In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00363-CR

KAJLON JAMAAL CARROLL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 40th District Court
Ellis County, Texas
Trial Court No. 38911CR; Honorable Bob Carroll, Presiding

September 19, 2017

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Following a plea of not guilty, Appellant, Kajlon Jamaal Carroll, was convicted by a jury of capital murder and sentenced to life without parole.[1] Presenting two issues, he contends (1) the evidence is insufficient to prove beyond a reasonable doubt that he

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[1] TEX. PENAL CODE ANN. §§ 19.03(a)(2), 12.31(a)(2) (West Supp. 2016).

caused the victim's death during the course of committing or attempting to commit robbery[2] and (2) the trial court erred in overruling his Rule 403 objection to the introduction of a photograph of the victim's "lifeless body lying in a pool of blood during opening statements." We affirm.[3]

BACKGROUND

During the afternoon hours of August 4, 2009, two young men went inside a pawn shop in the Dallas area and discovered a body on the floor behind the counter. The victim was later identified as the pawn shop owner. The young men called 911 at approximately 2:41 p.m. and police officers began arriving at the scene.

The victim was found lying face down on the floor just underneath the location of the cash register on the counter. He had been shot numerous times. Impressions from a shoe had been left on the back of his shirt. While securing the scene, officers found a white Nike cap with fresh blood on it in a back room of the pawn shop not accessible to customers.

A pawn shop employee testified that the store's surveillance equipment had been stolen as well as a Dell computer and scales used to weigh gold. He also testified that

[2] After Appellant filed his original brief, he submitted a letter brief relying on the consolidated opinion by the Court of Criminal Appeals in *Walker v. State*, Nos. PD-1429-14 and PD-1430-14, 2016 Tex. Crim. App. Unpub. LEXIS 973 (Tex. Crim. App. Oct. 19, 2016), in support of his legal insufficiency of the evidence argument.

[3] Originally appealed to the Tenth Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Tenth Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3

the cash register, which typically contained between $1,500 and $2,000, was empty. Coins were strewn on and around the victim's body.

Despite posted flyers requesting information about the murder, the investigation continued for four years without producing a substantive lead. Then, in November 2013, one of Appellant's co-workers overhead Appellant telling another co-worker that he had robbed the pawn shop and killed the pawn shop owner. Several days later, the co-worker who overheard the conversation reported the incident to the police and the focus of the investigation shifted to Appellant as the suspect.

Appellant was interviewed by detectives on two separate occasions (December 30, 2013, and January 14, 2014). His demeanor was non-confrontational during the first interview. He admitted doing business at the pawn shop various times, including on the day the owner was killed when he attempted to pawn an air compressor. He denied committing the crime, and when asked, he voluntarily gave a DNA sample to be tested against the blood found on the Nike cap. DNA results were made available on January 8, 2014, which showed that Appellant could not be excluded as a donor of the blood.

Based on the DNA results, Appellant was interviewed a second time. He provided a written statement in which he theorized that if his blood was found on the cap, it must have been transferred there when he attempted to pawn the air compressor. The cap, however, was found in the back storage area of the pawn shop that was not accessible to him unless he jumped over the counter. After the second interview, a search warrant was obtained for Appellant's residence where officers recovered numerous pairs of tennis shoes to test against the shoe impressions left on

the victim's shirt. Forensic testing showed that one pair of shoes could not be excluded as a source of the impressions left on the victim's shirt. Appellant was arrested and indicted for capital murder.[4]

APPLICABLE LAW

A person commits capital murder if he intentionally causes the death of an individual in the course of committing or attempting to commit robbery. TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2016). One manner of committing robbery is if, in the course of committing theft, a person intentionally, knowingly, or recklessly causes bodily injury to another. *Id.* at § 29.02(a)(1) (West 2011). Theft is defined as unlawfully appropriating property with the intent to deprive the owner of the property. *Id.* at § 31.03(a) (West Supp. 2016).

STANDARD OF REVIEW—SUFFICIENCY OF THE EVIDENCE

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support a conviction is the standard set forth in *Jackson v. Virginia*, 443 U. S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Brooks v. State,* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). When examining the sufficiency of the evidence, appellate courts view the evidence in the light most favorable to the verdict. This requires the reviewing court to defer to the jury as the sole judge of the credibility of witnesses and the weight to be given their testimony, giving "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."

[4] We note the indictment incorrectly included "knowingly" as a *mens rea* but the court's charge correctly excluded it. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2016).

Jackson, 443 U.S. at 319. A reviewing court must therefore determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007)). This standard applies equally to circumstantial and direct evidence. *Laster v. State*, 275 S.W.3d 512, 517-18 (Tex. Crim. App. 2009).

When the record supports conflicting inferences, a reviewing court must presume that the fact finder resolved the conflicts in favor of the verdict and defer to that determination. *See Jackson*, 443 U.S. at 326; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). After applying this analysis, if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, then the evidence is sufficient. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 895.

ISSUE ONE

Relying on *Walker v. State*, Nos. 14-1429-14 and 14-1430-14, 2016 Tex. Crim. App. Unpub. LEXIS 973 (Tex. Crim. App. Oct. 19, 2016), and *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010), Appellant directs this court to the circumstantial evidence presented by the State and concludes it is a "fabric of speculation and conjecture" that resulted in an irrational jury verdict. He adds that the property missing from the pawn shop without more to link him to it renders the evidence insufficient to support the robbery element of capital murder. We agree with Appellant that his conviction is based on circumstantial evidence; however, we assay that evidence in the light most favorable to the jury's verdict and disagree with him that the jury's verdict was irrational. We also disagree with his conclusion that the cumulative force of the

circumstantial evidence is not legally sufficient to support all the elements of capital murder. *See Temple*, 390 S.W.3d at 359-60 (noting that "[i]n a circumstantial evidence case, it is not necessary that every fact point directly to the accused's guilt"). *See also McAfee v. State*, No. 10-04-00141-CR, 2006 Tex. App. LEXIS 3354, at *2-3 (Tex. App.—Waco April 26, 2006, pet. ref'd) (mem. op., not designated for publication) (affirming an aggravated robbery conviction despite lack of direct evidence and lack of a link between the defendant and the stolen property).

Testimony from several witnesses established an approximate time of death of the pawn shop owner to be between 2:30 p.m. and 2:41 p.m., the time the crime was reported. Appellant admitted he had been at the pawn shop on the day of the offense trying to pawn an air compressor but the owner had no need for it that day. Witnesses testified they had observed a man dressed in a white painter's suit rolling an air compressor from a Silver Lexus SUV in the parking lot. Evidence also established that Appellant's mother owned a vehicle matching that description.

One of the witnesses testified that she visited the pawn shop at 2:30 p.m. on the day of the crime. She proceeded through an open gate and encountered a second gate that was closed. The witness announced her presence and someone wearing a clean, white painter's suit with a hoodie and with only his face visible came to the door to inform her that the owner was not on site and he was painting inside. She described him as a light-skinned black male in his twenties,[5] similar to the description of Appellant testified to by one of the detectives.

[5] At the time of the offense in 2009, Appellant was eighteen years old.

Furthermore, DNA results showed that Appellant could not be excluded as the donor of the blood on the Nike cap found in the back area of the pawn shop.[6] More specifically, the DNA expert testified that the chance of the blood not being Appellant's was one in sixty-six quintillion (eighteen zeros). A forensic scientist testified that he tested a pair of shoes found under Appellant's bed and concluded they could not be excluded as the source of the impressions on the back of the victim's shirt.

A firearms expert testified that the bullets from the victim and the shell casings from the crime scene came from a Hi-Point .45 caliber pistol. Appellant told detectives he owned several guns but claimed he did not own a .45 caliber. A murder weapon was not recovered and no weapon was introduced into evidence.

A former high school classmate of Appellant's gave police a written statement in 2014 that Appellant was "the number one guy on the pawn shop heist." During his testimony, however, he claimed the statement was false. His statement was admitted into evidence under Rule 613 of the Texas Rules of Evidence over a hearsay objection.[7]

One of Appellant's former co-workers who carpooled with Appellant testified that Appellant told him he shot the "old man" at the pawn shop. The other former co-worker who overheard that conversation and who later reported the conversation to police testified he overheard Appellant say, "I'm the one that shot his ass." He testified the statement adversely affected him and he called in sick for days before deciding to report

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[6] A DNA test was also conducted on samples from inside the headband of the cap which showed that the major profile belonged to the victim and the minor profile was Appellant's.

[7] Rule 613 allows admission of evidence of a witness's prior inconsistent statement.

what he heard. He did receive a $1,000 Crime Stopper's reward which Appellant contends was the motivation for reporting him to the police.[8]

Based on the facts presented and reasonable inferences that could be drawn from that evidence, we cannot say the jury reached an irrational verdict. Viewing the circumstantial evidence under the appropriate standard of review, we conclude the State established beyond a reasonable doubt that Appellant intentionally caused the pawn shop owner's death while committing robbery. Issue one is overruled.

ISSUE TWO

By his second issue, Appellant maintains the trial court erred in overruling his Rule 403 objection to use a photograph of the victim's "lifeless body lying in a pool of blood during opening statements." Rule 403 of the Texas Rules of Evidence provides that "[t]he court may exclude relevant evidence if the probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403.

The admissibility of photographic evidence is within the sound discretion of the trial court. *Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App. 2009). We review a trial court's ruling on admission of a photograph for abuse of discretion. *Id.* A trial court abuses its discretion when its ruling falls outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1991) (op. on reh'g).

[8] The former co-worker who reported Appellant to the police testified his life had been ruined since coming forward. He lost his job, family, and home. His motivation for turning in Appellant was not the reward; rather, his humanity motivated him.

In the underlying case, prior to opening statements and outside the jury's presence, the trial court held a hearing to determine the admissibility of certain photographs. One of those photographs, State's Exhibit Number 56, depicted the victim lying face down in a pool of blood. When the trial court asked for any challenges, defense counsel objected on the ground that the photo was "gruesome" and therefore of a "prejudicial nature." The prosecutor responded that the photograph was "the least gruesome" of any of the crime scene photos and added that is "coming into evidence" and "this is the time to talk about it and show it." The trial court allowed the photograph to be used during the State's opening statement.

Citing to article 36.01(a)(3) of the Texas Code of Criminal Procedure[9] and *Fisher v. State*, 220 S.W.3d 599, 603 (Tex. App.—Texarkana 2007, no pet.), Appellant argues that the purpose of an opening statement is to communicate to the jury the party's theory of the case in order to help the jury evaluate the evidence as it is being presented. The *Fisher* court, confronted by a case of first impression, pondered whether an opening statement is limited to words alone or whether a party may resort to the use of visual aids. The court found that allowing photographs during opening statements may place matters before the jury without a determination of their admissibility and concluded the trial court had erred in doing so. *Id.* Nevertheless, the court found the error harmless because the photographs were ultimately admitted into evidence. *Id.* at 604.

[9] Article 36.01(a)(3) provides, "[t]he State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof." TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(3) (West 2007).

Although the State denies that the trial court abused its discretion in admitting the photograph during opening arguments, it contends that if error occurred, it was harmless. Therefore, assuming *arguendo* that the trial court abused its discretion in permitting a photograph of the victim to be used during the State's opening statement, we are required to conduct a harm analysis.

HARM ANALYSIS

We apply the test for non-constitutional error found in Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). Such errors are harmful only if they affect substantial rights. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). An error is harmless if an appellate court has "fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect." *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). However, "if the reviewing court has a 'grave doubt' that the result was free from the substantial influence of the error, it must treat the error as if it did." *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002). Stated another way, "in cases of grave doubt as to harmlessness the [appellant] must win." *Id.* at 637-38.

The State offered numerous photographs into evidence while the lead detective was testifying, including Exhibit Number 56, which was the photograph used during opening statements. When the prosecutor asked for the photographs to be admitted, defense counsel stated, "[d]efendant doesn't have any objection." The trial court then admitted the photographs, including Exhibit Number 56, into evidence.

An appellant does not suffer harm by the use of photographs during opening statements when those photographs are ultimately admitted into evidence during trial. *Fisher*, 220 S.W.3d at 603. Moreover, in the underlying case, defense counsel stated he had no objection to admission of the photograph used during opening statements, which was the least gruesome of all the photographs. We conclude that Appellant's substantial rights were not violated by the trial court's decision to allow a photograph of the victim to be used by the State during its opening statement. Issue two is overruled.

Conclusion

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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