In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00130-CR

JAVONTE DAMONE SANDERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 71st District Court
Harrison County, Texas
Trial Court No. 14-0374X

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Multiple shots were fired at a crowded party at a house in Marshall where a dice game in the kitchen had become heated. In the aftermath, tragically, Wesley Blackmon lay dead; Tommy Jones and Kasey Jones suffered gunshot wounds.[1] In a single jury trial, Javonte Damone Sanders was convicted of murder and two counts of aggravated assault from these events, each alleged in separate indictments and memorialized in three separate judgments. On appeal, Sanders complains of the denial of his mid-trial motion for continuance, a suggestive identification, and the sufficiency of the evidence regarding the aggravated assault convictions. We affirm the three judgments of the trial court, because (1) denying Sanders a continuance mid-trial was within the trial court's discretion, (2) error regarding the suggestive identification was not preserved, and (3) sufficient evidence supported Sanders' convictions for both aggravated assaults.

(1) Denying Sanders a Continuance Mid-Trial Was Within the Trial Court's Discretion

Sanders complains of the trial court's denial of Sanders' request, mid-trial, for a continuance and the court's denial of his post-trial motion for new trial.[2] Because the trial court did not abuse its discretion with either of these decisions, we overrule this issue.

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[1]The party, called a "kickback," was packed. In the kitchen, a dice game was in progress, with Sanders participating. An argument seems to have developed from this game, and Sanders shot and killed Blackmon, who had been a Wiley College basketball player. Several shots were fired, and Tommy Jones was shot at least twice, in the buttocks and left calf. A stray bullet fragment also hit Blackmon's girlfriend, Kasey Jones, apparently no relation to Tommy. While the record contains conflicting evidence of whether one or two guns were on the scene and the color of the gun used in the shooting, there is no suggestion that there was anyone shooting other than Sanders.

[2]The title of his point of error claims that the trial court abused its discretion in denying the continuance and in overruling Sanders' motion for a new trial. Again, for ease of analysis, these two complaints would be better argued in two distinct points of error. However, Sanders offers no briefing specific to his new trial claim. While he makes passing assertions that he should have been given a new trial, all of his briefing is in the context of addressing the denied continuance. To the extent Sanders raises a point of error alleging abuse of discretion in the denied new trial, we overrule it as insufficiently briefed. *See* TEX. R. APP. P. 38.1(i).

A day or so after trial had commenced, the State discovered that DNA analysis had, in fact, been completed on certain evidentiary items which, to that point, the State did not believe had been tested. The tested items included bullet fragments and blood stains, which had been submitted to the Texas Department of Public Safety (DPS) crime laboratory, but on which no report had been received before trial. The prosecutor's office contacted the crime laboratory, which relayed by telephone and by e-mail the results of those DNA tests. The crime lab reported that blood stains throughout the house were consistent with the DNA profile of the male victims—some consistent with Tommy's blood and some with Blackmon's—and that two bullet fragments bore stains consistent with Tommy's DNA. The State promptly notified Sanders' attorneys, and the matter was brought to the trial court's attention. In the course of discussing the situation, Sanders asked the court for a continuance to allow him to investigate the newly discovered DNA report.

We review a trial court's decision to deny a requested continuance for an abuse of discretion. *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996).[3] A trial court has discretion to grant a continuance once trial has begun where the party seeking the continuance can satisfy the trial court "that a fair trial cannot be had" because of "some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated." TEX. CODE CRIM. PROC. ANN. art. 29.13.

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[3]Sanders' request for a continuance was made during trial. Article 29.13 of the Texas Code of Criminal Procedure addresses mid-trial requests for continuance. *See* TEX. CODE CRIM. PROC. ANN. art. 29.13 (West 2006). Rulings on motions for continuance made after trial has begun are reviewed for an abuse of discretion. *Vasquez v. State*, 67 S.W.3d 229, 240 (Tex. Crim. App. 2002) (defense asked for continuance after voir dire).

Sanders argued to the trial court that the newly discovered DNA test results unfairly surprised him. He had based his trial strategy at least in part on pointing out that DNA evidence had been collected, but never analyzed.[4] However, counsel also acknowledged that this newfound evidence was potentially mitigating, as it did not contain Sanders' DNA. He complained, though, that the defense did not have the proper witnesses present to discuss this evidence. At no time, however, did Sanders ask the trial court for subpoenas for the DPS laboratory witnesses responsible for the newly discovered tests and report.[5]

The trial court told Sanders that he could decide whether to have the evidence excluded or admitted and that he could also tell the jury that the reports had only just been made known to the defense. The State may have been just as surprised as Sanders to discover that the items at issue had in fact been subjected to testing, since the State did not oppose Sanders' request for a continuance. However, the defense knew, to some extent at least, that the items in question had been provided to the DPS laboratory. As said, part of the defensive opening argument impugned the State's upcoming case by telling the jury the State failed to have certain evidentiary items submitted to DNA analysis. On the first day of testimony, while cross-examining Sergeant Sarah Hodges, the defense gained admission into evidence of Hodges' evidence submission form, documenting Hodges submission of various evidentiary items to the DPS crime laboratory.

[4]In his opening argument, Sanders told the jury they would be presented evidence that "DNA was collected . . . . that was never sent off for analysis."

[5]Introduced into evidence was a handwritten note, presumably made by one of the prosecutors who initially made the discovery that the rogue items had been tested, listing DPS laboratory personnel and their respective functions in the testing process, as well as an email from the DPS laboratory supervisor to one of the prosecutors summarizing the testing results.

Included on this log sheet appear to be the items subsequently discovered to have been tested. From these circumstances, we find that the trial court was within its discretion in considering whether, through reasonable diligence, the defense could have anticipated the late-discovered DNA testing results. *See* TEX. CODE CRIM. PROC. ANN. art. 29.13.

Further, within the court's discretion was whether or not Sanders could still get a fair trial or, in the words of the statute, whether Sanders was "so taken by surprise that a fair trial [could not] be had." *Id.* We cannot say that a fair trial was unattainable in these circumstances. While the late production of the DNA results did undercut part of Sanders' defensive strategy of impeaching the thoroughness of the investigation, that was only a part of the defense. The results did not foreclose the defensive theory that there was a different shooter, but simply confirmed that Blackmon and Tommy had been shot, as their DNA was found in the blood stains on the walls and Tommy's DNA was on two of the bullet fragments. Nothing in the tardy discovery of the DNA results prevented Sanders from presenting his defense. Finally, Sanders has not demonstrated that he was actually prejudiced by the denial of the continuance. *See Heiselbetz v. State*, 906 S.W.2d 500, 511 (Tex. Crim. App. 1995) (appellant must show actual prejudice to show abuse of discretion in court's denial of continuance).

Finding no abuse of discretion in the trial court's denial of Sanders' request for a continuance, we overrule this point of error.

(2) Error Regarding the Suggestive Identification Was Not Preserved

Sanders complains of an arguably suggestive identification procedure, in which Kasey, the second victim of aggravated assault, identified Sanders as the shooter. In interviews with police

immediately after the shooting at the party, Kasey said that she could not identify the shooter, but that her recollection of his face was blurry. However, the day of voir dire, one of the prosecutors brought Kasey into the courtroom to "look" at Sanders, after which viewing Kasey identified him as the shooter.

We do not reach the merits of this claim, because Sanders did not preserve it for our review. "[P]reservation of error is systemic" and required for an appellate court to review a point of error. *Archie v. State*, 221 S.W.3d 695, 698 (Tex. Crim. App. 2007). "In order to preserve alleged error for appellate review, a party must make a timely objection to the trial court or make some request or motion apprising the trial court what the party seeks . . . thereby giving the trial court an opportunity to remedy any purported error." *Dollins v. State*, 460 S.W.3d 696, 698 (Tex. App.—Texarkana 2015, no pet.); *see* TEX. R. APP. P. 33.1(a). "Failure to properly object and preserve a complaint waives any appellate review of the matter." *Dollins*, 460 S.W.3d at 698; *see also Vidaurri v. State*, 49 S.W.3d 880, 885–86 (Tex. Crim. App. 2001). Posing a specific objection is not enough; the objecting party must "obtain a ruling on the objection." *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

Under direct examination by the State, Kasey said she saw "the boy shoot Wes in the head and run out the backdoor." She said she "just remember[ed] [the shooter] to be short and had white on, on his shirt." She then identified Sanders as the young man who had shot Wesley. When interviewed immediately after the shooting, though, Kasey had not been able to identify the shooter because "[h]is face was blurry." After identifying Sanders at trial, she said she had recognized him a few days before, when the State brought Kasey into the courtroom during voir dire so Kasey

could "look at" Sanders. At that point, Kasey said she "recognized [Sanders] plain as day." When Sanders became aware of this method of identification, he objected, "We've just heard evidence of an independent observation where -- getting her to identify the defendant." The court told Sanders, "[A]t this point you've got something you can cross-examine on . . . . I don't know what the objection was."[6]

Sanders then agreed that he would "just cross-examine." He used Kasey's video-recorded interview with Detective Patrick Clayton to impeach her in-court identification and to show that, immediately after the crime, she could not identify the perpetrator. No attempt was made to clearly state the reason for his objection; he did not ask the court to exclude Kasey's identification or to instruct the jury to disregard it. Finally, and fatal to this point of error, Sanders did not get a ruling

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[6]The entire exchange was as follows:

> [Defense counsel]: We've just heard evidence of an independent observation where -- getting her to identify the defendant.
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> THE COURT: That's not what she's testified to.
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> [Defense counsel]: She came into court and identified the defendant.
>
> THE COURT: No. She said she looked at him. That's what she said. You know, at this point you've got something you can cross-examine on, [Counsel]. I don't know what the objection was.
>
> [Defense counsel]: All right. I'll just cross-examine.

The trial court was correct. Kasey said she looked at Sanders, but right before that, she also identified Sanders as the shooter. Sanders was clearly aware that, prior to her in-court identification, Kasey had not identified Sanders as the suspect; Sanders used a video interview of Kasey from the night of, or the day after, the party to impeach her in-court identification with evidence that, until then, she had not been able to identify a suspect. All of this is moot, though, because of Sanders' failure to more clearly articulate his complaint and secure a ruling and his acceptance of the trial court's suggested remedy of simply cross-examining the witness.

from the trial court on his complaint. By agreeing to be satisfied with cross-examination, he waived any complaint about the in-court identification. We overrule this point of error.

(3) Sufficient Evidence Supported Sanders' Convictions for both Aggravated Assaults

Sanders complains that the evidence at trial was not sufficient to prove he committed aggravated assault on Tommy or on Kasey. We disagree and overrule this point of error.[7]

Sanders asserts that insufficient evidence proves Tommy[8] was even in the kitchen where the attacks occurred; thus, the State could not have proved that Sanders assaulted Tommy. There was no requirement, however, that the State prove in what room Tommy was shot, and the record belies Sanders' argument.

There is at least some evidence that Tommy was in the kitchen when he was shot by Sanders, but his location is not an element of the offense.[9] The indictment charged Sanders with "intentionally, knowingly, and recklessly caus[ing] bodily injury to Tommy Jones, by shooting him with a firearm," and "us[ing] or exhibit[ing] a deadly weapon[,] . . . a firearm, during the commission of said assault." The State's burden was to prove beyond a reasonable doubt that Sanders shot Tommy.[10] Also, "[j]uries are permitted to make reasonable inferences from the

[7]Respectfully, we point out that this is not the most efficient or preferred method to present such appellate complaints. Strictly speaking, Sanders should raise these points in separate points of error, lest he risk having his singular point of error dismissed as multifarious. *See Harris v. State*, 133 S.W.3d 760, 764 n.3 (Tex. App.—Texarkana 2004, pet. ref'd). In the interest of justice, we address Sanders' sufficiency point as to each alleged assault victim.

[8]Tommy was not allowed to testify at trial after the trial court found that Tommy had violated the court's ruling that witnesses must not be present in the courtroom during other witnesses' testimony. Tommy stayed in the courtroom for the testimony of at least one of the State's law enforcement witnesses despite being told multiple times by the State's victim's coordinator to leave.

[9]*Cf.* TEX. PENAL CODE ANN. § 22.02(a) (West 2011).

[10]Sanders does not challenge the other aggravated assault elements.

evidence presented at trial, and circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor." *Hooper v. State*, 214 S.W.3d 9, 14–15 (Tex. Crim. App. 2007).

While the record contains no testimony that Tommy was present in the kitchen when Sanders opened fire and killed Blackmon,[11] there was significant evidence that Tommy was shot during the attack. First, Sergeant Sarah Hodges photographed the victims at the hospital. In describing some of her photographs, Hodges identified Tommy and Blackmon as the two shooting victims that she photographed at the hospital. Hodges testified that she had been called to the hospital to photograph victims while another officer responded to the house on Bishop. Hodges later went to the house and photographed the scene. One of Hodges' photos, State's Exhibit 12, shows a man in a hospital bed with an open wound in his left calf. Hodges identified this man as Tommy. There are two close-up photos of Tommy's calf injury. Hodges said Tommy was shot in the leg, and a bullet fragment was later introduced into evidence. That fragment, testified Hodges, was removed from Tommy's leg during surgery.[12] The emergency room physician who treated Blackmon also identified Tommy as the person brought in with Blackmon, both of whom presented with gunshot wounds. Tommy's medical records from his emergency room treatment were admitted into evidence.

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[11]Kasey said in her video-recorded interview with law enforcement that Tommy was shot around the time Sanders fired multiple shots at Blackmon.

[12]Although not directly pertinent to any of Sanders' points of error, the fragment from Jones' leg had "yellow pieces." In the room where Sanders stayed was found a bag of .45 caliber bullets with yellow plastic tips. The DPS serologist described the fragments recovered from Jones' leg as "a copper jacket fragment with yellow plastic fragment."

While this is circumstantial evidence that Tommy had been at the house where he and Blackmon were shot, testimony and evidence from the experts at the DPS laboratory firmly establish Tommy's presence in the house. Toolmark and firearms expert Nathan Tunnell testified to bullet fragments found in the living room. Flavia Schamber, the DPS serology expert, identified Tommy's blood on those two fragments. Schamber's report also states that Tommy's blood was found in two locations in the hallway of the house.[13] Also, a witness named Courtney Hunter[14] said that he was a friend of Tommy and went to the party with Tommy. Hunter also said another young man he did not know, but who was a basketball player, was shot. In Kasey's video interview, she said Tommy was shot, in addition to Blackmon.

Sanders does not challenge the evidence that he killed Blackmon. In Sanders' bedroom, bullets were found similar to the fragments retrieved from Jones and the scene—.45 caliber rounds with yellow plastic at the bullets' hollow points. Other .45 caliber shell casings were found in the kitchen where Blackmon's body was found.

Though she did not specifically identify Sanders in court, Deshontay Lewis testified that a young man she had met one time before the party, identified as Vonte,[15] had a gun and fired several shots at the party. Other witnesses reported hearing several shots fired. Leary said that he came into the kitchen to find Sanders and Blackmon having a discussion or argument about a dice game, that he heard shots fired, and that he saw Sanders shoot Blackmon. In a video interview, Leary

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[13]Specifically, Jones could not be excluded as the donor of these blood stains, and it was several quintillion times more likely that Jones was the source of the DNA. From photos of the residence, the living room seems to open directly into the kitchen, where the shootings occurred.

[14]Hunter did not testify, but his video interview was played for the jury.

[15]Sanders' cousin, Trevian Leary, testified Sanders was sometimes known as Vonte.

also said that he saw Sanders shoot two men at the party. There was also testimony that the shooter was named Vonte, a name consistent with Sanders' first name, Javonte.

Though there was evidence suggesting that Leary had a handgun on the scene and even conflicting evidence on the colors of Sanders' and Leary's guns compared to the color of the shooter's gun, the evidence points to only one shooter at the scene, Sanders, using a .45 caliber gun, the caliber of ammunition found in a bag in Sanders' residence.

There was sufficient evidence from which a rational jury could conclude that Sanders shot Tommy, inflicting serious bodily injury.

In Kasey's testimony, she did not mention being shot at the party. However, Detective Clayton testified that, in his conversation with Kasey, he learned that she had been shot at the party. Portions of Kasey's video interview were played for the jury, though it is unclear which portions were played. Most indications are that Sanders played parts to refresh her memory or impeach her trial testimony with statements she made to police in the days after the shooting. Because no limiting instruction was requested regarding Kasey's video interview, the evidence was admitted for all purposes. *See Delgado v. State*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007). Kasey told Clayton, in the recorded interview, that she had what she believed to be a bullet fragment in her arm and that, after the interview, she was going to the hospital to be examined and have the fragment removed. Finally, State's Exhibit 80 was admitted without objection. Hodges said the exhibit was a bullet fragment "recovered from Kasey Jones."

There was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that Sanders committed aggravated assault on Kasey. This point of error, with its two separate arguments, is overruled.

We affirm the trial court's judgments.

Josh R. Morriss, III
Chief Justice

Date Submitted: April 17, 2017
Date Decided: July 12, 2017

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