In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-08-00509-CR

MICHAEL WAYNE CHARLES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court Jefferson County, Texas Trial Cause No. 97612

MEMORANDUM OPINION

A jury convicted Michael Wayne Charles of capital murder. *See* TEX. PEN. CODE ANN. §19.03(a)(2) (Vernon Supp. 2009). The State did not seek the death penalty. The trial court assessed the mandatory life sentence. *See* TEX. PEN. CODE ANN. § 12.31(a) (Vernon Supp. 2009).

Charles contends the trial court erred in refusing to conduct a hearing on the voluntariness of his statement to the investigating officer. He argues that the evidence is

¹Because section 19.03(a)(2), as applied to Charles, has not materially changed since the date of the offense, we cite to the current version of the statute.

legally and factually insufficient to support the finding of guilt. He also complains of error in the jury charge. We conclude he did not timely raise his challenge to the voluntariness of his statements, the evidence is sufficient to support the conviction, the unobjected-to jury charge error does not rise to the level of egregious error, and the defendant was not entitled to a lesser-included offense instruction. The trial court's judgment is affirmed.

THE EVIDENCE

Around 10 or 11 p.m. on November 2, 1995, Reba Richard arrived at a house in Vidor and asked her friend Douglas Roberts if he wanted to go with her to use crack cocaine at a motel in Vidor where she had rented a room. Roberts agreed, and he, Richard, and two others went to the motel room and used crack cocaine. When they had used all of the cocaine, Richard wanted to go to Beaumont to "score some more" cocaine from Bubba, a drug dealer. Richard had prescription pills she could trade for cocaine.

Roberts testified he and Richard left for Beaumont sometime after 1:30 a.m. The truck ran out of gas in Beaumont, and coasted down to the underpass at Magnolia. It was raining and Roberts tried to get Richard to stay in the truck while he walked to a pay phone to call a friend for help. Richard insisted on going with him.

As they were walking down the road, several men in a white car and a gray car approached them and started "hassling" them. A couple of the men forced Richard into the gray car, and the men drove off. Roberts testified Richard did not know them and,

when she was forced into the car, she was "scared to death." Roberts ran down the street to the pay phone, called 911, and reported what happened.

On November 3, 1995, Reba Richard was found dead, lying unclothed in a ditch in Beaumont. Police Department personnel made a cast of a tire impression from the mud close to where the body was located. The crime scene technicians took photographs and "bagged" Richard's hands to preserve DNA evidence under her fingernails and on her hands. Investigators collected a leather purse strap, Richard's wallet, a key to the motel, a prescription pill bottle, and other items that were located near her body.

Roberts later submitted a DNA sample and was excluded as a possible suspect in the murder of Richard. Although at trial Roberts identified Charles as one of the men that approached them, Roberts testified at an earlier deposition that he could not positively identify any of the men in the vehicles.

Dr. Charles Harvey, a forensic pathologist, performed the autopsy. Harvey noted that Richard had a "dramatic" amount of tissue swelling affecting her entire face. He documented thirteen separate injuries to her face. Harvey concluded that these bruises and abrasions were consistent with blunt force trauma caused by some sort of "crushing injury" like a punch to the face. Harvey stated that thirty-four of the thirty-six injuries to her body occurred within the twenty-four hours prior to her death. There were markings on her neck in a linear pattern consistent with consistently applied pressure from a flat object like a "strap or belt or purse strap[.]" The pattern of injuries underneath the neck

markings indicate there was a "really terrific amount of force that was applied." Harvey documented other wounds consistent with a person trying to defend herself. Harvey concluded the cause of death was ligature strangulation. Harvey prepared a sexual assault evidence collection kit, and it was submitted to the Jefferson County Crime Lab.

Larry Thomas, a detective sergeant with the Beaumont Police Department at the time, investigated the crime. Roberts was identified as a possible suspect because he was with Richard prior to her death. Thomas was present when a blood sample was taken from Roberts so that it could be compared to the sample contained in the rape kit collected from Richard's body. Thomas was also present when a blood sample was taken from another possible suspect. Thomas deposited both blood samples into the evidence locker in the police department property office.

John Dean was an investigator with the Beaumont Police Department on November 3, 1995, and was dispatched to the crime scene that morning. Dean was present when blood samples were taken of two other possible suspects. Dean deposited the blood samples with the D.P.S. DNA crime lab.

Lisa Harmon Baylor, a forensic scientist and serology DNA analyst, processed the sexual assault kit. She detected semen in the vaginal specimens from the kit. She extracted DNA from the semen, and extracted DNA samples from blood taken from six suspects, including Douglas Roberts. As a result of the DNA comparisons, each of these

individuals was excluded as contributing the semen on the vaginal specimen. No vehicle was ever matched with the cast of the tire tracks from the crime scene.

Kristi Wimsatt, a forensic scientist at the D.P.S. crime laboratory in Houston, testified regarding entering DNA samples into the CODIS DNA database. While working on another case in 2004, Wimsatt's attention was drawn to Richard's case, and she then entered the DNA sample taken from Richard into the database. The DNA database indicated a "hit" for Charles. Wimsatt sent a letter to the Beaumont Police Department notifying the department of the CODIS hit. Wimsatt was then provided DNA samples from Charles and Donald Ray Farris for comparison with the semen sample found in Richard. The DNA profile Wimsatt obtained from the rape kit from Richard was consistent with a mixture of both Richard and Charles.

In December 2005, Detective Richard Boaz with the Beaumont Police Department received a letter from the D.P.S. lab stating that Charles had been identified as a DNA match with the DNA sample collected from Richard's body. Boaz and Detective Tamayo obtained a search warrant authorizing collection of Charles's DNA. Boaz, Tamayo, and Sergeant Teddy Ratcliff met with Charles.

Boaz testified that they talked with Charles at the police station, and that he was not under arrest and was free to leave at any time. They introduced themselves, gave him Miranda warnings, and showed him a picture of Richard taken before her death. Charles stated that he recognized her as someone who came into the area where he sold drugs,

and that she would buy crack cocaine there. He admitted directing her to where she could buy crack, but said he never sold her drugs.

The detectives asked Charles if Richard traded sex for drugs, and Charles stated that she always bought drugs with money. He claimed he had never had sex with Richard. Charles also told the detectives that two detectives stopped him in 1995 because he was in a vehicle that matched the description of the vehicle that Richard was last seen getting into. He told the two detectives in 1995 that he did not know how Richard had been killed.

The detectives typed out Charles's first written statement, and after informing him that DNA evidence implicated him in the crime, took his second written statement. The statements were admitted into evidence. After the detectives at the police station told Charles they had a warrant for his DNA, Charles repeatedly stated, "Let the DNA do the talking[.]" Boaz informed Charles that the database identified him as a match. Charles's demeanor changed and then he said he neglected to mention that he had traded sex for crack with Richard the night before she was found dead.

In Charles's second statement, he said he had not been "completely truthful" in the first statement, and that he had sex with Richard the night Richard was murdered. He explained in his statement that around ten or eleven o'clock that night, "D-Ray" was driving him in a "grayish" four-door Oldsmobile Delta 88 around Magnolia. They saw Richard walking by herself down Magnolia by the underpass. They stopped and asked

her if she had money to buy drugs, and she said she did not have any money. Charles said he offered her crack cocaine in exchange for sex and she agreed. Charles told her to meet him at his uncle's house about a block away. Richard walked there alone. After they arrived at the house, Charles gave her a rock of crack cocaine and they had sex. About half an hour later, Charles left with "D-Ray," who had waited outside in the car. Richard stayed in the house with Charles's uncle, who died in 1996.

"D-Ray" and Charles "rode around" the rest of the night and sold drugs. The next day, while riding with Curtis Butcher, Charles found out that Richard had been murdered. A Beaumont police detective pulled them over and asked if they knew anything about Richard. Charles said he told the detective he "knew nothing about it." In the statement, Charles acknowledged that he did not tell the detective that he had been with her the night she was killed because Charles "did not want to be looked at in the wrong way because there were drugs involved." He also acknowledged voluntarily taking a polygraph test and that Officer Ratcliff had informed him that he failed the test. He stated that when he was told by Tamayo and Boaz that the DNA evidence had implicated him, he decided to tell them how his DNA was found in Richard. Boaz testified they located Donald Ray Farris, whose nickname is "D-Ray" and that they spoke with him.

Beaumont Police Detective Jesus Tamayo testified he was present when a DNA sample was taken from Charles. Tamayo transported the sample to the Jefferson County Crime Lab, and then the sample was shipped to the D.P.S. DNA lab.

Donald Ray Farris testified for the defense. He has known Charles since 1990 and they both sold drugs. He saw Charles at a club named "L.G." around eleven o'clock at night on November 2, 1995. He asked Charles if he wanted to go with him to obtain some marijuana, and Charles agreed. On the way to get marijuana, Farris drove his white Cadillac down Magnolia and went to a crack house. Farris and Charles went in, and Richard approached them and asked if they wanted to buy some Xanax pills. Farris did not know Richard. She said she needed gas for her truck to get back to Vidor. He bought the pills, including the pill bottle, and Charles and Farris left less than ten minutes later. That was the last time Farris saw Richard.

When they left, Charles rode with Farris. They stopped at a store and got soda to drink with the pills. They took the pills and smoked marijuana. Charles said he was not "feeling" the pills, so they went back to the store and got more soda. Farris drove down Gladys and by then, Charles had passed out. Farris dropped Charles off around one o'clock in the morning. Farris then went to "the weed house" on Magnolia, got "a sack of weed[,]" put the car in reverse, went into a ditch, and passed out.

When shown a picture of the crime scene, Farris testified the bottle of pills he purchased from Richard was bigger than the bottle next to her body at the crime scene. Farris stated it would have been impossible for Charles to have sex with Richard after eleven o'clock that night. Farris was excluded as a possible contributor to the semen sample.

Charles testified that the day before Richard died, he was selling drugs all day and that night at a club called "L.G.'s." "D-Ray[,]" who Charles identified at trial as "Donald Ray Farris[,]" came by L.G.'s about 10:30 that night and asked Charles if he wanted to go get "some grass." Charles agreed. Farris drove, and they saw Richard on Magnolia. Charles told Farris to pull over. Charles saw Roberts in the distance but did not see his vehicle. It was not raining and to the "best of [his] knowledge," Charles did not see another vehicle pull up while he was talking to Richard on Magnolia.

Charles asked Richard if she had any money. Richard said she had some pills. At some point, Richard told Charles their vehicle had run out of gas. Charles testified he asked if she wanted to trade sex for drugs, and Richard agreed. Charles told Richard to meet him at his uncle's house which was within walking distance. She walked to his uncle's house. Charles testified they had sex, he gave her drugs, and he left with Farris around eleven o'clock that night. Charles did not see Richard again. Charles stated he did not hit her or hurt her in any way.

Farris had Richard's pills, but Charles had not seen Richard trade her pills to Farris for either money or drugs. Charles and Farris went to the store and got soda to drink with the pills. Charles testified that "the pills hit [him,]" he passed out, and the only thing he remembers after that is that Farris was trying to wake him up and bring him into a house.

The next morning, Curtis Butcher picked up Charles. Police detectives stopped their vehicle. The detectives told them Butcher's car fit the description of the car in which Richard was last seen. The detectives asked Butcher where he had been the night before, ran their names, and then let them go. According to Charles, the detectives did not ask him if he knew Richard.

Charles stated that Farris was lying at trial when he said Charles and Richard did not have sex. Charles testified he and Farris did not go to a crack house that night. Charles explained that he remembers telling Detective Tamayo in December of 2005 that he did not know anything regarding Richard's death, and that Charles remembered Richard and "Rick" in a pickup truck trying to purchase crack cocaine from him. Charles told Tamayo that Charles did not have any crack cocaine and he sent them to someone who did. He remembers talking to Boaz and Tamayo and giving a statement in which he denied having sex with Richard and stated that Richard had never traded sex for drugs. Charles then talked to Ratcliff, and the detectives started talking about DNA. Charles told the detectives, "Let the DNA do the talking" even though he knew he was "bluffing." Once the detectives confronted him and told him that DNA evidence implicated him, he told them he wanted to change his story. He then told the detectives he had consensual sex with Richard for crack.

Curtis Butcher testified at trial that he had known Charles since 1992. He admitted he had seen Richard before but stated he did not know her. He had not seen her the night she was killed and was not aware of her death until the police pulled his vehicle over the next morning. Charles and two other men were in the vehicle. Butcher testified that he did not know anything about Richard's death and neither did the others in the vehicle.

CHARLES'S STATEMENTS

In his first issue, Charles argues the trial court erred in refusing to conduct a hearing on the voluntariness of his oral and written statements. If an issue of voluntariness is raised, Article 38.22, section 6 of the Texas Code of Criminal Procedure requires the trial judge to make an independent determination in a hearing outside the presence of the jury that the statement was voluntarily made. Tex. Code Crim. Proc. Ann. art. 38.22, § 6 (Vernon 2005); *Oursbourn v. State*, 259 S.W.3d 159, 175 (Tex. Crim. App. 2008); *Page v. State*, 614 S.W.2d 819, 820-21 (Tex. Crim. App. 1981). As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1 (s)(1)(A).

Charles did not file a pretrial motion to suppress the statements, and his objections challenging the voluntariness of his statements were not timely. *See id.* Boaz had earlier testified that when Charles talked to Boaz, Tamayo, and Ratcliff, Charles was free to leave and was not under arrest. Boaz testified that they showed Charles a picture of

Richard and he stated he recognized her as someone that used to buy drugs in the area. Boaz testified that Charles stated he had never known Richard to trade drugs for sex with Richard and that he denied having sex with Richard. After the detectives mentioned DNA, Charles responded, "[1]et the DNA do the talking." Boaz then explained that once the detectives informed Charles of the results from the DNA database, Charles stated, "I want to change my story[,]" and then stated he traded sex for crack with Richard the night before her death.

Charles then objected to the voluntariness of the statements. His counsel said, "Your Honor, I'm going to have to object to any more of this confession. He didn't voluntarily give it then and is not voluntarily giving it now." The record reflects testimony had already been presented regarding the substance of Charles's statements at the time counsel objected. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Walsh v. State*, 658 S.W.2d 285, 288-89 (Tex. App.--Fort Worth 1983, no pet.) (objection untimely and insufficient to raise the issue of voluntariness when record reflects testimony regarding the substance of the statement had previously been presented without objection). Issue one is overruled.

SUFFICIENCY OF THE EVIDENCE

In his second, third, and fourth issues, Charles maintains the evidence is legally and factually insufficient to support the conviction, and that the trial court erred in denying his motion for an instructed verdict. Appellate courts treat an issue challenging the denial of a motion for instructed verdict as a challenge to the legal sufficiency of the

evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). We address issues two, three, and four together.

In a legal sufficiency review, an appellate court considers all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). Under the *Jackson* standard, the reviewing court gives full deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Id. In a factual sufficiency review, the appellate court must consider the evidence in a neutral light and determine whether the evidence supporting the verdict, though legally sufficient, is nevertheless so weak, or the verdict is so against the great weight and preponderance of conflicting evidence, as to render the jury's verdict clearly wrong and manifestly unjust. Gamboa v. State, 296 S.W.3d 574, 579 (Tex. Crim. App. 2009). Even though a factual sufficiency review permits an appellate court, to a very limited degree, to act as a "thirteenth juror," the reviewing court must nonetheless give the jury's verdict a great degree of deference. Steadman v. State, 280 S.W.3d 242, 246 (Tex. Crim. App. 2009).

The jury determines the credibility of the witnesses, and weight to be given testimony. *Cain v. State*, 958 S.W.2d 404, 408-10 (Tex. Crim App. 1997). The

eyewitness testimony from Roberts, the testimony from Charles and the witnesses testifying on his behalf, the evidence from the crime scene, and Charles's statements were all factors for the jury to consider in weighing the evidence. The jury heard Roberts's description of the events the night before Richard was found dead, the DNA evidence, Richard's injuries, Charles's denial of having sex with Richard until confronted with the DNA evidence, and the inconsistent testimony regarding Charles's whereabouts that night. A rational trier of fact could find the essential elements of the offense beyond a reasonable doubt. Viewed in a neutral light, the evidence is not so weak that the verdict is clearly wrong and unjust; the great weight and preponderance of the evidence does not contradict the jury's verdict. The evidence is legally and factually sufficient to support Charles's conviction for capital murder. We overrule issues two, three, and four.

THE JURY CHARGE

Charles contends in his fifth issue that the trial court committed fundamental error by charging the jury that it could convict him of murder by finding that he acted intentionally or knowingly with regard to the conduct that ultimately led to the death of the complaining witness. In his sixth issue, Charles argues the trial court abused its discretion in overruling his objection to the jury charge.

In defining "intentionally," the jury charge stated, "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." Charles

argues the trial court committed error by informing the jury that it could convict Charles if it finds he acted intentionally or knowingly regarding the conduct that led to the result, rather than the result itself. He maintains that the type of murder alleged in this case is a conduct offense, meaning the culpable mental state relates to the causing of the death. *See Roberts v. State*, 273 S.W.3d 322, 328-29 (Tex. Crim. App. 2008). Charles claims that the trial court charged the jury that a person commits capital murder by committing murder while committing or attempting to commit aggravated sexual assault.

We review claims of jury charge error under a two-pronged test. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)(op. on reh'g); *see also Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). We first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, we then evaluate the harm caused by the error. *Id.* The degree of harm required for reversal depends on whether the appellant preserved the error in the trial court. *Id.* When error is not preserved by a timely objection in the trial court, an unobjected-to charge requires reversal only if it resulted in "egregious harm." *Id.* at 743-44; *Almanza*, 686 S.W.2d at 171.

The State concedes the trial court committed error in the abstract portion of the charge. Charles did not object to the charge on the basis asserted in this appeal. Therefore, we review the error for "egregious harm." *See Almanza*, 686 S.W.2d at 171. If an appellant alleges that harm resulted from including "improper conduct elements in the

definitions of culpable mental states," we must review the charge's application paragraphs and consider whether they placed limitations on those definitions. *Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994) (citing *Cook v. State*, 884 S.W.2d 485, 492 n.6 (Tex. Crim. App. 1994)).

The trial court properly limited the definitions in the application paragraph. The application paragraph of the jury charge instructed the jury as follows:

Now, if you believe from the evidence beyond a reasonable doubt that in Jefferson County, Texas, that on or about the 3rd day of November, Nineteen Hundred and Ninety-Five, and anterior to the presentment of this indictment, in the County of Jefferson and State of Texas, the defendant Michael Wayne Charles, did then and there intentionally cause the death of an individual, namely REBA RICHARD, by strangulation, and the Defendant was then and there in the course of committing or attempting to commit the offense of Aggravated Sexual Assault of REBA RICHARD, then you shall find the defendant GUILTY of Capital Murder, as alleged in the indictment.

The application paragraph instructed the jury that it could only convict Charles of capital murder if the jury found that he intentionally caused Richard's death. The Court of Criminal Appeals has held that the trial court's failure to limit a definition in the abstract portion of the charge when it is properly limited in the application portion does not rise to the level of egregious error. *See id.* Issue five is overruled.

In his sixth issue, Charles maintains the trial court abused its discretion in overruling an objection to the jury charge. Charles requested a jury charge that included an instruction on the lesser-included charge of aggravated sexual assault. The trial court denied the request.

In determining if the jury should be charged on a lesser-included offense, an appellate court applies a two-pronged test. See Salinas v. State, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). "A charge on the lesser-included offense should be given when (1) the lesser-included offense is included within the proof necessary to establish the offense charged; and (2) there is some evidence that would permit a rational jury to find that the defendant is guilty of the lesser offense but not guilty of the greater." Id. "An offense is a lesser included offense if . . . it is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (Vernon 2006). When the greater offense may be committed in more than one manner, the manner alleged will determine the availability of lesser-included offenses. Hall v. State, 225 S.W.3d 524, 535-537 (Tex. Crim. App. 2007) (holding that the "cognate pleadings approach" is the sole test for determining in the first step whether a party may be entitled to a lesser-included-offense instruction). Charles argues aggravated sexual assault is a lesser-included offense of capital murder because the indictment charged Charles with capital murder and alleged he intentionally caused her death in the course of committing aggravated sexual assault of Richard, and aggravated sexual assault is one of the manners in which capital murder may be committed. See TEX. PEN. CODE ANN. 19.03(a)(2); see also TEX. CODE CRIM. PROC. ANN. art. 37.09(1).

However, to meet the second prong of the test, there must be some evidence that would permit a rational jury to acquit Charles of the greater offense while convicting him of the lesser-included offense. *See Salinas*, 163 S.W.3d at 741. In making this determination, we must review all the evidence presented at trial. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). The evidence must establish the lesser-included offense as "a valid, rational alternative to the charged offense." *Hall*, 225 S.W.3d at 536 (quoting *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999)). "[I]t is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted." *Bignall*, 887 S.W.2d. at 24.

On appeal, Charles states that although the DNA evidence presented by the State could support a guilty verdict on an aggravated sexual assault charge, "[n]othing else even remotely tied Appellant to the death of the victim." Appellant states that "it is obvious that evidence existed that appellant was not guilty of the charged offense, but, if at all, only of a lesser included offense." He argues that notes sent to the Court by the jury indicating that they were "'at an impass' (sic) and asking the results of being a hung jury" show that no evidence tied Charles to Richard's death.

"If a defendant either presents evidence that he committed no offense or presents no evidence, and there is no evidence otherwise showing he is guilty only of a lesser included offense, then a charge on a lesser included offense is not required." *Id.* (quoting *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) (citations and emphasis omitted)). Charles denied that he committed aggravated sexual assault and capital murder, but claimed he had consensual sex with Richard the night before she was found dead. No evidence in the record showed that if Charles was guilty, he was guilty of aggravated sexual assault only. *See id.* The offense of aggravated sexual assault does not constitute a valid, rational alternative to the charged offense. *See Hall*, 225 S.W.3d at 536; *see also Segundo v. State*, 270 S.W.3d 79, 91 (Tex. Crim. App. 2008). Charles was not entitled to an instruction on the lesser-included offense of aggravated sexual assault. *See Segundo*, 270 S.W.3d at 91; *Hall*, 225 S.W.3d at 536; *Bignall*, 887 S.W.2d at 24. Issue six is overruled. The judgment is affirmed.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on July 7, 2010 Opinion Delivered September 15, 2010 Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.