IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,022

WILLIE ROY JENKINS, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NO. CR-10-1063
IN THE 274TH DISTRICT COURT
HAYS COUNTY

ALCALA, J., filed a concurring opinion in which NEWELL, J., joined.

CONCURRING OPINION

Except for points of error three, eleven, and seventeen, I join this Court's majority opinion that affirms the capital-murder conviction and death sentence against Willie Roy Jenkins, appellant. I otherwise concur in this Court's judgment and write separately to address these three points of error.

First, with respect to appellant's third point of error, I agree with the majority opinion's ultimate conclusion that the trial court did not abuse its discretion by excluding appellant's proposed mitigation evidence that would have demonstrated his offer to plead guilty to the offense in exchange for a life sentence without parole. In a hearing outside the jury's presence at the end of appellant's punishment evidence, appellant attempted to introduce evidence of his written offer to plead guilty. Specifically, appellant's proposed evidence would have shown that, prior to his trial, he had offered (1) to plead guilty to the offense of capital murder in exchange for a sentence of life imprisonment, (2) to plead guilty to a felony information to the first-degree-felony offense of burglary of a habitation with intent to commit sexual assault after waiving indictment for that offense and waiving any challenge to the applicable statute of limitations, (3) to make the pleas in separate proceedings so as to permit the imposition of two consecutive life sentences, and (4) to waive his right to seek parole on the offenses.[1] The State objected to appellant's offer of evidence, and the trial court sustained the objection. The jury, therefore, never heard this evidence that would show that appellant attempted to plead guilty to the capital murder of Norris in exchange for a sentence of life without parole.

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[1] Because his offense occurred in 1975, appellant's capital-murder conviction is governed by the sentencing scheme set forth in Code of Criminal Procedure Article 37.0711. *See* TEX. CODE CRIM. PROC. art. 37.0711. That article provides for either a life sentence with the possibility of parole or a sentence of death for this offense. *Id.* 37.0711, §§ 2, 3(a)(1), (g). In contrast, under the current capital-murder sentencing scheme set forth in Code of Criminal Procedure Article 37.071, defendants whose offenses occurred at a later date have a possibility of either a life sentence without parole or a sentence of death. *See id.* art. 37.071, §§ 1, 2(a), (g).

I agree with this Court's majority opinion that the trial-court judge did not abuse his discretion by disallowing appellant's proposed mitigation evidence. Rule 403 of the Rules of Evidence provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. Under the circumstances of this case, the probative value of the evidence was minimal because appellant's offer to plead guilty was conditional, in that it was only in exchange for him receiving a life sentence that would have taken the death penalty off the table. Appellant could have pleaded guilty to capital murder to the jury without an agreed plea bargain with the State, but, under these circumstances in which his offer to plead guilty was only in exchange for the plea bargain, this evidence was more suggestive of his desire to avoid the death penalty than of an acceptance of responsibility for the offense. With respect to whether the admission of the evidence would have been overly prejudicial in this case, I note that, if I were the trial-court judge, I would not have determined that the evidence was overly prejudicial because the jury could have decided for itself whether appellant's motives for attempting to resolve the case absent a trial were based on genuine remorse or a desire for the benefit of a guaranteed life sentence rather than risking a death sentence. But I acknowledge that this presents a very close call and, therefore, I defer to the trial court's ruling because I cannot conclude that the judge was outside the bounds of reasonable disagreement in his decision to exclude the evidence. *See*

Pawlak v. State, 420 S.W.3d 807, 810 (Tex. Crim. App. 2013) (in reviewing a trial court's ruling under Rule of Evidence 403, the ruling "must be upheld if it is within the zone of reasonable disagreement"); *Winegarner v. State*, 235 S.W.3d 787, 791 (Tex. Crim. App. 2007) (explaining that Rule 403 "gives the trial court considerable discretion to exclude evidence when it appears to that individual judge, in the context of that particular trial, to be insufficiently probative when measured against the countervailing factors specified in the rule"; Rule 403 "thus allows different trial judges to reach different conclusions in different trials on substantially similar facts without abuse of discretion"). I note, however, that in another case, it may be that a trial court may decide to take the opposite course to admit this type of evidence by determining that it is not overly prejudicial under Rule 403, and it may be that that ruling would too fall within the bounds of the judge's discretion and would not result in reversible error. I note here that at least two federal district courts have concluded that this type of evidence of a defendant's willingness to plead guilty to a capital offense in exchange for a life sentence is relevant in mitigation to show acceptance of responsibility. *See Johnson v. United States*, 860 F.Supp.2d 663, 903-04 (N.D. Iowa 2012) (in capital-murder case, holding that trial counsel "performed deficiently in failing to attempt to introduce [defendant's] offer to plead guilty to a life sentence" because, "[w]here the offer to plead guilty *comes from the defendant* . . . it does have some bearing on the defendant's character and, more specifically, on the defendant's acceptance of responsibility for the charged offense"); *United States v. Fell*, 372 F.Supp.2d 773, 784 (D. Vt. 2005) (permitting

capital-murder defendant to introduce during the penalty phase a stipulation that he had offered to plead guilty in exchange for a life-without-parole sentence because that offer was "relevant to the mitigating factor of acceptance of responsibility"); *but see Owens v. Guida*, 549 F.3d 399, 420 (6th Cir. 2008) (although evidence of defendant's willingness to plead guilty to capital offense might be relevant to the positive character trait of acceptance of responsibility, defendant's offer in that case "show[ed] no such acceptance"; defendant "did not offer to plead guilty unconditionally, which she could have done," and instead she agreed to plead guilty "only if guaranteed a life sentence in return"; thus, she was "less interested in accepting responsibility and more interested in avoiding the electric chair, a motivation that is much less persuasive as a mitigating factor"). The fact that courts have held both ways on this issue lends further support to the idea that such a ruling, whether admitting or excluding the evidence, is generally subject to reasonable disagreement and thus will not constitute an abuse of discretion in the ordinary case.

Because I agree that the trial court's ruling excluding the evidence of appellant's willingness to plead guilty in exchange for a life sentence was not an abuse of discretion, I agree with the Court's decision to overrule appellant's third issue.

Second, with respect to appellant's eleventh point of error, I would, at this juncture, assume that the trial court erred by failing to define the phrase "continuing threat to society," but I would find the error harmless based on the egregious facts in this case. Appellant contends that the trial court committed constitutional error under the Eighth and Fourteenth

amendments by failing to define that phrase as being limited to "a threat of serious bodily injury or death, whether in or out of prison, and continuing after parole eligibility," but under this Court's precedent, that complaint has never been sustained. In the past, I have joined at least one opinion upholding that precedent. But, having considered similar complaints over many years, it appears to me that it may be necessary for this Court to reconsider that precedent in order to ensure that the death-penalty statutes in Texas are constitutional, in the sense that they limit the applicability of the penalty to only the worst of the worst offenders. *See Roper v. Simmons*, 543 U.S. 551, 568 (2005) (explaining that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'"; accordingly, states "must give narrow and precise definition to the aggravating factors that can result in a capital sentence") (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). To narrow the term, a trial court could define the word "society" as including only the people with whom a person convicted of capital murder may reasonably be expected to be in contact with for the remainder of his life. That type of instruction would likely lead a jury to consider whether a convicted capital murderer would be a continuing threat in prison society or in the free world only if the jury reasonably considered him to be a prison escape risk. Here, however, even assuming that the trial court erred by failing to define the term, appellant was not likely harmed based on the egregious facts in this case.

The record in this case shows that, in 1975, appellant sexually assaulted and killed

Sheryl Norris in a random and violent crime. The crime was unsolved until 2010, when appellant's DNA profile in the Combined DNA Index System, or CODIS, was matched to the rape-kit DNA sample that had been collected from Norris after her death. Appellant's DNA was in CODIS because of his sexual-assault convictions against several other women. By the time of his 2013 trial for this case, appellant had been convicted of rape four times between 1977 and 1991 in California and Texas, and he had received sentences ranging from three years' probation to ten years in prison. In the twenty-two years prior to his trial for the instant offense, appellant had been continually confined in California or Texas either in prison or in an institution pursuant to a civil commitment as a sexually violent predator. The State's case in the punishment phase of trial included, among other evidence, testimony from another one of appellant's victims who described how he randomly abducted and sexually assaulted her, and she had explained how the event had negatively impacted almost every facet of her life. The punishment evidence also included a lengthy history of appellant's violence while confined for his multiple offenses. Given the extensive evidence of appellant's future danger to society both in the free world and in prison society, I conclude that any error in failing to define the term "continuing threat to society" was harmless.

Third, I would assume error with respect to appellant's point of error seventeen, but, for reasons similar to those expressed above, I would find the error harmless. In point of error seventeen, appellant contends that the trial court erred by denying a defense motion to preclude the death penalty as a sentencing option due to Equal Protection violations.

Appellant complains about the absence of statewide standards to guide Texas prosecutors in deciding when they should seek the death penalty. Appellant suggests that, as a prerequisite to implementing death-penalty systems, states must establish mechanisms to ensure that the lives of all of their citizens are treated equally. Without such uniform and specific standards in place, appellant contends that Texas's system permits the arbitrary and disparate treatment of similarly situated people in violation of the Equal Protection Clause of the Fourteenth Amendment. Appellant cites to *Bush v. Gore*, 531 U.S. 98, 106 (2000), as support for his argument that Texas "lack[s] [ ] standards to ensure non-arbitrary treatment with regard to the right to life;" given that the right to life is fundamental, he asserts that "a state may not, by arbitrary and disparate treatment, value one person's life over that of another." Appellant argues that he is challenging "a system in which unchecked official discretion makes arbitrary and unequal treatment inevitable." Appellant contends that prosecutors in each of Texas's 254 counties make decisions on whether to seek the death penalty according to unwritten and wildly varying standards. He argues that the decision whether "a person charged with a capital crime will face the death penalty depends on arbitrary factors such as the location where the crime took place and, even more disturbingly, the race of the accused and the victim." Appellant believes that "statewide standards would remedy this violation of the Equal Protection Clause."

Many of appellant's arguments are intellectually appealing, but this is not the appropriate case in which to address these matters because appellant cannot show that he was

harmed by the absence of statewide standards that would guide the prosecution's decision whether to seek the death penalty in a particular case. Because of appellant's lengthy history of sexual assaults and other violence while in and out of confinement, it is nearly certain that any such statewide standards would include him within the category of offenders who may be properly subjected to the death penalty.

With these comments, I respectfully concur in this Court's judgment.

Filed: June 29, 2016

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