IN THE
TENTH COURT OF APPEALS

No. 10-16-00358-CR

AMBER HOPE HALFORD,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 87th District Court
Freestone County, Texas
Trial Court No. 15-065-CR

MEMORANDUM OPINION

The jury convicted Amber Hope Halford of the offense of capital murder. The trial court assessed punishment at confinement for life without the possibility of parole. We affirm.

Sufficiency of Evidence

In the first issue, Appellant argues that the evidence is legally insufficient to support her conviction. The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives 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." *Jackson*, 443 U.S. at 319. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011), *cert den'd*, 132 S.Ct. 2712, 183 L.Ed.2d 71 (2012).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Further, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to

establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Finally, it is well established that the factfinder is entitled to judge the credibility of witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

To determine whether the State has met its burden under *Jackson* to prove a defendant guilty beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence admitted on the record at trial before the factfinder. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *see Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240. The "law as authorized by the indictment" consists of the statutory elements of the offense and those elements as modified by the indictment. *Thomas*, 444 S.W.3d at 8; *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

Appellant was in a relationship with J.D. Mulkey, and she believed she was pregnant with his child. On March 7, 2015, Appellant and J.D. Mulkey picked up Dustin Sanoja and began discussing how to get some money. Appellant drove Sanoja and Mulkey to the residence of Douglas Hurst, who she testified is her uncle. She waited in

the car while they broke into Hurst's home and stole guns and computers. Appellant and Mulkey sold some of the guns to other individuals. Mulkey kept a pistol for himself, and Appellant planned to keep a laptop computer for herself.

Appellant and Mulkey exchanged text messages the following day discussing returning to the Hurst residence to take more guns to sell and also to find chargers for the computers. Appellant and Mulkey were unsure if Hurst had returned from a trip. Appellant instructed Mulkey to drive by the residence and see if the lights were on so they would know if Hurst had returned home. Appellant further told Mulkey to be careful returning to the Hurst residence and to take someone with him. Mulkey and two other males returned to the Hurst residence on the night of March 8, 2015. Mulkey and Hurst exchanged gunfire, and Mulkey was killed at the scene. Hurst was taken to the hospital where he later died from his injuries.

Section 7.02 of the Texas Penal Code provides:

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
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> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or
>
> (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.
>
> (b) 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.

TEX. PENAL CODE ANN. § 7.02 (West 2011). By a general verdict, Appellant was found guilty of capital murder. The trial court's jury charge allowed the jury to find Appellant guilty individually, as a party, or as a co-conspirator, pursuant to sections 7.01, 7.02(a)(2), and 7.02(b) of the Texas Penal Code. Where, as here, the jury charge authorizes conviction on multiple theories, we must uphold the jury's verdict if the evidence is sufficient under any of the multiple theories. *Hooper v. State*, 214 S.W.3d 9,14 (Tex. Crim. App. 2007); *Green v. State*, 495 S.W.3d 563,572 (Tex.App.-Houston [1 Dist.] 2016, pet. ref'd). To convict Appellant for capital murder as a conspirator, the State was required to prove beyond a reasonable doubt that (1) Appellant was a party to a conspiracy to commit burglary of a habitation, (2) in the attempt to commit burglary of a habitation, one of Appellant's co-conspirators intentionally caused Hurst's death, (3) the murder was committed in furtherance of the conspiracy to commit burglary of a habitation, and (4) Appellant should have anticipated Hurst's murder could result from carrying out the burglary of a habitation. *Green v. State*, 495 S.W.3d at 573.

The record shows that Appellant participated in burglarizing Hurst's home with Mulkey the night before Hurst was killed. Appellant helped sell the guns stolen from Hurst and planned to sell the stolen laptop. The following day Appellant exchanged text messages with Mulkey discussing returning to Hurst's house to steal more guns.

Appellant instructed Mulkey to drive by the house and see if Hurst has returned from a trip. Appellant further instructed Mulkey to be careful when returning to the house and to take someone with him. After Mulkey was shot at the Hurst residence, Appellant sent text messages to his phone stating "It's my fault this happened I shouldn't have said go back. And I shouldn't have let the first lick happen."

Appellant knew that Mulkey was armed, and she knew that there were more weapons in the Hurst residence. Appellant also knew that there was a possibility Hurst had returned and would be at the residence during the second burglary. Appellant should have anticipated that Hurst's murder could result from the burglary of a habitation. We find that the evidence is sufficient to support Appellant's conviction. We overrule the first issue.

Jury Charge

In the second issue, Appellant argues that the trial court erred in failing to include all of the elements of the offense in the charge. In the third issue, Appellant contends that the jury charge expanded the theory of conviction. A claim of jury-charge error is reviewed using the procedure set out in *Almanza*. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *Riggs v. Stat*e, 482 S.W.3d 270, 274 (Tex.App.-Waco 2016, pet. ref'd). If error is found, we then analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003).

If an error was properly preserved by objection, reversal will be necessary if there is some harm to the accused from the error. *Almanza v. State*, 686 S.W.2d at 171. Conversely, if error was not preserved at trial by a proper objection, a reversal will be granted only if the charge error causes egregious harm, meaning the appellant did not receive a fair and impartial trial. *Id*. Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007); *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). However, the Court of Criminal Appeals has suggested that it is unlikely that charge error in the abstract portion of the charge which is not present in the application paragraph will be egregiously harmful. See *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999); *Riggs v. Stat*e, 482 S.W.3d at 274.

For both preserved and unpreserved charging error, the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *Patrick v. State*, 906 S.W.2d 481, 492 (Tex. Crim. App. 1995); *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). To obtain a reversal for jury-charge error, an appellant must have suffered actual harm, not merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d at 352.

Appellant complains that the jury charge is erroneous because in the abstract portion of the charge it defines "conspiracy" as follows:

> By the term "conspiracy" as used in these instructions, is meant an agreement between two or more persons with intent, that they, or one or more of them, engage in conduct that would constitute the offense. An agreement constituting a conspiracy may be inferred from the acts of the parties.

Appellant argues that the definition of "conspiracy" leaves out the requirement of an "overt act". Section 15.02 of the Texas Penal Code provides that a person commits criminal conspiracy if, with intent that a felony be committed: (1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and (2) he or one or more of them performs an overt act in pursuance of the agreement. TEX. PENAL CODE ANN. § 15.02 (a) (West 2011).

Appellant did not object to definition of "conspiracy" in the charge. Accordingly, we will conduct our review using the above-described standard of review for egregious harm. The application paragraph of the charge correctly applies the relevant law. The application paragraph requires the jury to find that:

> … while in the course of committing such burglary of a habitation of Douglas Carr Hurst, owner of said habitation, Joshua Donnell Mulkey intentionally caused the death of Douglas Carr Hurst with a firearm, and the murder of Douglas Carr Hurst was committed in furtherance of the conspiracy …

We find that Appellant was not egregiously harmed by any error in the trial court's definition of "conspiracy" in the abstract portion of the jury charge. We overrule the second issue.

In the third issue, Appellant argues that the jury charge expanded the theory of conviction. The indictment alleged that Appellant "did then and there intentionally cause the death of an individual, namely Douglas Carr Hurst, by shooting the said Douglas Carr Hurst with a firearm, and [Appellant] was then and there in the course of committing or attempting to commit the offense of burglary of a habitation of Douglas Carr Hurst, who was the owner of said habitation." The trial court's jury charge allowed the jury to find Appellant guilty individually, as a party, or as a co-conspirator, pursuant to sections 7.01, 7.02(a)(2), and 7.02(b) of the Texas Penal Code, and Appellant argues that expanded the theory of conviction.

The law is well-settled that if the evidence presented at trial supports an instruction on the law of parties, the trial court may charge on the law of parties even though there is no such allegation in the indictment. *Pitts v. State*, 569 S.W.2d 898, 900 (Tex. Crim. App. 1978). The evidence at trial supported an instruction on the law of parties. The trial court did not err in including the instruction on the law of parties in the charge. We overrule the third issue.

Change of Venue

In the fourth issue, Appellant complains that the trial court erred in denying her motion to change venue. Section 31.03(a) of the Code of Criminal Procedure provides:

> A change of venue may be granted in any felony or misdemeanor case punishable by confinement on the written motion of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine:
>
> 1. That there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial." …

TEX. CODE CRIM. PROC. ANN. art. 31.03(a) (West 2006). The credibility of the persons making the affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person. The issue thus formed shall be tried by the judge, and the motion granted or refused, as the law and facts shall warrant. TEX. CODE CRIM. PROC. ANN. art. 31.04 (West 2006). A trial court has discretion in ruling on a motion for change of venue, and we will not disturb the trial court's ruling absent an abuse of discretion. *Gonzalez v. State*, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007).

Appellant filed a motion for change of venue that complied with Article 31.03. The State filed affidavits from three persons. Each of the affidavits filed by the State says:

> I have read the Motion for Change of Venue and affidavits [filed by Appellant] and I find the conclusions expressed therein are incorrect. I believe that a fair and impartial jury can be impaneled in Freestone County and the [Appellant] can be insured a fair and impartial trial.

> Further, the population of Freestone County has not been overly subjected to inflammatory or unfair publicity such that would create hostility toward the [Appellant] and prevent [her] from receiving a fair trial. As such, [Appellant] could receive a fair trial in Freestone County.

Appellant argues that because the State's affidavits do not controvert the motion for change of venue, she was entitled to a change of venue as a matter of law. On rehearing on *Lundstrom v. State*, the Court of Criminal Appeals held that affidavits that state that the defendant could receive a fair trial in the county are sufficient to controvert the affidavits in support of a motion for change of venue. *Lundstrom v. State*, 742 S.W.2d 279 (Tex. Crim. App. 1986) (opinion on rehearing).

The trial court held a hearing on the motion to change venue. The trial court considered the affidavits filed by Appellant and the State as well as exhibits filed by Appellant. The trial court heard arguments from both Appellant and the State. The trial court furnished juror questionnaires to address concerns over whether Appellant could receive a fair trial. We find that the trial court did not abuse its discretion in denying the motion to transfer venue. We overrule the fourth issue.

Conclusion

We affirm the trial court's judgment.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed September 13, 2017
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