraignment, on the other hand, is for the purpose of reading the

indictment to the accused, and is a procedure to determine the identity and hear the plea of the person charged. TEX. CODE CRIM. PROC. ANN. art. 26.02 (West 2009); *Collins v. State*, 548 S.W.2d 368, 375 (Tex. Crim. App. 1976); *Posey*, 840 S.W.2d at 37. Here, the trial court correctly arraigned appellant a day earlier outside the presence of the jury but before jury selection began. The next day, after the jury was impaneled, the prosecutor read the indictment to the jury and the trial court asked if his plea was guilty or not guilty. Appellant entered a plea of not guilty. The trial judge, by asking appellant to plead to the indictment, did not arraign him. *See Martinez v. State*, 867 S.W.2d 30, 38 (Tex. Crim. App. 1993) *reversed on other grounds by Ex parte Martinez*, 233 S.W.3d 319 (Tex. Crim. App. 2007). We overrule the fourth issue.

In his fifth issue, appellant contends the trial court erred in overruling his objection to the identification evidence presented by the State. Within this issue, appellant does not provide any legal analysis, only a conclusory statement that the in-court identification "should have been suppressed as a due process violation due to impermissibly and irreparably suggestive police conduct in this case." Because this issue is inadequately briefed, it is waived. *See* TEX. R. APP. P. 38.1(i).

In his sixth issue, appellant contends the trial court erred in overruling his request for a jury charge on the lesser-included offense of murder. Within this issue, appellant adequately sets out the law governing his complaint and then asserts, without more, that "review of the entire record shows that there was evidence that Appellant may have shot and killed only the victim, Mr. Gilstrap, that he was allegedly holding onto and shot in the head." Because appellant does not direct us to any evidence in the record that supports his complaint, we conclude this issue is waived. *See* TEX. R. APP. P. 38.1(i).

In his seventh issue, appellant contends the trial court erred in overruling his objection to the prosecutor's comment during closing argument.

After thanking jurors for not using excuses to avoid service and accepting their responsibilities as citizens, the prosecutor said, "But now, ladies and gentlemen, more importantly, it's time for this Defendant, Terrance Henry, to accept responsibility for his actions on the night of September the 26th of 2009." Appellant objected the comment was a direct reference to appellant's "not taking the stand" and violated his Fifth Amendment rights. The trial court overrule the objection.

The Texas Court of Criminal Appeals addressed this issue most recently in *Randolph v. State*, 353 S.W.3d 887 (Tex. Crim. App. 2011). There, the court explained that court's must view the State's argument from the jury's standpoint and resolve in ambiguities in the language in favor of it being a permissible argument. 353 S.W.3d at 891. Any implication that the State referred to the defendant's failure to testify "must be a clear and necessary one." *Id*. If the language might be reasonably construed as merely an implied or indirect allusion, there is no Fifth Amendment violation. *Id*. Thus, the test is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. *Id*. In applying this standard, we analyze the context in which the comment was made to determine whether the language used was of such a character. *Id*.

Here, we cannot conclude the prosecutor's argument was a direct comment on appellant's failure to testify. The statement was made at the beginning of the prosecutor's rebuttal to defense counsel's closing argument when he was thanking jurors for their service. After the objection, he went on to discuss the "credible evidence" that supported the State's contention that appellant shot and killed two men while dismissing appellant's alibi evidence. The statement did not suggest appellant should have testified nor would the jury necessarily and naturally take it as referring to appellant's choice to remain silent. We agree with the State: jurors would have understood the

statement merely to be asking them to hold appellant accountable and not allow him to escape the legal consequences for his conduct. Because we conclude the remark was not a direct comment on appellant's failure to testify, we overrule the seventh issue.

In his eighth issue, appellant contends the applicable punishment–a mandatory life sentence without the possibility of parole–violates his Eighth Amendment right to be free of cruel and unusual punishment, given that he was seventeen years old at the time of the offense.

Since the submission of this case, the United States Supreme Court has held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (June 25, 2012).

Here, the evidence showed appellant was seventeen years old at the time he committed the murders. Under the current statutory scheme, appellant's crime carries a mandatory minimum punishment of life without parole. *See* TEX. PENAL CODE ANN. § 12.31(b)(2) (West 2011). Because his punishment violates the Eighth Amendment, we resolve this issue in his favor. In a supplemental brief, the State concedes that the punishment imposed "cannot stand."

The State suggests this Court has the authority to "reform the sentence to delete the language 'without parole,' to give effect to the statute in place before the unconstitutional amendment occurred or because the 'without parole' language is a provision that effects only parole eligibility and the manner in which the sentence will be served." None of the authorities cited by the State, however, allows for a court to impose a sentence that has no statutory basis, as would be the circumstance in this case. And while the State's suggestion might well be the most expeditious solution, we cannot modify a sentence to impose one that is not statutorily authorized. Rather, only the Legislature can repair this gap in our statutes.

We affirm the trial court's judgment on guilt. We reverse the trial court's judgment as to punishment and remand the cause for a new punishment hearing.

MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TERRANCE HENRY, Appellant	Appeal from the 363rd Judicial District Court of Dallas County, Texas. (Tr.Ct.No. F09-59736-W).
No. 05-11-00676-CR V.	Opinion delivered by Justice Francis, Justices Bridges and Lang participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, we **AFFIRM** the judgment of guilt. We **REVERSE** the judgment as to punishment and **REMAND** the cause for further proceedings consistent with the opinion.

Judgment entered August 24, 2012.

/Molly Francis/
MOLLY FRANCIS
JUSTICE